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THE

Weekly Reporter:

APPELLATE HIGH COURT.

CONTAINING

ISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH RULES, AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF HER MAJESTY'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

BY D. SUTHERLAND.

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(12) In order to make a person summoned as a witness liable under Section 174 of the Penal Code, the fact must be that he intentionally omitted to attend at the place or time mentioned in the summons, or that he wilfully departed from the place where he had attended before the time at which it was lawful for him to depart 20

(13) A Magistrate is not justified by Section 206 of the Code of Criminal Procedure to take a person without any previous notice or summons from among the audience or attendant witnesses in open Court, and place him in the dock to be immediately tried upon a charge which had already been commenced to be entertained against other prisoners and on which evidence had already been given; that Section applies to investigations preliminary to commitment for a subsequent trial, and not to cases where the trial is actually being proceeded with ... *ib.*

(14) Object of Circular Order No. 17, dated 17th June 1863, pointed out 27

(15) A Magistrate cannot refuse a summons to a complainant even in a case in which the charge might have been laid at the Police in the first instance, but is bound, under Section 66 of the Code of Criminal Procedure, to examine the complainant on oath and pass orders on the case 36

(16) A Magistrate is bound, with reference to Section 20 of the Code of Criminal Procedure, to proceed in the investigation of cases arising under a special law (such as the Salt Law), according to all the provisions of the Code of Criminal Procedure ... ... *ib.*

(17) Section 270 of the Code of Criminal Procedure does not apply to complaints under a special law, but only to complaints triable by the Magistrate and punishable under the Penal Code with imprisonment for a period not exceeding 6 months. *ib.*

(18) A Magistrate is competent under Section 133 of the Code of Criminal Procedure to direct enquiry to be made by a police-officer into an offence punishable under a Local Act—such as the Police Act ... 41

(19) HELD that, where a Magistrate professes to act under one Section of the Criminal Procedure Code under which he has no jurisdiction, but it is found that he has jurisdiction under some other Section of the Code, the mistake is one which does not justify interference with the Magistrate's order, if otherwise good, and if the accused has not been prejudiced thereby 41

(20) In a case in respect of which a warrant might issue, and which is triable under Chapter XIV. of the Code of Criminal Procedure, a Magistrate ought, under Section 180 of that Code, by virtue of Section 244 as amended by Act VIII. of 1869, to order the discharge of the accused persons, although they are in attendance, if he thinks that there is no case of a criminal character made out against them ... 63

(21) A Magistrate of a district has power, under Section 68 of the Code of Criminal Procedure, whether there be a private prosecutor or not, to order the arrest of a person who had been previously under trial by a Subordinate Magistrate, and who had been discharged under Section 225 of that Code 65

(22) The powers given under Sections 435 and 68 of the Code are distinct and independent powers—the former providing for the revision of proceedings which have been already commenced, and the latter for the institution of proceedings *de novo* *ib.*

(23) In referring a case regarding a nuisance to arbitrators under Section 310, Code of Criminal Procedure, a Magistrate should fix a time within which the arbitrators are to send in their award; and this must be done whenever from any cause the constitution of the Jurors is changed and a fresh Juror is appointed. Where this is not done, a Magistrate cannot carry out his original order if there is any delay in the submission of the award by the arbitrators 69

(24) A Sub-Registrar, who is also a Magistrate, cannot investigate a case against one of his subordinates in the registry office, and afterwards himself try and convict him ... 74

(25) In a case under Chapter XV., Code of Criminal Procedure, it is incumbent on the accused either to produce their witnesses, or to apply beforehand for a summons to enforce the attendance of any witness who is not likely to appear without a summons; nor is it necessary in such cases to record the examination of the accused with the same formalities as in cases under Chapters XII. and XIV. 76

PROCEDURE—*(Continued)*.

(26) The High Court, in the exercise of the powers vested in them by Section 405 of the Code of Criminal Procedure, set aside the conviction of a prisoner in a case in which the Magistrate refused to grant him copies of papers which were necessary for his defence. A Magistrate acts contrary to law when he determines, on an application by a prisoner for copies of documents required for his defence, whether the documents are necessary or not ... 77

(27) In warning an accused person before taking down his statements, a Magistrate should state how the accused was warned 81

(28) In a case of an offence (such as Hurt under Section 323, Penal Code) punishable with imprisonment exceeding 6 months, and therefore falling under Chapter XIV. of the Code of Criminal Procedure, a Magistrate is bound to summon all the witnesses required by the accused... *ib.*

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(1) A pleader may appear in criminal cases, not only on behalf of an accused person, but also on behalf of a private prosecutor 23

(2) Case in which the High Court declined, on the facts, to strike a pleader off the rolls for using improper expressions during the argument of a case before a Zillah Judge, who recommended, after observing the requirements of Section 16, Act XX. of 1865, that such punishment should be awarded. The Zillah Judge should have called the pleader to order and required him to apologize 53

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(2) The measure of —— is a matter entirely in the discretion of the Court of Session 53

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(1) Where a widow was put in possession of the property of her husband in order to obtain by that possession payment of her dower (10,000 Rs.), and she, and after her death her heir, continued in possession for 15 years, it was held that there was a very strong presumption that the dower was paid off; and in a suit to recover possession of the property from the heir of the widow, the proper course would be to direct an —— to be taken with a view to see if the dower had been paid; and in that event to make the heir repay the difference; or, if otherwise, to order plaintiff to pay the difference as the terms of obtaining possession of the estate ... 5

(2) In a suit for a sum of money on an unadjusted ——, plaintiff filed a memorandum (A) with her plaint, from which the amount claimed in the plaint could not be made out. In her examination by the Court, the plaintiff put in another memorandum (C) to explain Memorandum A. Defendant admitted that Memorandum C was signed by him. It had reference to a period immediately preceding that for which the suit was brought: HELD that memorandum C was rather evidence to support the originally stated cause of action, than an amendment of the claim or the substitution of one claim or cause of action for another. The case was one which should have been decided, not merely on the discrepancy between the two statements made by plaintiff, but on the whole of the evidence ... 24

(3) The mere omission of an accountable party framing his own—— to carry forward into a new—— a balance against himself existing in a former one can constitute no evidence in his own favor. To prove the existence of the balance, such omission might be considered in conjunction with other evidence in the cause ... *ib.*

ALLUVION LANDS.

Plaintiff sued for the recovery of ——, which originally formed a portion of his estate which had been washed away by the Ganges, but which subsequently re-formed. The defendants relied on Section 4, Regulation XI. of 1825, and contended that the plaintiff's land having been wholly submerged so as to make the defendant's land the river boundary, the subsequent recession of the river caused a gradual accession to their land and an increment by annexation to their estate, notwithstanding that the land has been re-formed on the ascertainable and ascertained site of the plaintiff's mouzah.

HELD that Section 4 did not apply to this case, and that that Section refers only to cases of gain by acquisition by means of gradual accession to the gain which an individual proprietor might make from what was part of the public territory, not from a private person's property ... 11

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BENAMEE TRANSACTIONS.

(1) The law as to benamee conveyances taken by a father in the name of a son, whether in Hindoo or Mahomedan families, should be considered in all Courts in India as conclusively settled by the decision of the Privy Council in *Gossain* v. *Gossain*, 6 Moore 53 ... 14

(2) That case, however, was not applied to the present case in which it was found that a father, who had purchased property with his own funds, had had the conveyance drawn up in his son's name with a view to affect the interests of his daughters, and to vary the rule of succession between sons and daughters in his family ... *ib.*

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L.

LIMITATION.

Where the original judgment-debtor died, and there was a dispute as to whether any estate of the judgment-debtor had passed into the hands of his heirs, and that dispute was *bonâ fide* prosecuted and contested, it was held that the proceeding in question was sufficient to keep the decree in force within the meaning of Section 20, Act XIV. of 1859 ... 21

M.

MESNE PROFITS.

(1) Where in a suit by *L* for recovery of certain lands with ——, a decree was given by the Privy Council declaring *L* absolutely entitled to two mouzahs, and also to certain other lands with regard to which the High Court was ordered to institute certain enquiries, it was held that he might have waited the result of these enquiries before applying for execution in respect of the two mouzahs ... 23

(2) HELD, further, that although the decretal order of the Privy Council did not specifically mention anything about the —— of the said two mouzahs, the right to —— was consequential on the declaration for possession contained in the decree and upon possession; and the High Court was accordingly directed to proceed to ascertain the —— of the said two mouzahs ... *ib.*

MITAKSHARA LAW.
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MORTGAGE.

(1) The plaintiffs in this suit were purchasers of the equity of redemption in a portion of certain mortgaged premises which were sold in lots, and they brought this suit against the mortgagees who were also purchasers of the equity of redemption of several of the lots. They made the purchasers of the other lots parties to the suit, and sought to redeem their own portion of the estate and to recover possession of their own portion, and the portion purchased by the purchasers other than the mortgagees, on payment into Court of a sum sufficient to cover the proportion of the mortgage-debt attributable to the said parcels. The mode of applying the whole of the —— debt between the different mouzahs of the mortgaged estate in such a case pointed out ... 17

(2) The principle of Construction No. 359 —that when a creditor sues for his principal and interest (the latter being equal or more than equal at the time of the commencement of the suit to the principal), he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtor's resistance of the demand is not applicable to a case in which a mortgagee in possession is not a party suing for the money, but the party resisting by every means in his power a claim to redemption and the final settlement of the account ... *ib.*

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Where a deed
executed by a
see that it was fa
and that she was
duly informed of
about. When the di
the nature of a death-
tion, the Court that upholds
from whomsoever it proceed
be satisfied that it was the fre
untary act of the party by who
purports to have been executed an
expresses his real intention ...

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HELD that, notwithstanding that the lands were the subject of assessment when the zemindaree was permanently settled by the Government with the zemindar in 1802, the plaintiff had no right to assess these lands. The settlement between the Government and the zemindar could not affect the rights of the jageerdars, whose rights were derived, not from the zemindar, but from the supreme authority in the State. The lands held on

SERVIC.

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SUCCESSION.

(1) Under the Mitakshara Law, a great-great-great-grandson of a common ancestor is not *excluded* from inheriting as a gentile to a great-great-great-grandson on the ground that he is too remote in descent from the common ancestor ... 1

(2) When a question of *precedence* among heirs arises, as precedence is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. No ground of entire *exclusion* exists if the opposing parties confer inferior benefits or benefits in equal degree only; but where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy is inapplicable to the solution of that question of precedence ... *ib.*

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The Weekly Reporter:

APPELLATE HIGH COURT.

The 1st June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Sale for arrears of revenue—Rights of shikmee-lakherajdars—Clause 8, Section 10, Regulation VII. of 1822.

Cases Nos. 2927 and 2928 of 1869.

Special Appeals from a decision passed by the Subordinate Judge of East Burdwan, dated the 20th September 1869, affirming a decision of the Moonsiff of Selimabad, dated the 15th March 1869.

Ram Gobind Roy (Plaintiff), *Appellant,*

versus

Syud Kushuffudoza and another (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter, Unnoda Pershad Banerjee, Tarucknath Sein, Mohendro Lall Mitter, and *Kalee Prosunno Dutt* for Appellant.

Baboo Ashootosh Dhur for Respondents.

Suit for ejectment and khas possession by an auction-purchaser under Act XI. of 1859. The defendants' case was that after resumption of their lakheraj tenure, a settlement had been made under Regulation VII. of 1822 with the principal proprietor, and by that settlement it was arranged that the Government revenue payable by all the proprietors, the defendants among them, was to be paid through the principal proprietor, and that the defendants were to hold perpetual possession as shikmeedars, and that their rights should be reserved intact.

HELD that the possession of the defendants as lakherajdars, could not be disturbed as long as they paid the revenue assessed upon them under the settlement.

HELD (Markby, J., *dissentiente*) that Clause 8, Section 10, Regulation VII. of 1822, applies only to cases referred to in Clause 7, that is, of cultivating proprietors on putteedaree or byhacharee tenure, or the like, and not to a case of this kind.

Bayley, J.—IT is admitted that these two special appeals will be governed by one and the same decision by this Court. In both cases, Ram Gobind Roy is plaintiff. In the one case, he lays his suit at 994-10-10 to set aside a summary order and to recover khas possession and mesne-profits, valuing his suit at 98-9-6.

Plaintiff alleges that he is an auction-purchaser at a sale for arrears of Government revenue of Mehal Bahadoorpoor, bearing No. 5537 on the Collector's Rent-roll, the recorded proprietor being one Akburnissa, and that by that purchase all other rights remaining in defendants have passed to him, plaintiff, the purchaser, and that he can eject and take khas possession, and is entitled to mesne-profits of defendants' lands.

The sale and purchase were admittedly under Act XI. of 1859.

The defendants' case is that a settlement was made with them by the Collector after resumption of the lands by Government under Regulation II. of 1819, and that up to the time of settlement they had held the lands as rent-free proprietors, and that after the settlement they still held possession of them as proprietors, of resumed rent-free tenures with whom settlement was made and their proprietary rights recorded, and therefore could not be ejected by plaintiff so long as they paid the settlement jumma of their own proprietary lands. It is admitted and proved that this was a lakheraj tenure resumed under Regulation II. of 1819, and settled under the provisions of Regulation VII. of 1822, as extended to Bengal resumed and khas mehals by Regulation IX. of 1825.

The arrangements of the settlements and the first Court's opinion on their legal effect are thus recorded by the first Court—

"On reference to the settlement-proceedings, amulnamah, &c., filed with the record, it appears that as the lands previously held rent-free by the defendants and other parties were resumed, the Collector at *first entered into separate settlements with each of the holders;* that afterwards the Commissioner, in order that the rents might be more conveniently collected, directed that the whole of the lands be included in one towjee, the former holder Akburnissa be made the principal proprietor, and a settlement entered into with her; that, accordingly, the said mehal was settled with Akburnissa on these conditions, that the defendants and others should as shikmeedars hold perpetual possession of the lands occupied by them, and pay the rent due by them to Government to the above-named party obtaining the settlement; that out of Rupees 394-14-5 due to Government, after deduction of the mâlikanah to which the said shikmee lakherajdars were entitled, the said party obtaining the settlement should receive Rupees 39-6-10, the collection-charges on the rents payable by the lakherajdars, the defendants and others, at 10 per cent., and that the residue, namely, Rupees 355-7-7, and the rent due on the share of the said party obtaining the settlement, Rupees 152-9-3, in all Rupees 508-0-10, and Rupees 5-0-2, the expense incurred in repairing the roads, making a gross total of Rupees 513-1-0, should be paid to Government as sudder jumma.

"Therefore, this Court is of opinion that plaintiff is simply entitled to recover the equitable rent from the defendants, but has no power to dispossess them from the lands, houses, &c., settled with them and held from time immemorial."

Now, with the exception of the use of the first term *shikmeedars*, where the first Court should have said "*shikmee lakherajdars*," as it does alter, the first Court has correctly stated the details and legal effect of the settlement-proceedings, and I concur with the first Court in holding that the plaintiff cannot eject the defendants and obtain khas possession. The settlement-proceedings recorded their rights in express terms, namely, that although Akburnissa should be the party directly paying the revenue due to Government, still all other parties with whom the settlement was made (defendants being individually and by name scheduled as those parties) should have *rights as proprietors* reserved intact, "*maliker-suttyo*" being the words used.

It would have been well if the case had stopped here, but in appeal to the Lower Appellate Court the Subordinate Judge has made such a confusion of terms as has led to this special appeal. He states that the names of the defendants were included in the dowl as shikmeedars. It is no such thing. In the dowl they were included as *shikmee lakherajdars*. A shikmeedar might be a tenant, and as such, would have no dowl with a Collector at all. A mere shikmeedar is not a proprietor. The lakherajdar is not only a proprietor of land, though paying in this case through another, but actually recorded here to have all his rights as such reserved, though Government revenue for convenience is paid by Akburnissa as the largest proprietor. The Lower Appellate Court has also stated that the defendants were designated *mokurruree semandars*. Now, such a designation has not been shown to us by respondent's pleader in the settlement-proceedings at all, and he at least does not contend that it exists there at all. The Lower Appellate Court also has misunderstood the position of parties completely in the following very inconsistent and incorrect passage :—

"Defendants do not admit that they were co-sharers of Akburnissa in the said settlement, and the grantor of the settlement declared the defendants to be the *inferior jotedars and co-sharers of Akburnissa*, when therefore the defendants were recorded as inferior jotedars at the time of the settlement."

Now, in the first place, there is not one word in the settlement-proceeding terming the defendants *inferior jotedars*, and the pleader for the respondents admits that there is not. In the next place, a *jotedar* is *not* a proprietor of a rent-roll property. A co-parcener in this case is a proprietor as above pointed out; and especially when, as here, the rights of a proprietor were reserved in express terms to defendants in this case.

In the end, however, the Lower Appellate Court held that plaintiff cannot eject the defendants.

It is upon this that plaintiff appeals, urging—

Firstly.—That the Lower Appellate Court is wrong in holding the defendants were not co-proprietors; and, *secondly*, that plaintiff, as auction-purchaser, can eject the defendants, inasmuch as he purchased all the rights and interests of the defaulting proprietors.

As before pointed out, the first of these grounds is correct, inasmuch as the Lower Appellate Court has confusedly considered the defendants to be inferior jotedars, when, in fact, they are each and all proprietors, *i. e.*, parties due provisions for securing the rights of whom have been made under Clause 1, Section 10, Regulation VII. of 1822. Upon the second point, I consider the plea of the special appellant untenable, inasmuch as I quite concur in the view taken by the Moonsiff in the first Court, that the possession of the defendants as lakherajdars, though paying revenue through Akburnissa, is one that could not be disturbed by the plaintiff so long as defendants pay the revenue assessed upon them *under the settlement* and there recorded.

Some argument has been used with reference to the applicability of Clause 8, Section 10, Regulation VII. of 1822 to this case. I regard Clause 8 as applying only to cases referred to in Clause 7, that is, of *cultivating proprietors in putteedaree or byhacharee, or the like.*

Now, certainly in the District of East Burdwan, neither a putteedaree or byhacharee tenure, or the like, is known, nor is there such a thing as a cultivating proprietor, except in the instance of a zemindar's nij-jote, and the present is not for a moment contended to be an instance of that kind. Then we are told the words "*or the like*" will include this case. Regulation VII. of 1822, however, was passed for the settlements of the ceded and conquered provinces, Cuttack and Puttespoor, in none of which was there ever a permanent settlement as there is in East Burdwan. Further, in East Burdwan, the present mehal, No. 5593. on the Collector's Rent-roll there has been *permanently* settled, and nothing like putteedaree or byhacharee tenures exist in East Burdwan. I do not think, therefore, the words "*or the like*" can apply. This, in fact, is a case simply of badshahee grants of one large and a number of small rent-free *proprietors*, who never had or pretended to have putteedaree or byhacharee rights. Akburnissa was one proprietor, and defendants are others. The mode of paying revenue cannot make that man not a proprietor who is recorded in a settlement-record as a proprietor, and he can only cease to be such when he does not pay the revenue assessed by that settlement. In this case defendants did pay the revenue, or at least it is not shown they did not. They cannot lose their proprietary rights so secured and expressly received, because Akburnissa defaulted. To rule otherwise would render the reservation of proprietor's right in a settlement-record a nullity.

In this view, I would dismiss these special appeals and the plaintiff's suits.

Markby, J.—In this case, as I gather from the facts found and the statement made by the vakeel for the appellant, in the year 1860 the village in question which had up to that time been held rent-free was resumed by Government under the provisions of Regulation II. of 1819. The claim to hold the lands rent-free was found to be invalid, and the Collector in 1866 proceeded to make a settlement with all the persons (a very considerable number) who were the proprietors of the lands comprised within the village. The Commissioner, however, before the settlement concluded, directed that all the lands should be included in one settlement with Akburnissa, one of the proprietors, which was accordingly done, upon condition that the other proprietors should as shikmeedars hold perpetual possession of the lands occupied by them, and pay the revenue assessed upon them into the hands of Akburnissa, who was to pay the same together with her own share of the revenue to Government, deducting a certain percentage.

Akburnissa having made default in payment of the revenue, the estate was put up to sale, and purchased by the plaintiff, and the question is whether the plaintiff is entitled to evict the defendants who are some of the persons described in the settlement as shikmeedars.

Both the Lower Courts have decided this question in the negative, and dismissed the plaintiff's suit. The plaintiff has appealed and has contended before us that all these parties are co-proprietors in an estate which is assessed singly, and that on the default of any one of them, in the absence of any apportionment, the whole estate is liable for sale, and that all their interests pass to the purchasers at the auction-sale.

The defendants, respondents, do not deny that the whole estate was put up for sale, but they contend that they and Akburnissa have been placed by the settlement in the relation of mâlgoozaree and subordinate proprietors as contemplated by Section 10 of Regulation VII. of 1822, and that their holdings are protected by Clause 8 of that Section. This was one of the contentions of the defendants in the first Court, and the Moonsiff thought that it was right.

I also think that this contention is well founded. It is true that this Regulation was originally in force only in the ceded and conquered provinces, the district of Cuttack, and the pergunnah of Puttaspore; but by Section 2 of Regulatiou IX. of 1825 the major portion of the provisions of the Regulation of 1822 are extended "to all lands "(including jagheers, mokurrurees, and other "tenures, held free of assessment, or at "a quit-rent under special grant) not in-"cluded within the limits of estates for "which a permanent settlement has been "concluded in the manner prescribed by "Regulation VIII. of 1793, and Regulations "II. and XXII. of 1795 as far as the same "may be applicable."

It seems to me clear that the land now in dispute is land which falls within the description of that Section. It could not have been included within the limits of an estate for which a permanent settlement had been concluded, otherwise, if the land had been resumed at all, the settlement would have been made with the proprietor of that estate. I understand the settlement with the lakherajdar to proceed on the assumption that he is recognized as proprietor though liable to assessment (see Regulation XXXVII. of 1793, Section 6). And indeed, unless the land, now in dispute, fell within the description of Section 2 of Regulation IX. of 1825, no such settlement as was made in this case would have been possible. The appellants admit that this settlement was, in fact, made under the provisions of Clause 3 of Section 10, Regulation VII. of 1822.

The question, then, will be whether Clause 8 of Section 10 is one of the provisions which are applicable to this case. I see no reason why it should not be so. It is true that the Clause immediately preceding Clause 7, applies to a mehal or a portion of a mehal held by cultivating proprietors "in putteedaree or byhacharee tenure, or the like;" and Clause 8 commences with the words, "When it shall be determined to make a settlement of a mehal *of the above description* with one or more of the parceners;" but even supposing that, on the strength of these words, we hold that Clause 8 is applicable only to such mehals as fall strictly within the description contained in Clause 7, still I am not prepared to hold that this mehal would be excluded. What the exact nature of the defendants' holding was prior to the resumption we are not informed, but I see no reason why their tenure should not fall under the very general words "or the like."

But I am not inclined to put so narrow a construction on Clause 8. I think it refers to any mehal settled under the provisions of Section 10 with one or more of the proprietors on behalf of the whole.

I think, therefore, that the decision of the Moonsiff was, in this respect, right, and that on that ground he was right in dismissing the suit. I think this appeal should be dismissed with costs.

It was admitted that this case (No. 2928) would be governed by the decision in special appeal No. 2927. I think, therefore, that it ought also to be dismissed with costs.

The 1st June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby.
Judges.

Enhancement of rent—Sections 13 and 17, Act X., 1859—Pleadings—Presumptions.

Case No. 2394 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 30th June 1869, affirming a decision of the Deputy Collector of that District, dated the 20th May 1864.

Thakoor Dutt Singh and others (Defendants), *Appellants,*

versus

Gopal Singh and others (Plaintiffs), *Respondents.*

Mr. G. C. Sconce and *Baboo Kishen Succa Mookerjee* for Appellants.

Mr. G. C. Paul for Respondents.

In a suit for a kubooleut at enhanced rates after notice under Section 13, Act X. of 1859, where the defendants stood by, and, though raising a good many objections on other points, raised no question as to rates, their conduct and pleadings were held to afford a fair presumption of admission of the plaintiff's claim as to the rates sued for.

Semble (by Markby, J.) that, when a landlord gives notice of enhancement to a tenant on the first of the grounds stated in Section 17, Act X. of 1859, he treats him as a ryot having a right of occupancy.

Bayley, J.—THIS was a suit for a kubooleut at enhanced rates. The rates sued for ranged from 4 annas to Rupees 2-8. The notice of enhancement was issued under Section 13, Act X. of 1859, and the ground of enhancement was that the defendant paid at a lower rate of rent than those paid by the same class of ryots for lands with similar advantages in the places adjacent.

It may be observed that this case has been tried exactly 12 times, commencing on the 14th April 1864 and ending on this the 1st June 1870, and all the trials by the Lower Courts have been subjects of special appeals. There have been four decisions by Division Benches of this Court, and now the case again comes up in special appeal.

To the claim of the plaintiff as above set forth, the defendants or their agent gave the following oral answer, *viz.*, that "from "the time of their ancestors before the sway "of the British Government, they have cul-"tivated 64 beegahs at 4 annas a beegah, on "two deeds of sale; the notice issued by or-"der of the Judge has been reversed by or-"der of the High Court." The defendants also put in as evidence decisions of the Principal Sudder Ameen of the 15th September 1862 and 4th August 1863, and a copy of the decision of the 20th May 1831. All these documents admittedly referred to certain trials respecting the mokurrureedars having kept the plaintiff out of possession, and the question was whether they were trespassers or had legal right to keep the plaintiff out of possession. There was not one word on the part of the defendants to the effect that the rate paid by him was not below the rate of rent prevailing in the neighbourhood.

The first Court, on the 20th May 1864, held that the defendants had proved that they paid at one uniform rent from the time of the Decennial Settlement, and also that the notice issued by the plaintiff was not in accordance with the provisions of Act X. of 1859, and dismissed the plaintiff's suit.

There was then an appeal to the Judge who, on the 15th December 1864, held that the mokurruree nature of the defendant's tenure had been decided against them by the High Court in 1863. Intermediately, however, there was a remand by the Judge, and the case again went to the Deputy Collector, who, on the 20th February 1865, decreed the plaintiff's suit, being of opinion that it was held by this Court that there was no irregularity in the notice, and remarking that the defendants had not in their statement of objections raised any question as to the rates claimed by the plaintiff.

Again there was an appeal to the Judge, the issue before whom was simply as to the plaintiff's right to enhance, and the Judge also remarked that there was no objection taken before him as to the rates.

There was again a special appeal, and on the 19th June 1866 the case was again remanded to be tried only on the question of the mokurruree.

Again the Judge found in favor of the mokurruree.

Again there was a special appeal, and again a remand on the 20th February 1868. The Judge again heard the case on the 4th June 1868, holding that the defendants had not proved their case under Section 4, Act X. of 1859, and remarking that no objection was taken before him as to the fairness of the rates.

Again there was a special appeal, and on the 25th March 1869 Mr. Justice Phear and myself were again obliged to send the case back to the Judge for re-trial. The Judge, by his decision of the 30th June 1869, has again held in favor of the plaintiff, and this decision is now the subject of the present special appeal.

It is needless to go into more details. Suffice it to say that the question of the notice was finally decided by this Court. The question of the mokurruree had also been found against the defendants. There remained then only two questions which have been very strongly contested by the learned Counsel Mr. Sconce and Baboo Kissen Succa Mookerjee for the appellants, *viz.*, *firstly*, that the question of rates ought to have been decided by the Lower Appellate Court, as the plaintiff was bound to prove the precise rates specified in his plaint; and, *secondly*, that the mere absence of any

denial by the defendants, even if true, would not justify a decree in the plaintiff's favor, but that, in fact, they (defendants) had in their grounds of appeal before the Judge against the judgment of the Deputy Collector, Mr. Maclean, dated the 20th February 1865, taken an objection on that point.

As to the *first* of these objections, I do not think that, under the circumstances, the plaintiff was bound more clearly to prove the rates he sued for. The defendant's agent was present in Court. He made oral statements and put in documentary evidence, but neither in his oral statements nor in any document did he say a single word objecting to the rates sued for. It is true that in a case where the defendant is absent and has not appeared, or has appeared and contested the plaintiff's claim, the plaintiff is bound to prove his allegation; but in this case where the defendants stood by and did not raise a single question as to rates claimed by the plaintiff either by his written statement or the oral one of his agent, I do not think that anything but a fair presumption of admission of the plaintiff's claim by the defendants arises from the pleadings and conduct of the defendants. They raised a good many objections to the plaintiff's claim on other points, but did not say a single word as to the plaintiff's demand of the rate of rent being unfair and inequitable by reason of being higher, not than their alleged mokurruree, but than the prevailing neighbouring rates.

There is, it is true, a passage in the petition of appeal to the effect that, "as to the "right of the plaintiff to enhance, there has "been a complete contest and dispute, and "the decision of the Deputy Collector that "there was no objection in the matter of "rate is opposed to justice," but certainly this objection, if it really meant to take the shape that is now contended for, would have been raised in plainer words. The defendants might have plainly said that the rate claimed by the plaintiff was not fair and equitable as above prevailing rates, or that there was evidence to this effect produced or to be produced.

Again, the *issue* before the Judge and his decision thereupon related only to the plaintiff's *right to enhance.* No issue was asked as to the fairness of the rates sued for as the prevailing rates. No review was sought of the decision, and both the Deputy Collector and the Judge state in distinct words that no question was raised as to the rates. I cannot from such pleadings really suppose that any question was intended to be raised by the defendants as to the fairness of the rates claimed by the plaintiff as prevailing rates; especially as the defendants had ample opportunity to raise that plea, but had not done so till the case had been fully disposed of by the Lower Courts. I do not think, therefore, that they ought now to be allowed to raise that objection.

There remains, then, another question as to whether the defendants' plea of mokurruree failing they are not entitled to such rights as *occupancy* would give them. On this point, Mr. Paul for the special respondent, I understand, admits that they are, but he says that the question does not arise, and I may here add that, from the year 1864 down to the present time, the question was never raised in this shape.

On the whole, I consider that all the grounds taken by the defendants fail, and I would, therefore, dismiss this special appeal with costs.

Markby, J.—I also think that this appeal must be dismissed, but not precisely upon the same grounds as those stated by Mr. Justice Bayley. I think it quite clear that for the purposes of this case we are bound to accept the concession made by the Counsel for the plaintiff that the defendants were sued in this case on the hypothesis that they were ryots having a right of occupancy; and I must say that that also entirely agrees with the view of the law which I have formed, although that matter has not been argued in this case, and Mr. Justice Bayley thinks otherwise. I should not venture to express a final opinion. It does, however, appear to me that, when a zemindar comes in and gives notice of enhancement to a tenant on the first of the grounds stated in Section 17, Act X. of 1859, which, I understand, is a ground held as a good ground in this case, he does treat him as a ryot having a right of occupancy, and I have great difficulty in seeing how otherwise a Court can compel a ryot to accept a lease, or compel a zemindar to grant that lease. It is only on the hypothesis that a party has a right to hold the lands as having a right of occupancy that the Court can have any power to settle the terms on which he has a right to hold. Assuming, then, that point which has been conceded in this case, I should be inclined to think that Mr. Maclean was wrong in his judgment of the

20th February 1865 in not going into the question of rates. It is a matter which occurred so long ago that it is not easy to ascertain now how the parties stood, but treating, as, I think, we are, for the purposes of this case, bound to treat, the defendants as having a right of occupancy, it was absolutely necessary for the plaintiff-zemindar to establish the rate which he alleged was the fair and equitable rate before he could get a decree. It was no part of the defendants' case to disprove that fact. It was for the plaintiff to prove his allegation. If, therefore, the question was whether or not Mr. Maclean's judgment was wrong, I would probably say that it was. But this judgment was appealed against, and although the grounds of appeal were not so very artificially drawn, I think they sufficiently raised the question that Mr. Maclean was wrong in not going into the question of rates. The Judge, in disposing of this question on the 21st September 1865, states that, as to the fairness of the rates, the defendants took no exception. If by this the Judge meant that no objection as to rates was taken before him, there was an end of the matter; but if, on the other hand, the Judge meant to say that it was not open to the defendants to contest the point, and that Mr. Maclean's decision to that effect was right, I think I should not agree with him. But then the defendants came up here on appeal, and there can be no doubt the defendants were bound, if they thought that Mr. Pearson was wrong in taking the same view as Mr. Maclean, to have taken the objection clearly in this Court. Whether the ground was taken or not does not appear, but it makes no difference, because the order of remand was distinct that it was on the question of the mokurruree title only, so that my view as to Mr. Maclean's judgment being right or wrong is wholly immaterial, because, supposing that he was wrong, the objection has long ago been overruled or abandoned. These are remarks upon the fourth and fifth grounds of this special appeal upon which alone we called upon Mr. Paul to answer. On the first, second, and third points we are clear that the order of remand has been rightly carried out.

The 1st June 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Pleader of the High Court—Vakalutnamah.

In the Matter of

Gopeenath Mudduck, *Petitioner.*

The acceptance of a vakalutnamah by a pleader of the High Court should in all cases be unconditional.

Phear, J.—We think that we ought to assume, for the purposes of this petition, that the statement of the pleader exhibits the true state of the facts, and upon that statement we are of opinion that the best course will be that the pleader should give up the 25 rupees and the other small balance in his hand to the petitioner, and that the vakalutnamah should be cancelled. We will appoint another day for the hearing of the review, and give the petitioner an opportunity of getting another pleader to represent him.

We also think that, on this occasion, we ought to say that, in our view, the conditional acceptance of a vakalutnamah, such as occurred in the present instance, is a practice detrimental to the best interests both of the public and of the profession. According to the English system, there can be nothing of this sort. If once a Barrister accepts a brief, he is bound to plead the cause of his client whether he is paid his fees or not. So also an Attorney, when he has taken a retainer to conduct a suit, must proceed as far as the money placed in his hands by his client will allow him, having regard to the necessary expenses of the suit. He can only abstain from proceeding on the ground that he is not furnished by his client with sufficient funds, and he must give timely notice that funds are needed.

He cannot claim to be paid his bill until the suit has been carried to its final termination, unless his professional relation to his client has been sooner put an end to. And clearly any other course would be liable to lead to great inconvenience and confusion.

In the present instance, we have a party to an appeal who finds his case on the board of the day, and who, although he has paid a considerable sum by way of fees, and has given a pleader a vakalutnamah, is still unrepresented in Court.

We think we ought to do what we can to discourage a practice of this kind, and we, therefore, express our opinion that the acceptance of a vakalutnamah by gentlemen practising in this Court should in all cases be unconditional.

Mitter, J.—I concur.

The 1st June 1870.

Present:

The Hon'ble J. B Phear and Dwarkanath Mitter, *Judges.*

Jurisdiction—Construction of a former judgment.

In the Matter of

Dibakur Soondur Roy, *Petitioner.*

Baboo Chunder Madhub Ghose for Petitioner.

Construction.—The judgment of the Division Bench reported in 10 Weekly Reporter, page 38 (Shoudaminee Dossee *versus* Ram Chand Baido), was not intended to lay down that the High Court had no jurisdiction to entertain an appeal from a Lower Court of regular appeal in the event of that Court's decision being passed without jurisdiction.

Phear, J.—We think that we ought not to grant this application.

The case varies materially from that reported in 10 Weekly Reporter, page 38, for there the Deputy Collector never pretended to determine any question of title between the parties. In the present instance, he certainly did so most specifically. He laid down an issue and came to a finding upon it, and that having taken place, it follows from a long current of decisions, which it is now too late to inquire into, that the appeal did lie from the Deputy Collector to the Judge.

I wish to take this opportunity of saying that the judgment of the Division Bench which is reported in 10 Weekly Reporter is somewhat unguarded in the language used. It certainly does appear to go the length of laying down that this Court has no jurisdiction to entertain an appeal from a Lower Court of regular appeal in the event of that Court's decision being passed without jurisdiction. But it undoubtedly was not the intention of the Judges of that Bench (I can speak for them because I delivered the judgment) to go to this length. The judgment was an oral judgment directed to the particular facts of the case then before the Court, and it was only intended to express that the Court could not entertain the appeal on the merits. This Court having come to the opinion that the Lower Appellate Court has passed a judgment without jurisdiction, the function of this Court, the Court of special appeal, was limited to determining the case on that point. Under the circumstances of that particular case, so far as I recall them, it was desirable for the ends of justice that the decree of the Lower Appellate Court should be quashed and got entirely out of the way, and it was for that reason that the order of this Court was made in the particular form which it there took.

We reject this application.

Mitter, J.—I concur.

The 1st June 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Affidavit—High Court's powers of supervision.

In the Matter of

Biddyabuttee Dossia and another, *Petitioners.*

Baboo Kishen Dyal Roy for Petitioners.

An application to the High Court to exercise its extraordinary powers in respect to a finding of the Moonsiff that a summons had *not* been served, which finding was disputed by the petitioners, was refused, because the affidavit on which they came into Court omitted to state that the summons *was* served.

Phear, J.—We ought not to exercise the extraordinary power of this Court which is invoked on the present application unless we see that it is really necessary for the purpose of doing justice between the parties

Now, the matter in dispute is whether or not the summons was served on the defendant in a suit filed about six years ago. The present applicants have no ground to stand upon unless, in fact, that summons *was* served, because a Court competent to determine that point between them, and the defendant has judicially decided that the summons was *not* served. But the petitioners entirely omit in the affidavit of the facts on which they come before this Court, to swear that, notwithstanding the finding of the Moonsiff to the contrary, the summons *was* served on the defendant. No one apparently thinks fit to vouch on oath for the truth of their case.

It does not appear to us, therefore, that there is sufficient reason for our exercising the extraordinary powers of this Court in favor of the petitioners, and we accordingly reject this application.

Mitter, J.—I concur.

The 1st June 1870.

Present :

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

High Court's power of superintendence.

In the Matter of

Khenumkuree Dabee and another, *Petitioners,*

versus

Ranee Shurut Soonduree Dabee, *Opposite Party.*

Mr. J. S. Rochfort for Petitioners.

Baboo Gopal Lall Mitter for Opposite Party.

Where a Deputy Collector who had passed an informal decree refused to execute it on application, the decree-holder was held to be entitled to an order from the High Court, in the exercise of the powers it possesses under Section 15 of the Charter Act, directing the Deputy Collector to do his duty.

Phear, J.—THE petitioner in this case is one of several defendants in a suit. The respondent is the sole plaintiff. In that suit a decree was passed in these terms: "Suit dismissed with costs;" and appended to the decree was a schedule specifying the plaintiff's costs and the costs of each of the defendants. The petitioner applied to the Deputy Collector, in whose Court the decree was passed for execution of the decree for costs against the plaintiff.

The Deputy Collector said that he saw no decree for costs, or for payment by the plaintiff of costs to the petitioner, defendant.

Thereupon a rule *nisi* was granted, calling upon the respondent to show cause why the Deputy Collector should not be directed to execute the petitioner's decree for costs.

It cannot, we think, be seriously questioned, but that the decree to which we have referred really was a decree ordering the plaintiff to pay the petitioner the costs which were specified in the schedule to the decree, as the costs of the petitioner.

The decree was, no doubt, informal, but this was obviously the effect of it; and the Court which passed that decree was bound in law to execute it on the application of the petitioner.

It is, however, urged in argument before us that the decision of the Full Bench, reported in 5 Weekly Reporter, page 25, Miscellaneous Rulings (DaCosta *versus* Hall), lays down that in a case like this the parties must abide by the decision of the Deputy Collector, and that this Court cannot interfere by the exercise of the powers granted to it by Section 15 of the Charter Act.

It appears to me that the decision of the Full Bench by no means goes to the extent which is contended for. There the Sudder Ameen, having sold certain moveable property in execution of a decree, afterwards set aside that sale, and made a re-sale. The purchaser, a third party, and not one of the parties to the suit, appealed against this order of the Sudder Ameen to the Judge, and it was held, both by the Judge and by this Court on special appeal, that no appeal lay against the order of the Sudder Ameen at the instance of a third party; and the judgment of this Court given by the Full Bench also said that in such a case this Court could not interfere under the powers given to it by Section 15. The parties to the suit made no complaint. So far as they were concerned, there was nothing to indicate that the Courts below had not done their duty, and we think it is obvious that the Court could not, on the

He cannot claim to be paid his bill until the suit has been carried to its final termination, unless his professional relation to his client has been sooner put an end to. And clearly any other course would be liable to lead to great inconvenience and confusion.

In the present instance, we have a party to an appeal who finds his case on the board of the day, and who, although he has paid a considerable sum by way of fees, and has given a pleader a vakalutnamah, is still unrepresented in Court.

We think we ought to do what we can to discourage a practice of this kind, and we, therefore, express our opinion that the acceptance of a vakalutnamah by gentlemen practising in this Court should in all cases be unconditional.

Mitter, J.—I concur.

The 1st June 1870.

Present:

The Hon'ble J. B Phear and Dwarkanath Mitter, *Judges.*

Jurisdiction—Construction of a former judgment.

In the Matter of

Dibakur Soondur Roy, *Petitioner.*

Baboo Chunder Madhub Ghose for Petitioner.

Construction.—The judgment of the Division Bench reported in 10 Weekly Reporter, page 38 (Shoudaminee Dossee *versus* Ram Chand Baido), was not intended to lay down that the High Court had no jurisdiction to entertain an appeal from a Lower Court of regular appeal in the event of that Court's decision being passed without jurisdiction.

Phear, J.—We think that we ought not to grant this application.

The case varies materially from that reported in 10 Weekly Reporter, page 38, for there the Deputy Collector never pretended to determine any question of title between the parties. In the present instance, he certainly did so most specifically. He laid down an issue and came to a finding upon it, and that having taken place, it follows from a long current of decisions, which it is now too late to inquire into, that the appeal did lie from the Deputy Collector to the Judge.

I wish to take this opportunity of saying that the judgment of the Division Bench which is reported in 10 Weekly Reporter is somewhat unguarded in the language used. It certainly does appear to go the length of laying down that this Court has no jurisdiction to entertain an appeal from a Lower Court of regular appeal in the event of that Court's decision being passed without jurisdiction. But it undoubtedly was not the intention of the Judges of that Bench (I can speak for them because I delivered the judgment) to go to this length. The judgment was an oral judgment directed to the particular facts of the case then before the Court, and it was only intended to express that the Court could not entertain the appeal on the merits. This Court having come to the opinion that the Lower Appellate Court has passed a judgment without jurisdiction, the function of this Court, the Court of special appeal, was limited to determining the case on that point. Under the circumstances of that particular case, so far as I recall them, it was desirable for the ends of justice that the decree of the Lower Appellate Court should be quashed and got entirely out of the way, and it was for that reason that the order of this Court was made in the particular form which it there took.

We reject this application.

Mitter, J.—I concur.

The 1st June 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Affidavit—High Court's powers of supervision.

In the Matter of

Biddyabuttee Dossia and another, *Petitioners.*

Baboo Kishen Dyal Roy for Petitioners.

An application to the High Court to exercise its extraordinary powers in respect to a finding of the Moonsiff that a summons had *not* been served, which finding was disputed by the petitioners, was refused, because the affidavit on which they came into Court omitted to state that the summons *was* served.

Phear, J.—We ought not to exercise the extraordinary power of this Court which is invoked on the present application unless we see that it is really necessary for the purpose of doing justice between the parties

Now, the matter in dispute is whether or not the summons was served on the defendant in a suit filed about six years ago. The present applicants have no ground to stand upon unless, in fact, that summons *was* served, because a Court competent to determine that point between them, and the defendant has judicially decided that the summons was *not* served. But the petitioners entirely omit in the affidavit of the facts on which they come before this Court, to swear that, notwithstanding the finding of the Moonsiff to the contrary, the summons *was* served on the defendant. No one apparently thinks fit to vouch on oath for the truth of their case.

It does not appear to us, therefore, that there is sufficient reason for our exercising the extraordinary powers of this Court in favor of the petitioners, and we accordingly reject this application.

Mitter, J.—I concur.

The 1st June 1870.

Present :

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

High Court's power of superintendence.

In the Matter of

Khenumkuree Dabee and another, *Petitioners,*

versus

Ranee Shurut Soonduree Dabee, *Opposite Party.*

Mr. J. S. Rochfort for Petitioners.

Baboo Gopal Lall Mitter for Opposite Party.

Where a Deputy Collector who had passed an informal decree refused to execute it on application, the decree-holder was held to be entitled to an order from the High Court, in the exercise of the powers it possesses under Section 15 of the Charter Act, directing the Deputy Collector to do his duty.

Phear, J.—THE petitioner in this case is one of several defendants in a suit. The respondent is the sole plaintiff. In that suit a decree was passed in these terms: "Suit dismissed with costs;" and appended to the decree was a schedule specifying the plaintiff's costs and the costs of each of the defendants. The petitioner applied to the Deputy Collector, in whose Court the decree was passed for execution of the decree for costs against the plaintiff.

The Deputy Collector said that he saw no decree for costs, or for payment by the plaintiff of costs to the petitioner, defendant.

Thereupon a rule *nisi* was granted, calling upon the respondent to show cause why the Deputy Collector should not be directed to execute the petitioner's decree for costs.

It cannot, we think, be seriously questioned, but that the decree to which we have referred really was a decree ordering the plaintiff to pay the petitioner the costs which were specified in the schedule to the decree, as the costs of the petitioner.

The decree was, no doubt, informal, but this was obviously the effect of it; and the Court which passed that decree was bound in law to execute it on the application of the petitioner.

It is, however, urged in argument before us that the decision of the Full Bench, reported in 5 Weekly Reporter, page 25, Miscellaneous Rulings (DaCosta *versus* Hall), lays down that in a case like this the parties must abide by the decision of the Deputy Collector, and that this Court cannot interfere by the exercise of the powers granted to it by Section 15 of the Charter Act.

It appears to me that the decision of the Full Bench by no means goes to the extent which is contended for. There the Sudder Ameen, having sold certain moveable property in execution of a decree, afterwards set aside that sale, and made a re-sale. The purchaser, a third party, and not one of the parties to the suit, appealed against this order of the Sudder Ameen to the Judge, and it was held, both by the Judge and by this Court on special appeal, that no appeal lay against the order of the Sudder Ameen at the instance of a third party; and the judgment of this Court given by the Full Bench also said that in such a case this Court could not interfere under the powers given to it by Section 15. The parties to the suit made no complaint. So far as they were concerned, there was nothing to indicate that the Courts below had not done their duty, and we think it is obvious that the Court could not, on the

application of a third person, rightly interfere by virtue of its extraordinary powers with the proceedings in a suit between parties who did not complain. The remedy of the purchaser was by a separate suit.

There is another case in Volume 7, Weekly Reporter (Gobind Koomar Chowdhry *versus* Kristo Koomar Chowdhry), in which a Full Bench held that an application very similar to the present application made by a party to the suit could be entertained by this Court.

In that case, the Deputy Collector had made a decree for arrears of rent. Subsequently, the Lower Appellate Court, and this Court on special appeal, modified that decree, declaring the plaintiff entitled to something less than the amount originally decreed. Meanwhile, the plaintiff had executed his original decree against the defendant for the full amount. After the judgment of this Court on special appeal, the defendant went to the Deputy Collector, and asked the Deputy Collector to order the plaintiff to refund to him (defendant) the excess which he had paid beyond the amount finally awarded. The Deputy Collector refused this application, referring the defendant to his remedy by a separate civil suit.

The Full Bench, on this, held that the Deputy Collector was refusing to do his duty on the application of a party to the suit who was entitled to require him to make the order in question.

So here the petitioner appears to us to be entitled to have the Deputy Collector ordered to do his duty, and to execute the decree which he has wrongly understood not to be a decree.

We think that there really is no collision between the case of DaCosta and the case reported in 7 Weekly Reporter.

There is, no doubt, a third class of cases with which we are familiar—more than one has come under our notice to-day—in which a subordinate Court having exercised its judicial discretion on the matters and the facts involved in the suit between the parties, and the Legislature having forbidden an appeal, the party aggrieved by the decision seeks a remedy by applying to this Court to exercise its extraordinary powers for the purpose of setting the Lower Court right. In such a case as that the argument of the present respondent's pleader is, we think, good.

This Court will not allow the powers which it possesses under Section 15 of the Charter Act to be made use of simply for the purpose of obtaining an appeal in cases where the Legislature has expressly forbidden an appeal. But, as we have endeavoured to explain, the present case lies outside that class of cases altogether. The Deputy Collector has, in our opinion, refused to do that which it was distinctly his duty to do. The matters on which he exercised his judgment—if he did exercise any—were not matters and facts remaining in issue between the parties, but were the circumstances of an act done by his own Court.

It seems to us that no cause has been shown against the rule, and therefore it must be made absolute with costs, which we assess at 32 rupees.

The 1st June 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Possessory suit—Onus probandi—Transfer of title—Section 36, Act XI. of 1859—Section 260, Act VIII. of 1859—Section 21, Act I. of 1845.

Case No. 157 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 29th September 1869, affirming a decision of the Moonsiff of Kishengunge, dated the 8th July 1869.

Shaikh Johur Ali (Plaintiff), *Appellant,*

versus

Brindabun Chunder and others (Defendants), *Respondents.*

Baboo Grish Chunder Ghose for Appellant.

Mr. R. E. Twidale for Respondents.

In a suit to recover possession by the ostensible purchaser of an estate sold for arrears of revenue under Act I. of 1845, where it was found that plaintiff had stood by ever since his purchase, and had for 11 years allowed defendants to remain in possession and enjoy the usufruct as proprietors:

HELD that the burden of proof was rightly thrown on the plaintiff.

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5 W. R., Civil, 56, and 11 W. R., Full Bench, 16 —the former on Section 36, Act XI. of 1859, and the latter on Section 260, Act VIII. of 1859—considered, and applied to a case under Section 21, Act I. of 1845.

Hobhouse, J.—The plaintiff in this case was the auction-purchaser, it is admitted, on the 11th February 1858, of the revenue-paying estate in question, and purchased that estate at a sale for arrears of revenue under Act I. of 1845. His allegation then was that after the purchase he obtained possession in the usual way; that he enjoyed possession by means of receiving certain rents of the estate up to the 13th April 1858; and that he was then ousted by the defendants; and he brings his suit to recover possession on the 11th February 1869.

The Courts below have found as facts, about which there can be no contest in this Court of special appeal, that the plaintiff never obtained possession of the property in question, that he never arrived at any enjoyment of that property, and that he was never ousted of the property by the defendants; but that, on the contrary, the defendants, notwithstanding the ostensible purchase by the plaintiff on the 11th February 1858, retained possession of the estate ever after and up to the present time, that is, for a period of no less than 11 years. Under these circumstances, the Courts below dismissed the plaintiff's suit.

In special appeal it is urged that the plaintiff being a certified purchaser at auction under the provisions of Act I. of 1845, the defendants were not in a position to dispute the plaintiff's right to obtain possession of the estate; and it is also stated that the Courts below have thrown the burden of proof upon the wrong party.

In answer to the second objection, it is sufficient to say that it is founded upon a mistake; that it is not until the Courts below have found that the plaintiff was never in possession and was never ousted, and that the defendants had been in adverse possession for a period of 11 years, that the Courts below called upon the plaintiff to establish the fact that he was the real purchaser and not the defendants. Therefore, it seems to us that it cannot be said that the burden of proof has, in any way, been wrongly thrown upon the plaintiff.

But the first objection taken requires a little more consideration. We think it is quite clear that there is so little difference between the provisions of Section 21, Act I. of 1845, and Section 36, Act XI. of 1859, and Section 260, Act VIII. of 1859, that any decisions of this Court which are founded upon the provisions of any one of those Sections may be said to apply to matters which are governed by any other of those Sections. I will, therefore, take it that the decision of the Division Bench of this Court to be found at page 56, Volume V. of the Weekly Reporter, and the decision of the Full Bench to be found at page 16, Full Bench Rulings, Volume XI. of the Weekly Reporter, are in point. But being in point, we think that these decisions themselves show us that upon the findings of fact of the Courts below, the plaintiff was not entitled to succeed in this case.

The facts of the case to be found in Volume V. of the Weekly Reporter were these: That the plaintiff was not only the certified purchaser, but that he had actually obtained possession under his purchase and was ousted. That being so, the learned Judges held that the plaintiff was entitled to the protection of Section 36, Act XI. of 1859, which, as we have said before, is equivalent to Section 21, Act I. of 1845, which applies to this case, unless, as the learned Judges put it, the plaintiff had by any act of his debarred himself of the right to the benefit of the Section in question. Then the learned Judges go on to say that had the plaintiff in that case, the certified purchaser, in any way waived his right to the purchase or relinquished it in favor of the defendants in the cause, then those defendants would have had a good cause and a good reason for ousting the plaintiff. The Judges further went on, it being a regular appeal, to decide that the plaintiff had not in any way debarred himself of the right to the benefit of the Section in question, and they held, therefore, that he was entitled to succeed in his suit to recover possession.

The ruling, therefore, in that case was that although the certified purchaser was the person who had been in possession and had been ousted, yet that ouster was defensible if it could be shown that the certified purchaser had so acted as to waive his right to the purchase and relinquish it in favor of the defendants.

But the facts here, we need not to [illegible] very different: for here the finding of the Courts below is that the [illegible] never been in possession and [illegible] ousted. [illegible]

and Mr. Justice Mitter, the appellant's pleader appears to have taken orally the fresh objection that as the defendants were not the parties taking under the lease, the suit against them was beyond the jurisdiction of a Collector's Court, and ought to have been dismissed.

Upon this, the Chief Justice held that the Full Bench Ruling, 8 Weekly Reporter, page 431, applied; that the Revenue Court had no jurisdiction to go into evidence extraneous to the lease; that in that Court Chundee Pershad, or the persons admitted to be beneficially interested in the lease, could alone be made liable; that if a person chooses to let to one man, he cannot in the Revenue Courts recover the rent from others on the ground that the lease was taken for the benefit of those others and *benamee* for them. He was, therefore, of opinion that the plaintiff's suit must be wholly dismissed.

Mr. Justice Mitter was of the contrary opinion; but the Chief Justice's view prevailed, and the plaintiff has in consequence appealed under the 15th Clause of the Letters Patent.

In determining this appeal it is necessary first to consider whether the Full Bench Ruling cited governs the case; and, secondly, whether the suit was, in fact, beyond the competence of the Collector's Court.

It must be borne in mind that the case was before this Court in regular appeal; that for this reason, all questions of fact, no less than of law, were open to consideration by the Division Court, and consequently by us on this appeal, and especially that the contract between, and the liabilities and remedies of, the parties must be viewed and considered in accordance with the principles and practice administered by the Courts in Bengal.

I think there is a clear distinction between the present case and that decided by the Full Bench.

In the latter case, the plaintiff having granted a pottah to Gopal Chunder Mookerjee, and having treated him as the tenant, having also made a petition to the Collector to sell the putnee for rent due from Gopal Chunder, afterwards brought a suit for subsequent arrears against Gopal and P. C. Paul Chowdhry and his wife, alleging these two persons to have a beneficial interest in the lease. The wife denied having any interest at all. The plaintiff proposed to abandon his claim against her, but the husband insisted that the liability of both should be tried.

There was thus a real contest for the purpose of establishing a liability on the part of a defendant who denied it and who was not *primâ facie* liable for the rent, and evidence was consequently gone into to show from what sources the purchase-money came, and upon a question whether the wife had independent means or had a joint treasury with her husband.

The Full Bench was then asked to decide, among other things, "whether the Collector "was competent to try whether P. C. Paul "Chowdhry alone was beneficially interested "in the putnee * * * upon the ground "that whatever interest his wife might have "had in it was *benamee* for him, or whether "P. C. and his wife were jointly beneficially "interested, * * * or, if not jointly, "what was their respective interests therein, "for the purpose of ascertaining whether P. "C. and his wife were jointly liable for this "rent, or whether they were to be rendered "liable according to their respective bene-"ficial interests in it."

This question was answered in the negative after some debate whether it really arose in the case.

I was one of the Judges who gave that answer, and I said (page 433): "It seems to "me to be such a case as is not within the "jurisdiction of the Collector, who is re-"stricted to try questions between a landlord "and his actual tenants, persons between "whom directly or indirectly some engage-"ment has been entered into. But where "the landlord seeks to make other persons "liable by reason of their having a bene-"ficial interest in the tenure, he must resort "to the assistance of the regular Civil Courts "which take cognizance of all causes of "action of which their cognizance is not "expressly taken away," and I think that is also the effect of the answer as given by the other Judges.

In the present case, the facts are very different. Not only does no one defendant repudiate liability (on the contrary, as remarked by the Chief Justice, liability is eagerly claimed by all defendants), but the

liability of each defendant has been affirmed in previous decisions between the parties, the only dispute being not between the plaintiff and the defendants, or any of them, but between one of the defendants who claims for himself and a co-defendant (who has not appeared) the exclusive liability, and of course exclusive beneficial interest, under the lease,* and the two female defendants who claim interest and admit liability, but allege their liability to be limited and separate, though they do not set up any legal foundation for that part of their allegation.

There is not, therefore, as it seems to me, the least necessity in this case for dealing with any such questions as were held by the Full Bench in the case cited to be beyond the cognizance of a Court of Revenue.

It is necessary now to enquire whether on any other ground there was defect of jurisdiction in the Collector, and I must observe that none of the parties having objected to the jurisdiction, but the suit having gone on to trial, it seems to me very doubtful whether it would be just to dismiss the suit with costs of both Courts, even if the want of jurisdiction were manifest.

In my opinion, the Collector was fully competent to hear and determine the suit, and I apprehend that the Revenue Courts have tried by thousands, and are every day trying suits where either landlord or tenant is a benamee holder; in other words, where on one side or the other of the contract the name used is not that of the real contracting party.

In this very large class of cases, it seems to me the rule in regard to admission of parol evidence to vary written contracts will not apply; and I conceive that the decisions, refusing to allow an agent who enters into a written contract in which he appears as principal to offer parol evidence for the purpose of exonerating himself, are wholly wide of the case before us.

There is, in my opinion, no question here of surrender nor of substituting one contract for another.

The principle of one of the common forms of *benamee* contract in this country is that *A* contracts with *B*, though by the desire and for the convenience of one or other of those parties the name of *C* is used instead of the name of that party.* It is clear that in such a case, *C* did not contract at all. He was not the agent for either, but was and is a stranger to the whole business.

* See the case of Sheikh Bahadoor Ali, appellant, I. Select Reports, S. D. A., page 250; and Mussamut Hyatun and others, appellants, IV. Select Reports, page 134; and see the repealed Regulation XVII. of 1793, Section 27. See also the observations of Lord Justice Knight Bruce, at pp. 72-3 of the judgment in Gopee Kristo Gossain *versus* Gunga Pershad Gossain, VI. Moore's Indian Appeals.[1]

And that this was so as to Chundee Pershad, the *furzi* in the present case is clear, not only from his own statement and that of his personal representative after his death in a former suit for rent of the same lands, but from the allegation of all the parties to this suit, and from the history of the tenancy, there can be no doubt whatever that Chundee Pershad never had and never claimed the slightest interest in the lease. Nor, as I think, was he in any sense an agent for the lessees; in truth, he did not act in the matter at all for himself or for others, but the real principals, with his permission, used his name.

But it seems to me the case does not rest merely on the contract.

The plaintiff alleged, and the defendants admitted, that they had got the land, and surely the holding of the land admittedly under the plaintiff entitled the plaintiff to the rent.

There is a case † in the 9th Weekly Reporter, page 71, where under a benamee contract the landlord recovered rent from the parties in possession, although no previous realization of rent from them was proved.

† Before Seton-Karr and Macpherson, *JJ.*

The case before us is a great deal stronger, for the plaintiff has got previous decrees against all the defendants, and it is noticeable that in the case I have just referred to, the Full Bench decision, which is supposed to be authority for the judgment now under appeal, is cited and declared to be in accordance with the principles on which the learned Judges there proceeded.

And where the admitted occupancy of the lands indicates the real tenancy and corroborates the statements of the parties as to the true contract, I cannot conceive any reason why the plaintiff should be debarred

[1] 4 W. R., Privy Council, p. 46.

from recovering his rent in the Collector's Court.

This, be it remembered, was not a mere suit for arrears of rent as originally reserved, nor a suit for the purpose of establishing the liability of the defendants, for that had been determined in the previous suit.

It was occasioned by the defendants' setting up a recent settlement which, according to their contention, entitled them to a lower rate, and also partly, no doubt, by the reluctance of Preonath Chowdhry to admit that he held jointly with the two ladies.

I conceive that the plaintiff's right to recover rent from the defendants was based upon their occupation of the land, their acceptance of the covenants and liability of tenancy, and the previous decision on that point, and that the production of the kubooleut was only necessary for the purpose of showing what the *terms* of the agreement were. Indeed, regard being had to the facts and to the previous decision between the parties, I imagine that the plaintiff might very well have dispensed with the production of the kubooleut altogether.

It seems to me, therefore, that the main question in this case was a question of fact, namely, whether there was evidence of the joint liability alleged by the plaintiff on the part of all the defendants.

In my opinion, there was such evidence in the admissions of the defendants themselves, in the sworn statements of the agents who were examined, and in the previous judgments; nor do I think that, if we get over the first difficulty of making a decree at all in this case, there can be any question of what the decree should be.

The defendant Preonath, no doubt, repudiates any joint liability with the two ladies, but I conceive that he has no grievance in the terms of a judgment, which, while it tends to lessen his liability for the particular rent sued for, decides nothing as between himself and the co-defendants, so as to prejudice him in any future litigation regarding the interests claimed by them respectively.

As to the two ladies, they expressly admitted a joint liability in the first instance though they set up a subsequent partition to which the assent of the landlord was *not* alleged. As far as they were concerned, therefore, I conceive there was nothing in the way of making a decree against them on their own admissions; and if it had not been for the plaintiff's consent, I should have thought that a decree against the defendants jointly would have been the proper termination of the suit.

It is not, indeed, very easy to account for the form of the previous decree of this Court between the parties, dated the 12th March 1866, nor is it precisely apparent in what position as to execution the parties were left by that decree. We may assume, however, that, for some reason or other, the parties there acquiesced in a decree so worded, and probably the rent was paid without further objection.

It is not perhaps necessary to decide here what decree could have been made if it had been quite clear that the two ladies were no tenants, and could not, therefore, be jointly liable for the rent.

But I think that the procedure of our Courts quite admits of such a result as a judgment against one or more of several parties charged as jointly liable, the suit as against the rest being dismissed in consequence of their liability not being made out. And in the particular case before us, I think it would have been obvious that the plaintiff was compelled, by what had previously occurred, to sue all the defendants.

I, therefore, think the decision complained of must be reversed, and the judgment of the Deputy Collector restored (the plaintiff having expressly consented to the decree being given in that form, see the last sentence but one of his examination, page 18 of the paper-book, and not now offering any objection to the decision that Juggut Tara and Puddo Coomaree are to pay a certain part, and the other defendants the rest), the only exception being as to the amount alleged to have been paid to the plaintiff's agent as to which, as suggested by Mr. Justice Mitter, there must be further enquiry.

Of course, in the view which I have taken of the case, the parties sued being held to be (with the knowledge of the sureties) the real contending parties, it follows that the sureties really made themselves responsible for these parties, and not for Chundee Pershad.

Kemp, J.—I concur in this judgment.

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Norman, J.—In 1851, the Nowab Nazim, by a gantee or jungleboore pottah, granted a lease of four mehals, Hasnabad, Mohunpore, Shoolkooly, and Koolyedangah, to Chundee Pershad Bose, and took a kubooleut from Chundee Pershad Bose, by which Chundee Pershad, as principal, and Ram Chunder Roy and Debnath Roy, as his sureties, covenated to pay a rent of Rupees 4,500, being at the rate of 12 annas per beegah, on 6,000 beegahs then in cultivation, with a stipulation that a measurement should take place in 1270, and 10 annas per beegah be fixed as the rent for the residue of the land.

The present suit was brought by the plaintiff, who is a purchaser from the Nowab Nazim of Bengal, against Preonath Chowdhry, Prosunno Chunder Chowdhry as the representative of the estate of Mothooranath Chowdhry, and Juggut Tara Chowdhrain and Puddo Monee Chowdhrain, and the sureties of Chundee Pershad, Ram Chunder Roy, and Debnath Roy, alleging that the lease of 1851 was taken by Mothooranath, Preonath, Prosunno, and Juggut Tara, in the name of Chundee Pershad; that in 1270 the land was measured and found to be 19,317 beegahs, and the rent fixed at 12,823 rupees 9 annas.

The representatives of Roy Mothooranath Chowdhry do not appear.

Roy Preonath Chowdhry alleged that the ganteedaree right in the four mehals in question was held by himself and Roy Mothooranath Chowdhry, and that Juggut Tara has no ganteedaree right, and is not a shareholder therein.

Juggut Tara and Puddo Coomaree say that they formerly held the four mehals jointly with the other shareholders, but that the estate has been divided, and they now hold Mohunpore separately, the other three lots Hasnabad, Shoolkooly, and Koolyedangah, belonging to Roy Mothooranath Chowdhry and Roy Preonath Chowdhry.

The Chief Justice was of opinion that the Revenue Court had no jurisdiction to try the suit, and, reversing the decision of the first Court, dismissed the suit on that ground. Mr. Justice Dwarkanath Mitter differing from the Chief Justice, this appeal has been preferred under the provisions of the 15th Clause of the Charter.

The first question we have to consider is what is the effect as between the plaintiff and the defendants of the lease taken by Chundee Pershad? It may be quite true that as between Chundee Pershad and the defendants, or some of them, Chundee Pershad may have no interest, and his name may have been used merely for the convenience of the persons really interested. But as between the plaintiff and Chundee Pershad, the question is totally different. The person to whom the lessor granted the lease was Chundee Pershad. Chundee Pershad, and Chundee Pershad alone, agreed for the payment, and bound himself by the stipulations in the lease. The defendants did not enter into any contract with the lessor. They did not choose to bind themselves. The sureties do not bind themselves for the payment of rent and performance of the covenants by the defendants, but only for the acts of Chundee Pershad, and would apparently be discharged from liability by such a dealing by the lessor with Chundee Pershad as the principal as would, according to ordinary rules of law, discharge the surety of any other principal. Whatever may be the case upon the question of privity as between the defendants and Chundee Pershad, or the defendants and the third persons, as between the lessor and Chundee Pershad the *contract* is a reality.

The Advocate-General argued that the Chief Justice was in error in saying that the land was demised to Chundee Pershad, and that he covenanted to pay the rent.

The argument comes to this, that the pottah and kubooleut by which that demise was created might be contradicted by oral testimony as to what the real contract was. Now this cannot be done. It is a well established principle of law, which has been recognized in this Court, that evidence is never admissible to show that a person who appears on the face of a written contract to be personally a contracting party is not really a contracting party, and therefore not liable as such upon the contract. It is quite another matter whether evidence may be admitted to charge another person as the principal.

The contention that the defendants in the name of Chundee Pershad Bose stipulated to pay the rent now sought to be recovered being for the excess land on certain conditions is, in my opinion, wholly untenable.

I think that *under the pottah and kubooleut* as they stand, Preonath and Mothoora-

nath acquired nothing, and did not render themselves liable to pay rent to the lessor.

If the rent had not been paid to the lessors by Chundee Pershad or his heirs, the lessors might have had a right to resort to the defendants, and to hold them liable. But that is a right arising out of the peculiar relations of the several parties to each other, not a right which can be enforced under Act X. of 1859. Under the 23rd Section of that Act, Clause 4, suits for arrears of rent due on account of land are made cognizable by the Collector alone. That Section does not empower the Collector to try any question except between a landlord and his tenant. He is not empowered to entertain suits, nor is the jurisdiction of the ordinary Civil Courts taken away, in respect of any collateral contracts or the obligations arising out of any relation that may exist between the parties beyond that of tenancy in respect of which rent is claimed.

In the present case, I think that Preonath and Mothooranath could not have been sued in the Collector's Court for rent by the lessor unless something occurred subsequent to the pottah and kubooleut to create the relation of landlord and tenant between themselves and the lessor.

If, after the grant of the pottah, the lessor discovered that Chundee Pershad was merely in name the lessee, that he was an agent by a contract in whose name the defendants had obtained possession of the property demised to him; if Chundee Pershad or Chundee Pershad's heirs, as appears to have been the case here, had disclaimed all interest in the property; if the defendants had paid their rents to the lessor and the lessor had accepted the same from them as his tenants—the defendants might have rendered themselves directly liable for rent; but if so, so far as that liability would be one enforcible by ordinary suit for rent in the Collector's Court, it would only be upon a new contract to be implied from their acts and those of the lessor.

If, in the present case, any new contract could be implied from the conduct of the parties in paying and receiving rent, or otherwise, I think the action might be maintained. But it is plain that the parties are not agreed as to the terms of any new contract.

In the former suit for the rents of 1270 and 1271, the plaintiff joined in one comprehensive plaint Saroda Pershad, the heir of Chundee Pershad, the defendants Mothooranath and Preonath, and the sureties. Down to the date of that suit, it is evident that there is no new contract in which Preonath and Mothooranath were treated as the contracting parties liable for the rent. Buroda Pershad disclaimed all interest and was released. There was a decree against Preonath and Mothooranath, and if the matter had rested there, and Preonath and Mothooranath had paid subsequent rents on the footing of that decree, it may well be that they or their representatives might have been sued at the present day as tenants. But the plaintiff appealed, and the ladies Juggut Tara and Puddo Coomaree put in a petition alleging that they also were tenants, and should be made liable jointly with Preonath and Mothooranath. A Division Bench of this Court made the ladies jointly liable as to part of the rent with Preonath and Mothooranath, but to that Preonath and Mothooranath have never assented either directly or indirectly. In the present suit, the plaintiff seeks to charge the representatives of Preonath, the representatives of Mothooranath, and the two ladies Juggut Tara and Puddo Coomaree Chowdhrain as jointly liable.

As it cannot be shown that the parties agreed to the same terms, there is no contract, and therefore I must say that no new contract has been substituted for the original one. Nothing has taken place to alter the relation of the parties, according to which Chundee Pershad was the contracting party, the tenant liable for the rent, and the defendants, or some of them, being the persons who had used his name, were bound to indemnify him and liable in equity to answer for the payment of the rent by Chundee Pershad to the plaintiff.

Under Act X. of 1859 a Collector has no jurisdiction to adjudicate upon the rights and liabilities arising out of such relation. The extent of the liability of the several defendants depends on the extent of their interest in the tenure. For the determination of the question whether either and which of them is liable, and, if so, to what extent, according to the decision in the Full Bench case already quoted, recourse must be had to the ordinary Civil tribunals which have cognizance of all civil cases in which their jurisdiction is not expressly taken away.

I may add that it is a general rule that Courts of law will not take cognizance of

distinct and separate liabilities in one suit; and neither in the Civil Court under Section 8 of Act VIII. of 1859, nor in the Collector's Court under any law that I ever heard of, can a cause of action against *A* and *B* for one demand be joined with a cause of action against *A*, *B*, and *C*, or a cause of action against *C* alone. They are not causes of action against the same parties.

In my opinion, the claim against Juggut Tara and Puddo Coomaree for the rent of a portion of the tenure cannot be joined in the same suit with the cause of action against Preonath and Mothooranath or their representatives.

I think it clear that Preonath had a right to insist that he and Mothooranath were alone liable for the rent, and that he is not liable as to any part of the rent jointly with Juggut Tara and Puddo Coomaree. If these ladies are his tenants, it is clearly prejudicial to him that they should be permitted to pay rent directly to the superior holder. It would tend to nothing but confusion of rights if any thing of the sort could be allowed.

It would materially affect the value of Preonath's tenure if he were going to sell it, if it were found that another person was paying rent for a portion of it.

Mr. Justice Mitter says: "Rightly or "wrongly, the Deputy Collector has passed a "decree against those two ladies, and as "they are satisfied with it, the appellant Preo-"nath ought not to be allowed to complain, "when it is clear that the effect of that "decree has been to reduce his liability."

But I think that a man who, if liable at all, is liable solely, has a right to insist that he shall not be made liable jointly with a stranger. He has a right to say, "I do not "choose to run the risk of the costs of an "action for contribution to which I shall be "exposed if a joint decree passes against "myself and another, if that other chooses to "pay the whole debt."

In English Courts of justice it has long been settled that if an action is brought against two persons on a contract alleged to be joint, if one allows judgment to go by default or expressly admits the debt, and the case goes on against the other whose liability to the entire debt is proved on the trial, but it is shown that the parties against whom judgment has gone by default and also has admitted the debt is not jointly liable. Judgment cannot be given as against the defendant who has appeared and defended, jointly with the one who has made no defence, but the suit must be dismissed altogether. (See Sheriff and Wilkes, 1 East's Reports, 52; Gray and Palmer, 1 Espinasse's Reports, 135.)

Unless the plaintiff is allowed to amend by abandoning his suit against the other defendant, as was the case in Greaves and Humphries, 4 Ellis and Blackburn, 851, I think that as regards the surety-defendants, the Deputy Collector had no jurisdiction. I may add that they are sureties for Chun lee Pershad and his heir, and that by the discharge of Chundee Pershad's heir, Buroda Pershad, all remedy against them is gone.

I, therefore, think that the Chief Justice was right in holding that the suit must be dismissed, and I would affirm his judgment with costs.

The 2nd June 1870.

Present:

The Hon'ble J. B. Phear and Sir Charles Hobhouse, *Bart.*, *Judges.*

Appellate Court—Additional evidence—Section 355, Civil Procedure Code—Section 57, Act II. of 1855.

Case No. 178 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 10th November 1869, affirming a decision of the Moonsiff of Kanderah, dated the 27th April 1869.

Maharajah Juggut Indur Bunwaree (Defendant), *Appellant*,

versus

Bhubo Tarinee Dossee (Plaintiff), *Respondent.*

Baboos Juggodanund Mookerjee and *Romesh Chunder Mitter* for Appellant.

Baboos Chunder Madhub Ghose, Anund Chunder Ghossal, and *Unnoda Pershad Banerjee* for Respondent.

Where an Appellate Court received additional evidence, recording only that the papers were material and important, there was held to be no sufficient com-

pliance with the proviso of Section 355, Civil Procedure Code, which requires the reason for admitting additional evidence to be stated.

The improper reception of evidence does not necessarily make the evidence no evidence at all; nor does it warrant reversal of the Lower Appellate Court's decision if justified by sufficient evidence independently of the evidence improperly admitted.

Phear, J.—We think that the Lower Appellate Court committed an irregularity in receiving at the hearing on appeal papers and documents which had not been produced before, without giving any better reason than the following: "The papers "alluded to above being material and impor-"tant documents, the Court has accepted "them."

Under Section 355 of the Procedure Code, the Appellate Court is forbidden to receive additional evidence except when it is necessary to enable the Court to pronounce a satisfactory judgment, or for any other *substantial* reason; and the latter part of the Section obliges the Appellate Court, whenever additional evidence is so admitted, to record its reasons for admitting it. Also, by an earlier Section in the Code (Section 128) it is enacted that no documentary evidence of any kind which the parties or any of them are desirous to file shall be received at a subsequent stage, that is, after the first hearing, unless good cause be shown for their non-production earlier. Now, in the present case, it does not appear that any cause is shown for the non-production of the documents in question at an earlier stage of the proceedings, and we cannot hold the mere statement that "the papers are material and important documents" to be a sufficient compliance with the proviso of Section 355 which requires the reason to be stated why the Appellate Court admitted the evidence.

The special appellant argues that this evidence, in consequence of being improperly received, is not evidence at all, and that inasmuch as the judgment of the Lower Appellate Court is to a considerable extent founded on it, that judgment ought to be set aside.

We are not prepared to say that the improper reception of evidence in the manner we have mentioned necessarily has the effect of making the evidence not evidence at all between the parties. In this instance this evidence simply stands in the position of evidence which has been improperly admitted; and that being so, Section 57 of the Evidence Act forbids us to reverse the decision of the Lower Appellate Court on the ground of improper admission of evidence, if it appears to us that, independently of this evidence, there was sufficient evidence to justify the decision.

Now, unquestionably, putting the whole of this evidence on one side, there is still very strong evidence to support the decision of the Lower Appellate Court. The only question before that Court was this, namely, whether or not the chur in dispute belonged to Nyehattee, and the Subordinate Judge says that "An Ameen was deputed by the "Court of first instance, who, after institut-"ing local inquiry, has recorded in his *Po-"edad* that the disputed chur has accreted "contiguous to the main land of Mouzah "Nyehattee, and that the same has also "been proved by the evidence of the wit-"nesses in the *locale*."

This evidence is amply sufficient to prove that the chur did belong to Nyehattee. There is nothing, so far as we understand, that tends to contradict this testimony or to show that it is false; and in the face of it we feel it is impossible for us to say that there was not sufficient evidence, independently of the evidence objected to, to justify the decision which the Lower Court has come to.

We, therefore, dismiss this appeal with costs.

The 2nd June 1870.

Present:

The Hon'ble L. S. Jackson and E. Jackson, *Judges.*

Contract—Verbal agreement—Registration.

Case No. 698 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 28th December 1869, modifying a decision of the Subordinate Judge of that District, dated the 27th August 1869.

Gooroo Pershad Roy and another (Defendants), *Appellants,*

versus

Roy Dhunput Singh (Plaintiff), *Respondent.*

Baboo Sham Lall Mitter for Appellants.

Baboo Sreenath Doss for Respondent.

The refusal of one of the parties to a contract to carry out a verbal agreement to register the deed not contained in the contract, does not give the other party a right to put an end to the contract. His proper remedy is to apply to enforce registration under the Registration Act.

L. S. Jackson, J.—It appears to me that the plaintiff in this case had no cause of action, and that the decision of the Court below upon his plaint is erroneous and must be set aside.

The plaintiff, it is alleged, lent a sum of money to the defendant on a bond, in which bond it was stipulated that certain immoveable property belonging to the defendants was pledged as security for the re-payment of the loan with interest. It was alleged that the defendants also agreed verbally to have this document registered; and the evidence shows that the document was, in fact, taken to the registry office, but that as the defendants did not appear, and their mookhtear did not consent to registration, the document was returned to the plaintiff, although there is no formal note by the Registrar refusing to register endorsed upon it. Upon this the plaintiff considers that the defendant having broken the contract, he is entitled to put an end to it, and he sues to recover the money lent, although the due date, which is in the month of Srabun 1277, has not arrived.

Both the Lower Courts consider that the refusal of the defendants to register gave the plaintiff a cause of action, which entitles him to recover the money lent. It appears to me that it did not, and that the conduct of the defendant (of which the account given is somewhat obscure) was such as would entitle the plaintiff to come before the Zillah Court, on the Registrar refusing to register, and under Section 84 of the Registration Act, apply by petition to establish his right to have such document registered.

It cannot be said that the refusal of one of the parties to the contract to carry out a verbal agreement not contained in the contract, enables the other party, at his option, to set aside the contract *in toto*.

It may be contended that the period allowed by law for registration of the document having expired, the plaintiff has now lost his security. That, it appears to me, will not enable the Court to grant the plaintiff the relief which he asks for in this suit. I think he has lost, by his own negligence, his security which the bond originally provided, and that if he is now reduced to a bare suit for his money when it becomes due, he has only himself to blame.

The judgment of the Courts below must be reversed with costs.

E. Jackson, J.—I also think that the judgment of the Court below must be reversed. I think the plaintiff's proper course was to have enforced registration of the bond.

The 2nd June 1870.

Present:

The Hon'ble Sir Charles Hobhouse, *Bart., Judge.*

Appeal from order under Section 9, Act VI. (B. C.), 1862—Stamps.

In the Matter of

Puriag Bhuggut, *Appellant,*

versus

W. M. Donzelle, *Respondent.*

Baboo Luckhee Churn Bose for Appellant.

An appeal from an order of a Lower Appellate Court on an application under Section 9, Act VI. (B. C.) of 1862, not being otherwise provided for by the Court Fees Act, may be admitted on a 6 annas stamp.

Note by the Deputy Registrar.—This is an appeal from an order of the Lower Appellate Court on an application under Section 9, Act VI. of 1862 (B. C.). The question whether such an appeal will lie to this Court has been referred to the Full Bench, and is now pending its orders.

The Court Fees Act has apparently not provided for an appeal under that Section; but for an application the fee leviable is set down in Article 13, Schedule II. as 5 rupees. If, therefore, for an application under Section 9, Act VI. of 1862 (B. C.), 5 rupees is the fee leviable, the fee for an appeal (if one be held to lie to this Court from an order on such an application) cannot, it is presumed, be less than that amount.

Lay before the 3rd Bench for orders.

Hobhouse, J.—I think the appellant is entitled to the benefit of the proviso in Schedule I., and that this being an appeal "not otherwise provided for" by the Court Fees Act, must be let in on a 6-annas stamp.

The 3rd June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Review—Remand—Re-hearing.

Case No. 2601 of 1869.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 2nd August 1869, affirming a decision of the Moonsiff of Bamunarah, dated the 25th February 1869.

Makhun Kooer and another (Defendants), *Appellants*,

versus

Tincowree Dutt and another (Plaintiffs), *Respondents*.

Baboo Oopendro Chunder Bose for Appellants.

Baboo Gopenath Mookerjee for Respondents.

Where a review had been granted for the purpose of seeing whether a chittah ought not to be used, and the case was remanded for a re-hearing, the party was held to be concluded from objecting that the chittah was improperly made use of upon the re-hearing.

Couch, C. J.—In this case, the plaintiff's suit having been dismissed by both Courts, there was an application for a review, and the ground upon which it was applied for was, as stated in the notice issued on the application, in order to ascertain what effect the chittah would have on the plaintiff's case. The Court granted the review, and the case was remanded for re-trial. We think that it is too late now for the special appellants to object that the Courts below ought not to have made any use of that chittah. It has been held by this Court in several cases that a decision of a Lower Appellate Court reversing a first Court's decision, and directing a remand is not an order within the meaning of Section 363 of Act VIII. of 1859, but without saying that the correctness of an order of remand may not be impeached when the final decree comes before the Court on a special appeal (Forbes *versus* Ameeroonissa Begum, 10 Moore's Indian Appeals, page 340),* we think that this is a case in which the party is concluded from objecting that the chittah was improperly made use of by the Court upon the re-hearing of the case, the review having been granted for the purpose of seeing whether that chittah ought not to be used, and the Court having upon the review directed that the case should be re-heard.

It would seem that both the Courts below in making use of the chittah have now come to a finding upon the question of fact in favor of the plaintiff, instead of the former finding which was adverse to him, and this certainly shows that the chittah did throw very considerable light upon the matter in dispute between the parties. The first Court says: "There is no doubt that the "aforesaid measurement had taken place "before respectable men of the village; "moreover the said chittah has been ad-"mitted by the Appellate Court, and the "decision has become final; consequently the "said chittah must be regarded as a valid "document in respect of the title of Binda-"bun to the disputed fishery, and the "evidence of the five witnesses on behalf of "the plaintiff with respect to the disputed "arrah having been before in Bindabun's "occupancy must be considered to be suffi-"cient evidence on that point, for the said "evidence is corroborated by Court papers." Now, that is a very distinct finding upon this matter, and the Appellate Court finds to the same effect. The Judge there says that having inspected the map drawn by the Ameen and taken his report into consideration, he finds that "the arrah regard-"ing which this dispute exists lies in the "portion indicated by the chittah of Bin-"dabun's jote, and that there is no fishery "at the spot which the appellant indicates "as the site of Bindabun's arrah. Under "these circumstances, and seeing that the "appellant has not proved by any satisfac-"tory evidence that he holds the julkur "of the tank near which this arrah is "situated, and as the respondent has proved "his possession by means of witnesses, "there is no necessity to interfere with the "decision passed by the Moonsiff." It might have been more satisfactory if this gentleman had gone somewhat more fully into this matter, and had shown that he had

* 5 W. R., Privy Council, p. 47.

considered all the evidence which was given in the case, but we cannot say that, because he has not done that, his finding upon the evidence is to be set aside—a finding which is in accordance with the finding of the first Court, and which does not appear to involve any error in his proceedings. There is no doubt that the proposition for which the judgment of the Privy Council is cited is one upon which all the Courts ought to act, but it is not a question here whether the Judge has acted upon that or not, but whether he has fully shown in his judgment that he has done so. We cannot suppose that he has not. This chittah was undoubtedly of considerable importance to the plaintiff's case, and had such weight with both Courts that they have now come to the conclusion that the decision ought to be in the plaintiff's favor.

The decree of the Lower Appellate Court will be confirmed with costs.

The 3rd June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Error—Evidence—Special appeal.

Case No. 2190 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 15th June 1869, reversing a decision of the Moonsiff of Sulkeah, dated the 24th March 1869.

Shoobul Chunder Kulleah (Plaintiff), *Appellant,*

versus

Koylash Chunder Mal (Defendant), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

Where a Subordinate Judge held, from the fact of one person carrying on a business-firm and appearing to the world to be the only person carrying it on, that there could be no other person in partnershio with him, he was considered to have committed an error which materially affected his decision on the merits, and was a good ground for special appeal.

The circumstance of a witness being a servant or a dependant of the plaintiff does not of itself disentitle him to credit.

Couch, C. J.—In this case, the question being whether the plaintiff and the defendant were partners, the Moonsiff appears in a well-considered and sensible judgment to have come to the conclusion that they were partners. The case then went before the Subordinate Judge, and he, in giving his judgment upon this question, says: "It is "rather admitted by the plaintiff himself "that he was known to the outside public "as being the owner of the *karbar*, and "that, therefore, the creditors instituted "suits against him, and that he himself "brought suits against the debtors to the "*karbar* and obtained decrees, and that he "himself sold the goods of the *karbar* and "received the price. Under these circum-"stances, it can never be held that the "*karbar* was jointly carried on by the "parties; on the contrary, it appears that "the plaintiff was the exclusive owner of "the firm."

Now, we think it is entirely wrong to hold that, where one person carries on a business-firm, and appears to the world to be the only person carrying it on, it necessarily follows that there can be no other person in partnership with him. This would be to hold that in no case can there be a dormant partner in a firm, and that, in fact, there can be no such partnership as that in which one of the partners would manage the affairs of the firm whilst the other would simply provide a share of the capital, taking a share of the profits. It is very well known that there are partnerships where there are dormant partners—persons who actually share in the profits, although not appearing to the world to be partners—and such partnerships exist in India perhaps more than in any other country. When the Subordinate Judge says that, under these circumstances, it can never be held that the *karbar* was jointly carried on by the parties—on the contrary, it appears that the plaintiff was the exclusive owner of the firm—there is an error in his proceedings which certainly would, and which did, very materially affect the decision of the case on the merits, and is a good ground of special appeal.

Then he goes on to say: "On reference "to the evidence, it appears that, with "the exception of the witness No. 1, "Romanath, none of the witnesses have "positively deposed to the fact of the

"*karbar* being carried on by the plaintiff "and defendant in the shares of 11 annas "and 5 annas respectively. The evidence "of the said Romanath is not worthy of "credit, for he has admitted in his deposi-"tion that he was employed by the plaintiff. "Consequently, he being a dependant of the "plaintiff, it is not surprising that he should "give evidence in his favor." He discredits that witness simply from the circumstance of his being what he calls a dependant of the plaintiff. There, we think, he was wrong, because in many cases the plaintiff could only call his servants or dependants to prove the books that were kept by them; and to say that the circumstance of such witnesses being servants or dependants of the plaintiff of itself disentitles them to credit would be a great injustice. The Subordinate Judge ought to have looked to the circumstances and facts offered for his consideration in order to ascertain whether this witness was worthy of credit or not. This might not be an error in law such as would afford sufficient ground for special appeal, but it is not at all the right way to deal with the evidence in the case.

The Subordinate Judge further says: "If, as alleged by the plaintiff, the *karbar* "was jointly carried on by the parties, both "of them, and not the plaintiff alone, would "have been known to the outside public as "the owners of the same." That is the same mistake again. It is not at all necessary that both parties should be known to the outside public as carrying on the business in partnership. It may be that one of them would be known to the public whilst the other would not be so; and from the nature of this case it is very possible that that would be the state of things, that the defendant who was the working-man, if I may so call him, the man who understood the mechanical part of the business, would be employed in that part of it, and would not, therefore, be known to the public as a partner, whilst the plaintiff who collected the debts, carried on the suits, transacted business with the public, and superintended the keeping of the books, would be the person known to the world. The way in which the Subordinate Judge has dealt with this case appears to be entirely wrong and erroneous in point of law. His decree must be reversed, and what appears to be a very good decree of the Moonsiff allowed to stand.

This appeal will be decreed with costs.

The 3rd June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Section 50, Act XX. of 1866—Registration—Fraud.

Case No. 2222 of 1869.

Special Appeal from a decision passed by the Judge of Patna, dated the 17th June 1869, reversing a decision of the Sudder Moonsiff of that District, dated the 18th November 1868.

Bhikdharee Singh (Plaintiff), *Appellant,*

versus

Kanhya Lall and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Moonshee Mahomed Yusuf for Respondents.

In a suit for possession and ejectment founded upon a deed of sale, where plaintiff's conduct in collusion with his vendor was found to be fraudulent, it was held that the mere fact of the deed of sale being registered gave him no priority over defendant's deed of sale, which was of earlier date, though unregistered.

Bayley, J.—I AM of opinion that the judgment of the Judge is quite right, and that this appeal must be dismissed with costs.

The Judge finds, firstly, that there was no cause of action, and then proceeds to the main question whether the special appellant, by reason of his having registered his deed of sale prior to the defendant's purchase, is entitled to a decree in this suit for possession and ejectment.

There were two defendants sued, one of whom was the vendor. He, it appears, did all that he possibly could to put the vendee in possession, and therefore the Judge gives no decree against him. The Judge also refuses to give the plaintiff any decree against the tenant-defendant, because there is no evidence that the tenant refused to pay rent or denied the plaintiff's title, and because the Judge holds as a fact upon the evidence and the conduct of the parties that, although the plaintiff's deed was registered, while the defendant's was not, still the whole transaction on the part of the plaintiff was of a collusive character for the purpose of fraudulently taking advantage of the

provisions of Section 50, Act XX. of 1866; or, in other words, that the transaction was not *bonâ fide*, and therefore the plaintiff's deed of sale, though it was registered, ought not to have priority. Such was the object of the law in Act XIX. of 1843 and is that of Act XX. of 1866, and it would be utterly subversive of justice if fraudulent acts like these be permitted to override a genuine and a *bonâ-fide* transaction. In addition, I would remark that the defendant was in possession as a tenant, and it is not shown that he was a tenant-at-will.

I would dismiss this special appeal with costs.

Markby, J.—I also agree in dismissing this appeal. The really important point for us to decide is whether the second defendant can maintain his title under his purchase of the 2nd January 1868, which was prior to the plaintiff's purchase of the 8th March 1868. The contention is that, because the plaintiff's purchase was registered, therefore the defendant's purchase must go for nothing. We find that the defendant is in actual possession of the lands, and the Court finds most distinctly that the title on which the plaintiff seeks to turn him out, although it was registered, was, as I read the judgment, the result of a fraud contrived by the plaintiff and his vendor conjointly, and therefore, whether it was registered or not, it was absolutely useless as against the defendant.

The 3rd June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Section 240, Act VIII., 1859—Attachment—Alienation.

Case No. 2994 of 1869.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 14th September 1869, reversing a decision of the Subordinate Judge of that District, dated the 14th May 1866.

Ram Churn Lall and another (Plaintiffs), *Appellants*,

versus

Jhubboo Sahoo and others (Defendants), *Respondents*.

Mr. C. Gregory for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

An alienation which is null and void because made whilst an attachment was subsisting, cannot be validated by the removal of the attachment.

Couch, C. J.—In this case, the mortgage to the plaintiff was made on the 3rd of January 1863, while the attachment was subsisting. It is not necessary, we think, to give any opinion as to whether the striking off of the execution-case in the manner which appears in the proceedings operated as a removal of the attachment or not. If it were necessary for us to determine that, we are strongly inclined to think that we should hold that it did not, but we abstain from giving any opinion upon that point. Then this mortgage being made whilst the attachment was subsisting, Section 240 of Act VIII. of 1859 says that any alienation of the property attached, whether by sale, gift, or otherwise, during the continuance of the attachment, shall be null and void. We think upon these words it is clear that the removal of the attachment would not operate so as to render an alienation made whilst the attachment was subsisting a valid one. It could not have such a retrospective effect. The alienation is said in Section 240 to be null and void; and if it is null and void, it cannot be validated by the removal of the attachment.

With regard to the argument derived from Section 245, if the decision of this Court in the case of Anund Lall Dass *versus* Radha Mohun Shaw and others (Weekly Reporter, Volume XI.), which has been appealed against to the Privy Council, stands, Section 245 cannot apply, because, if the alienation is only null and void as against the attaching creditor, and he withdraws the attachment under Section 245 on the decree having been satisfied, there can be nobody to impeach the alienation. But if it should be held that the opinion of Mr. Justice Markby is the correct one, and that the alienation is null and void against every body, there may possibly be some foundation for the argument based on Section 245. We are inclined to think that the circumstance that it would so operate (if Mr. Justice Markby's construction is correct) is an argument against its being so, and that the construction put upon that Section by the majority of the Court is the correct one.

The decree of the Lower Court must be affirmed with costs.

The 6th June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Alteration of decree.

Case No. 55 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 27th November 1869.

Mr. P. T. Onraet (Judgment-debtor), *Appellant*,

versus

Sunkur Dutt Singh and others (Decree-holders), *Respondents*.

Mr. R. E. Twidale for Appellant.

Baboos Chunder Madhub Ghose and *Lukhee Churn Bose* for Respondents.

After a decree has come up in appeal and been confirmed by the High Court, a Lower Court has no power to make any alteration in it even to correct a clerical error.

Couch, C. J.—In this case, the decree of the Lower Court was modified by this Court on a regular appeal, and the decree so modified has become the decree of the High Court. The alteration which has been made in it by the Lower Court is not an alteration to correct a clerical error, but is a material alteration in the decree by awarding interest on the amount of wassilat awarded. After the decree has come up on appeal and been confirmed by this Court, the Lower Court has no power to make any alteration in it even to correct a clerical error. The proper course would be to apply to the High Court whose decree it has become; but we cannot consider this alteration as the correction of a mere clerical error; far from being so—it is a very important alteration in the decree. I held (and I continue of that opinion) in the case of Bhánus Shankar Gopálram *versus* Roghoonathram Mangalram, reported in Volume II., Bombay High Court Reports, page 106, that after a decree is confirmed by the High Court on appeal, the subordinate Court has not the power of making any alteration whatever in it. We must reverse the order with costs.

Kemp, J.—I concur.

The 6th June 1870.

Present:

The Hon'ble H. V. Bayley, *Judge*.

Review—Grounds of application.

Case No. 63 of 1870.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and A. G. Macpherson, on the 12th February 1870, in Special Appeal No. 2799 of 1869.

Seetanath Ghose and another (two of the Defendants), *Petitioners*.

versus

Shama Soonduree Dossia (Plaintiff), *Opposite Party*.

Mr. G. C. Sconce for Petitioners.

Baboo Debendro Chunder Ghose for Opposite Party.

In applying for a review, it is not sufficient for the applicant to make an affidavit that he was not aware of the existence of a document filed by the other party; the law requires that he also showed due diligence and made inquiries to ascertain its existence, and found that it was not available.

Bayley, J.—I reject this application for review with costs.

The first ground urged is that there is an affidavit before this Court to the effect that the defendant was not aware of the existence of two documents filed in this review, *viz.*, a petition of the Commissioner of the Soondurbuns, dated the 16th Srabun 1265, and a proceeding of that Court, dated the 25th October 1858, which would show that the chitta of 1242, relied upon by the Court below, was not a genuine instrument. This proceeding, which was admittedly between parties other than the plaintiff and the defendant in this case, was a decision of the Commissioner of the Soondurbuns in regard to the Soondurbun and Jessore estates; and although the affidavit is that the defendant, applicant for review, was not aware of its existence before, I do not think that that is a sufficient excuse; for what the law requires is not that the party was not aware of a document, but that he also showed due diligence and made enquiries to ascertain its existence, and found that it was not available. It is difficult to believe that by a proper search into such well-known papers as the measurement

papers in the office of the Commissioner of the Soondurbuns, which would naturally be the papers to be looked for in a boundary-dispute like this, the party could not find the chitta out before this last stage of review.

It is then urged that a certain petition by Reazooddeen was binding as an admission against the parties representing Reazooddeen; but no such ground was taken in the petition of special appeal, and we can, therefore, hardly be said to be wrong in law in not deciding on a point which was not put before us at all to decide, and on which we are now called to admit a review.

Lastly, we are referred to two points originally taken in the petition of special appeal, *viz.*, that the evidence of certain witnesses had been wrongly rejected, and the whole evidence had not been duly considered by the Lower Appellate Court. On these points, however, it is unnecessary to say anything more than that they are completely covered and answered by our judgment in special appeal.

The application is accordingly rejected with costs.

The 6th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Non-appearance—Sections 58 and 151, Act X., 1859—Review—Jurisdiction.

Case No. 26 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 16th September 1869, affirming a decision of the Assistant Collector of Buxar, dated the 26th May 1869.

Radha Pershad Singh (Plaintiff), *Appellant,*

versus

Sansar Roy (Defendant), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

A defendant who has appeared on one or more occasions, and contested the suit up to a certain point, is not a defendant who has not appeared in the sense of Section 58, Act X of 1859, because at some subsequent stage of the proceedings he was not present when the suit was heard.

The proper construction of the word "revision" in Section 151 is not *review*, but such revision as the Board of Revenue and Commissioners as superior officers exercise over the proceedings of the Collectors and Deputy Collectors, or the High Court over the Lower Courts under Sections 404 and 405, Criminal Procedure Code.

HELD that, independently of Act X., there may be cases in which a Collector has power to admit a party to come in and be heard when a proceeding has taken place in his absence; and that every presumption should be made in such cases in favor of his having jurisdiction, especially where the party would have been without a remedy if the review had not been admitted.

Markby, J.—I DO not think that we need call upon the respondent in this case.

The facts necessary to state are these:—

On the 13th November 1867, the Assistant Collector, in a suit for enhancement of rent, held that the tenure was not liable to enhancement.

The landlord appealed against the decision, and on the 17th February 1868 the decision was reversed by the Judge who remanded the case to the Assistant Collector to enquire into the rates.

On the 18th May 1868, the Assistant Collector gave a decision for the plaintiff that the rates claimed were such as he was entitled to demand. On that occasion the defendant did not appear, but he appealed to the Judge who, on the 31st August 1868, refused to hear the appeal on the ground that the case must be governed by Section 58, Act X. of 1859, which provides that "no "appeal shall lie from a judgment passed "*ex parte* against a defendant who has not ap-"peared, or from a judgment against a plaintiff "by default for non-appearance," but he informed the appellant that his proper course was to apply for review to the Assistant Collector under that Section. On the 19th February 1869, the suit was re-opened by the Assistant Collector, and on the 21st May 1869 he gave a decree to the plaintiff at the rates admitted by the defendant, thinking that the plaintiff failed to prove the rates at which he claimed. He says that the point which the plaintiff wished to prove was that the rent paid for the lands was below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent, and he thinks that the plaintiff's proofs did not establish this. The plaintiff then went up to the Judge in appeal on the 10th December 1869, and the first objection

that he took was that the first Court had acted contrary to the provisions of Section 58 in reviving the suit, and also that the rates claimed by the plaintiff ought, on the evidence, to have been allowed.

The Lower Appellate Court declined to go into the first objection on the ground that it was not cognizable in appeal, and, on the second objection, held that the plaintiff was bound, under Section 17, to prove that the increased rate of rent demanded was fair and equitable. On this latter point, he thought that the decision of the first Court was right, and affirmed it accordingly.

It is contended before us in the first place that the Judge ought to have entertained the first objection taken before him in appeal, and it is also contended that the objection was, in fact, good in law. Now, we think that the appellant before us is so far right as that the words of Section 58 do not apply to such a case as this. The very same question came before another Division Bench of this Court upon Section 119, Act VIII. of 1859, the first paragraph of which is precisely similar to that of Section 58, and it was then held, as we now propose to hold, that a defendant who has appeared on one or more occasions, and contested the suit up to a certain point, is not a defendant who has not appeared in the sense of Section 58, merely because on some subsequent stage of the proceedings he was not present when the suit was heard. In this case, the defendant had appeared at the original hearing, had gone up to the Court on appeal, and it was only when the case came back on remand that he failed to appear, but he had appeared in the earlier stages of the litigation. No doubt, therefore, the Judge was wrong when he declined to proceed further in appeal on this point.

It is too late, however, now to rectify this error, and the defendant, having lost the appeal to which he was entitled, ought not to be shut out unless upon the clearest grounds.

It is contended that the action of the Assistant Collector in re-opening the suit was altogether without jurisdiction. Now, on the point of jurisdiction—we should always require to be clearly satisfied before setting aside the decision of the Lower Courts on that ground that there was a clear want of jurisdiction; and we should require it especially in a case of this kind where the necessity for taking that course arose out of the objection of the very party who now seeks to contest the jurisdiction. Had not the plaintiff objected to the Judge hearing the appeal of the 31st August 1868, the defendant would then have been heard in his appeal, and the whole matter would have been finally decided.

Now, we have not before us the reasons which induced the Assistant Collector to admit this case to a re-hearing, but it is argued that, under no circumstances can a Collector review his decision. It is said that that is so, firstly, because in Section 151, Act X. of 1859, it is laid down, in the concluding words, that "no judgment of a "Collector or Deputy Collector in any suit, "and no order of a Collector or Deputy "Collector passed in any suit and relating "to the trial thereof, or after decree and "relating to the execution thereof, shall be "open to revision or appeal, otherwise than "as expressly provided in this Act." We think that the proper construction of the word "revision" is not *review*, but such revision as the Board of Revenue and Commissioners as superior officers exercise over the proceedings of the Collectors and Deputy Collectors, or this Court over the proceedings of the Lower Courts in criminal trials under Sections 404 and 405 of the Criminal Procedure Code.

It is also said that the power of a Collector to admit a review is further limited by Section 154, but that Section only applies to cases in which the judgment of the Collector is final, and, as has been already shown, the judgment was not so in this case. We think, however, that independently of any provisions contained in Act X., there may be cases in which a Court has power to admit a party to come in and be heard when a proceeding has taken place in his absence. We admit that these cases must be exceedingly rare, but we do not think that we ought to hold as a matter of law that he acted entirely without jurisdiction. We think that every presumption which we ought to make ought to be in the other way, especially in a case where, if the review had not been admitted, the party would have been entirely without a remedy.

The only other question is whether the appeal is rightly disposed of by the Judge on the merits. What we understand the Judge to mean when he says that "the "party seeking to enhance must adduce

"most ample and convictive proof that the "increased rate of rent demanded is *fair* "*and equitable*," is that he means to say that they are fair and equitable when tried by the test of the rules for enhancement laid down in Section 17, because he had, immediately prior to using those words, referred to Section 17, and he immediately afterwards goes on to affirm the judgment of the first Court which had proceeded, in his judgment, entirely upon that Section. We do not think, when the Judge used those words and referred to the Section, he intended to set up any standard of fairness and equity except that laid down under Section 17. We think, therefore, that this ground also fails, and the result is that this special appeal is dismissed with costs.

The 6th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Usufructuary mortgage—Possession.

Case No. 70 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 30th September 1869, modifying a decision of the Sudder Moonsiff of Chuprah, dated the 31st December 1868.

Shaikh Fyezoollah and another (Defendants), *Appellants,*

versus

Syud Kazim Hossein and another (Plaintiffs), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Baboo Kalee Kishen Sein for Respondents.

A party, who, by paying off a mortgage-debt, becomes an usufructuary mortgagee in place of the original zur-i-peshgeedar, does not need to sue for the amount due, but is entitled to remain in possession until the whole debt has been discharged by the usufruct.

Markby, J.—This is rather a complicated case, but we do not think it necessary to state the facts at very great length.

The suit was for possession of 11½ pie of Mouzah Kureem Chuck and 3½ cottahs in Mouzah Danawana. We may get rid of the 3½ cottahs at once, for it is admitted that no question arises in this appeal as regards those lands.

The 11½ pie may then be divided into two parts, *viz.*, 8 pie which is said to have come into the family of Bibun and 3½ pie which is said to be a share in the two annas which belong to Hessamoodeen. As to the 8 pie which came to the family of Bibun, it is found now beyond question by the Lower Courts that the share of Hossein Ali and the share of Enayet Ali have been conveyed by valid instrument to the defendant, and to that extent she has been successful. The only question before us rises as to the share of Kefait Ali, which descended to Nuzur Ali. That share, whatever it was, went to Kaneez Fatima, the plaintiff's vendor, and the Lower Appellate Court has given him a decree for it. The objection raised in special appeal is that the Lower Appellate Court has not disposed of the finding of the first Court, that whatever may have been the title of Kaneez Fatima, she never obtained possession, and therefore the claim of the plaintiff who derives through her is barred by limitation.

The first Court did, in fact, find generally that Kaneez Fatima never obtained possession of any share at all in this property. The Lower Appellate Court, when it reversed that finding, no doubt, had just been speaking, not of the share which came from Kefait Ali to Kaneez Fatima, but of the share which came from Mussamut Bibun to Kaneez Fatima; but seeing that that Court has reversed the judgment of the first Court on this point, we think that the proper inference is that it intended to find that which is far the more probable thing in point of fact—that Kaneez Fatima did get into possession, not only of what came from Mussamut Bibun, but of all that which her father Nuzur Ali was entitled to—that is to say, what he obtained from both Kefait Ali and Mussamut Bibun. This disposes of the first point.

Then the other point taken is as to the 3½ pie share which came to Kaneez Fatima through Hessamoodeen. As to this, the first attempt of the defendant was to set up a title to it under a will of Hessam's daughter Ameerun. That attempt, however, altogether failed, and that failing, he fell back upon a zur-i-peshgee lease originally executed by Hessamoodeen, to which he said he had a title by paying off the debt, and being from 25 years ago ever since in possession. Both the Courts below have found that, in fact,

this was so, and that the defendant had become the mortgagee of this property in the place of the original zur-i-peshgeedar; but the Lower Appellate Court, finding this, does not dispose of the plaintiff's suit as to this 3½ pie share, but says: "If the proportional "amount of the mortgage-money of Fyezool-"lah in respect of the share of Mussamut "Ameerun, mother of the vendor, had not been "satisfied by the proceeds of the mortgaged "property, then he (defendant) is at liberty to "recover the same by instituting a suit." It seems to us that this is just reversing the position of the parties. On the facts found by the Lower Appellate Court, the defendant is in possession as zur-i-peshgeedar, and he has a right to remain in possession until the plaintiff can show that the whole debt has been discharged by the usufruct. But the plaintiff in this suit made no such allegation, and no enquiry was held on this point. He failed to prove his title to possession, and until he can prove these, he cannot recover possession against the zur-i-peshgeedar, but can, if he thinks proper, institute legal proceedings in Court for that purpose.

As the facts have been enquired into and found in this case, the defendant has a right to retain possession against the plaintiff of the 3½ pie share. The result of our judgment, therefore, is that the decision of the Lower Appellate Court, so far as it holds the plaintiff entitled to the 3½ pie share derived from Hossein Ali, is reversed, and the plaintiff's suit, as regards that share dismissed, and in all other respects the judgment of the Lower Appellate Court is held good, and should stand. Each party should bear his own costs in this appeal.

The 6th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Sale for arrears of rent—Absence of shareholder's name.

Case No. 11 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 23rd December 1869, reversing a decision of the Moonsiff of Arrah, dated the 25th February 1869.

Doorbijoy Mahtoon (Plaintiff), *Appellant,*

versus

Prithee Narain Singh (principal Defendant), *Respondent.*

Baboo Boodh Sein Singh for Appellant.

Baboo Prosunno Coomar Roy for Respondent.

Where a tenure is duly sold for arrears of rent under Act X. of 1859 and Act VIII. (B. C.) of 1865, the absence of a shareholder's name from the proceedings does not, as a matter of law, invalidate the sale as against him.

Markby, J.—There are five grounds of appeal taken in this case, but as they stand, they none of them, except the first, raise any intelligible point of law, and we have not been informed in the course of the argument what the points are which are intended to be raised by them. As to the first ground, however, there does seem to arise this question, that whereas the name of the plaintiff does not appear in the decree which the zemindar obtained for rent, his share in the property has nevertheless been sold.

It is, however, established by the decision of the first Court, and that finding is not displaced by the second Court, that the plaintiff is a shareholder, and the Judge says that both parties admitted that the land in dispute was duly sold for arrears of rent under the provisions of Act X. of 1859 and Act VIII. of 1865 (B. C.), and from this he infers that, whether the plaintiff's name appeared in those proceedings or not, the sale of the tenure was good against him. There is no reason shown to us why this conclusion of the Lower Appellate Court is not right. It does not follow as a matter of law that because the plaintiff's name did not appear in the proceeding, therefore the sale of the tenure is invalid. It may be that his name was not registered in the zemindar's sheristah as a shareholder, and that, therefore, the zemindar was not bound to recognize him as his tenant; or it may be that there was an engagement made between the zemindar and the other shareholders with his consent. Be that as it may be, it is sufficient here to say that the inference which the Lower Appellate Court has drawn is not shown to be wrong.

The special appeal is dismissed with costs.

The 7th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Joint Hindoo family—Suit by member—Separation.

Case No. 11 of 1870.

Regular Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 4th October 1869.

Mooktakeshee Debee (Defendant), *Appellant,*

versus

Oomabutty (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Appellant.

Baboo Sreenath Doss for Respondent.

In a suit by the mother and guardian of one of two nephews to set aside a hibbanamah under which defendant, who was the wife of their uncle, claimed to hold separately one-third of the property in dispute, it having been objected that the property being, according to plaintiff's allegation, joint and undivided, the suit should have been on the part of all the co-sharers interested, plaintiff was permitted in appeal to have herself placed on the record as plaintiff in her double capacity of guardian of both the infants.

The principle contained in the judgment of the Privy Council in the case of Appoovier *versus* Rama Subha Aiyan, namely, that there might be among the members of an undivided Hindoo family an operative division of title without a corresponding division of the subject-matter to which that title relates, was held not to apply in a case where there was no deed or agreement between the parties contemplating the subject of separation, but only vague expressions and statements contained in petitions not directed to that particular subject.

Jackson, J.—THE facts out of which the present suit has arisen are fully stated by the Zillah Judge before whom it was tried. It seems, therefore, unnecessary to re-state those facts at any great length.

The gist of the matter is this, that the property to which the suit relates, whether divided or undivided, is the property of three persons, of whom, unless the hibbanamah in dispute be a valid document, Kasheenath Roy is one, and his two nephews, sons of his deceased brothers, namely, Grish Narain Roy and Mohendro Narain Roy, are the other two.

The suit was brought by Oomabutty, the mother and guardian of Mohendro Narain, for the sake of setting aside the hibbah under which the defendant Mooktakeshee, who is Kasheenath's wife, claimed to hold separately one-third of the property in dispute. One of the objections taken by the defendant, which was unsuccessful before the Judge, but which was again urged before us in appeal, was that the property being, according to the plaintiff's allegation, joint and undivided, she was not competent to maintain this suit in her capacity as guardian of one of the co-sharers, but the suit should have been on the part of all the co-sharers interested. After the argument had proceeded some length, we intimated our opinion that the plaintiff, who, as it appears, is the guardian of Grish Narain as well as of Mohendro Narain, should have herself placed on the record as plaintiff in her double capacity of guardian of both the infants. This has accordingly been done, and the requisite amount of stamp-duty has been paid, so that the suit now represents the interests of the co-sharers excepting Kasheenath, whose share is now in question.

I may say that the only question we have had to consider on this appeal is whether the property to one-third of which the hibbah relates has been and is divided as to interest, or whether this Hindoo family continues to be a joint undivided Hindoo family in estate.

We have been very much pressed with a definition of an undivided Hindoo family in Hindoo Law, contained in the judgment of the Judicial Committee of the Privy Council in the case of Appoovier *versus* Rama Subha Aiyan in 11 Moore's Indian Appeals,* where the judgment commences at page 88. The passage on which the appellant relies is this: "According to the true notion of an undivided family in Hindoo Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the Collector or receiver of the rent a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among them-

* 8 W. R., Privy Council, 1.

"selves, with regard to particular property, "that it shall thenceforth be the subject of "ownership in certain defined shares, then "the character of undivided property and "joint enjoyment is taken away from the "subject-matter so agreed to be dealt with; "and in the estate each member has "thenceforth a definite and certain share "which he may claim the right to receive "and to enjoy in severalty, although the "property itself has not been actually "severed and divided."

Now, we must bear in mind for what purpose this definition was set forth. Looking at the facts of that case, it evidently was with advertence to the contention by the appellant that a division in such a case as this meant a division by metes and bounds, and that there could be no operative division of title until such a division had taken effect upon the property; and their Lordships, repudiating any such view, held that there might be an operative division of title without a corresponding division of the subject-matter to which that title relates, and then, applying the principle so enunciated to the particular case, their Lordships show that the members of the undivided family had agreed amongst themselves, with regard to the particular property, to have a written deed executed embodying their intentions of which the words are set out in the judgment, and which indicate quite unmistakeably the intention of the parties to separate and to enjoy that which had been joint property in definite specified shares.

It seems to me that it would be going very much beyond what their Lordships intended in that case, were we to attribute to vague expressions and statements contained in petitions, not directed to that particular subject, the effect of solemn deeds or agreements between the parties whether reduced to writing or not, but agreements contemplating the very subject of separation.

In this case, there is not only no document in which an agreement to separate is embodied, but there is no evidence that the members of the family came together with any such intention or made any such agreement. It is only sought to be shown, or to be inferred, from vague random expressions in certain petitions, or from the evidence of certain persons who have been cited as witnesses in this case, that as to portions of the property rents had been separately collected; but there is no documentary evidence; there is nothing beyond some verbal assertions; and as to the petitions upon which the defendant relies, every one of those petitions contains, together with the vague statements relied upon, a positive assertion that the parties are at this moment in a state of *ijmalee* or joint property.

There is a certain presumption in favor of the family continuing joint, and I think that, in the circumstances of the case, the Judge was quite right in concluding that the defendant, on whom the burden of proof lay, had not discharged herself of that burden by showing that the family were separate in estate. There can be no doubt that, if such separation had been made out, the plaintiff could have no interest which would enable her to maintain the present suit; but it also follows, conversely, that, if such separation was not made out, and if the property continued to be the common property of a joint Hindoo family, the co-sharer, Kasheenath, had no power to make the hibbah which is before us in this case, and that, consequently, the defendant had no title under the hibbah.

The result, therefore, I think, must be that the plaintiff must succeed so far as to obtain a declaration from the Court that the hibbah is not a valid instrument, and that the defendant has no title thereunder. Regard being had to the circumstances of the case and to the fact that Mooktakeshee is the wife of the co-sharer, Kasheenath, who is, manifestly from the evidence, a lunatic and incapable of managing his own affairs, I think it is not necessary that the decree should run so as to direct the ejectment of Oomabutty from the land, and therefore I think the decree of the Court below ought to be modified to this extent; but it will remain clear from the judgment and decree now made in this case that any possession which Mooktakeshee may retain will not be in the quality of owner under the hibbah, but simply out of her relation to Kasheenath, one of the co-sharers.

The costs of the suit will, of course, include the costs which the plaintiff incurred by payment of excess stamp-duty here, representing Grish Narain's interest in the property.

The respondent is entitled to her costs of this appeal.

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The 7th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Arbitration-award—Appeal—High Court's powers of revision.

In the Matter of

Shaik Elahee Buksh and others, *Petitioners,*

versus

Shaikh Hajoo and another, *Opposite Party.*

Baboo Debendro Chunder Ghose for Petitioners.

Baboo Mohinee Mohun Roy for Opposite Party.

A judgment passed by a Moonsiff in accordance with an arbitration award is not subject to an appeal to the Judge. A judgment of a Judge reversing a judgment of the Lower Court passed in accordance with an arbitration-award was accordingly set aside by the High Court under its extraordinary powers of revision under the Charter Act as passed without jurisdiction.

Markby, J.—I THINK this rule must be made absolute. There was a suit before the Moonsiff. That suit was referred to arbitration. Pending the arbitration, a dispute arose as to whether or not the arbitrators could proceed. An application was made to the Court, and the Moonsiff expressed an opinion that the arbitration could proceed. Thereupon two of the arbitrators proceeded to make the award, and the Moonsiff gave a judgment in accordance with that award.

Against that decision, the defendant appealed to the Judge. The Judge was of opinion that the award was invalid, and upon a consideration of the evidence on the record, he found that the plaintiff's claim was not satisfactorily proved, and therefore reversed the judgment of the Moonsiff, and dismissed the plaintiff's suit.

We think that the order of the Judge was made without jurisdiction, and ought to be set aside. The function of the Court in arbitration-cases in dealing with an award is laid down in Sections 324 and 325, Act VIII. of 1859. Under Section 324, an award can only be set aside on two grounds, *viz.*, on the ground of corruption, and on the ground of misconduct on the part of the arbitrators. Under Section 325, the Court, if no application to set aside the award, on the grounds above-mentioned be made, or if any application be made but refused, shall proceed to pass judgment according to the award, and in every case in which judgment shall be given according to the award, the judgment shall be final. No provision is therefore made for a case in which the award is absolutely void, and whether or no it is convenient that that should be the state of the law, it is quite clear that the remedy is not and cannot be by an appeal to the Judge. Of course, we do not in the least mean to intimate any opinion whether this award was a good or a bad award, or whether it can be enforced; that question is not before us. All that we do mean to say is that, when a judgment was passed by the Moonsiff in accordance with it, that judgment was not subject to any further appeal to the Judge. We think that this opinion of ours is in accordance with the view of law taken in a case reported at page 205, Volume VIII. Weekly Reporter; and although it is true that it appears at first sight somewhat in conflict with the view taken in a case reported at page 393, Volume XII., Weekly Reporter, I doubt if it is really so. This last case was one of a very peculiar character. The reference to arbitration did not take place until after a remand from this Court, and looking to the order of reference I doubt very much whether the record ever really left the Court. I am inclined to think that only the question on remand was referred to the arbitrators. At any rate, it is obvious that the course taken by the Judge in this case is erroneous. There was no judgment, according to the argument of the very party who appears to show cause, upon which an appeal could lie. The only contention is that the proceeding under the arbitration was void, and there was no judgment by the Moonsiff of his own, but only a decree according to the award. Upon this fact alone, however, it seems clear to us that no appeal could lie, because there was no judgment to appeal against.

We think, therefore, that the Judge acted without jurisdiction in this case, and that his judgment must be set aside, and this rule made absolute with costs assessed at two gold-mohurs.

The 8th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Hindoo Law—Ancestral property—Court of Wards—Right of suit.

Case No. 20 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 31st December 1869.

Bolakee Sahoo (Defendant), *Appellant,*

versus

The Court of Wards on behalf of Sheo Sunkur Pershad Sahoo, minor (Plaintiff) *Respondent.*

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Appellant.

Baboos Onookool Chunder Mookerjee and *Juggodanund Mookerjee* for Respondent.

The principle of the Mitakshara Law, that, if a father recover ancestral property which had been taken away by a stranger and not recovered by the grandfather, he need not share it against his inclination with his sons, was held to apply *a fortiori* where the property would have been irrevocably lost to the family, but was re-purchased by a member who was at the time solely entitled, and who advanced the money out of his self-acquired property.

The Court of Wards has a perfect right to maintain a suit for the recovery of land belonging to a minor, which is in possession of a person not having a good title thereto.

Markby, J.—This was a suit brought by the Court of Wards on behalf of Sheo Sunkur Pershad Sahoo, minor son of Sudaburt Pershad Sahoo, to recover possession of a 1 anna 9 pie share of Mouzah Ruhimpore Delna. Sudaburt Pershad was the only son of Dakhin Sahoo. It appears that Dakhin Sahoo purchased, in execution of a decree against Mussamut Moonya, a 5 annas 4 pie share in Mouzah Ruhimpore for Rupees 7,800. After Dakhin's death, and when Sudaburt was the only representative of the family (his son, the present plaintiff, not being then born), one Furhat Hossein claimed a 1 anna 8 pie share out of the property so purchased by Dakhin Sahoo, on the ground that, prior to that purchase, his father Koorshed Hossein had obtained a mortgage on this property and a decree for foreclosure, and that, as heir to his father, he was entitled to this share of the property. It appears that this right had been asserted by Koorshed Hossein during the proceedings in execution of the decree under which Dakhin Sahoo purchased, but had then been summarily rejected. Furhat Hossein was, however, not barred by the Statute of Limitation, because he only came of age shortly prior to the year 1859. Upon that claim being made by Furhat Hossein and a suit instituted, a compromise was effected by Sudaburt paying to Furhat Hossein the sum of 4,200 rupees, upon receipt of which Furhat Hossein filed in Court an abandonment of his claim.

The share in the property which the plaintiff now seeks to recover is made up of the 1 anna 8 pie share so claimed by Furhat Hossein, and recovered by Sudaburt as just now mentioned, and 1 pie out of the remainder of the 5 annas 4 pie purchased by Dakhin.

The defendant made his title to this property under a deed of sale executed by Sudaburt Pershad in the year 1867, after the birth of the minor, by which, in consideration of the sum of 10,937 rupees 8 annas, Sudaburt conveyed this 1 anna 9 pie share to him. In the deed of sale, the property conveyed is generally described as joint and separate; and it is also alleged on various grounds that there was a necessity for bringing the property to sale.

Four issues were raised in the Court below, but the only two upon which any question arises in this appeal are what are described as the *first* and the *second* issues of fact, *viz.*, "whether the property in suit is *ancestral* or was it *acquired* by Sudaburt Pershad, father of the minor," and "whether the property in suit is sold under *legal necessity* as provided by the Shastras, and whether its consideration-money is defrayed to meet lawful expenses or not."

Upon the first issue, the Subordinate Judge has found that out of the 1 anna 9 pie now claimed, 1 anna and 8 pie is to be considered as the property acquired by Sudaburt Pershad, by reason of his having got rid of the claim of Furhat Hossein in the manner above mentioned. The remaining 1 pie he holds to be joint; and considering that the legal necessity alleged did not exist, he finds that as to that 1 pie the sale is invalid, and he accordingly gives the plaintiff a decree for possession of that 1 pie, dismissing the rest of his claim.

Both the parties have appealed to this Court. The defendant contends, firstly, that a case of legal necessity sufficient for the purchase is made out; and, secondly, that the Court of Wards is not competent to bring this suit; and he also states that he is prepared to argue, if necessary, that the plaintiff could not recover in this suit except upon condition of his re-paying the purchase-money which the defendants had paid in respect of the lands; and also that, upon general principles of Hindoo Law, the sale was good as to the father's half share; but as these last two questions would only become of importance in case we should reverse the decision of the Court below upon the main question decided against the plaintiff, argument upon them was deferred.

The plaintiff, on the other hand, besides contesting these propositions, contends that the decision of the Court below, that 1 anna 8 pie of this property was self-acquired, was wrong.

It will be most convenient to dispose of this last question, which is that raised by cross-appeal, first. Upon this point, we think that the decision of the Lower Court may be upheld. The question is one not free from difficulty, on account of the very peculiar state of the family at the period when the events took place, that has been relied upon as changing the character of this property. It undoubtedly came into the possession of Sudaburt as a property acquired by his ancestors; but in the year 1859, Sudaburt, as the sole representative of the family, was solely and absolutely master, not only of the property which he had himself acquired, but also of that which had descended to him from his father. For this reason, we think that we may safely adopt the view which the Subordinate Judge seems to have adopted, that Sudaburt was dealing with Furhat Hossein in perfect good faith, and that the transaction was not entered into for any secret or fraudulent purpose, but was really such as upon the face of it it was represented to be. Had the state of the family been different, and had Sudaburt then been acting not only on his own behalf but on behalf of other members of the family, we should have had much greater difficulty in accepting this view of it; but as he was able to deal with the property exactly as he pleased, we are at a loss to see what reason he could have had for in any way misrepresenting the nature of his transactions. Looking, therefore, to the nature of this transaction as disclosed by the razeenamah, it appears that he did, in fact, admit the claim of Furhat Hossein to be a good and valid claim. The compromise is effected by re-paying to Furhat Hossein his share of the purchase-money in full with interest up to the date of the compromise. According to a passage of the Mitakshara Law, to be found at page 279 of Colebrooke's Translation, "if the father re-"cover property, which had been acquired "by an ancestor, and taken away by a "stranger, but not redeemed by the grand-"father, he need not himself share it, "against his inclination, with his sons, any "more than he need give up his own acqui-"sitions." If this be the case where the property is recovered by a single member of the family upon the strength of the ancestor's title, the same principle will seem to apply with still greater force where the property would have been irrevocably lost to the family, but was re-purchased by a person who at the time was solely entitled, and who (as is proved in this case) advances the money out of his own self-acquired property. On these grounds, therefore, we uphold the decision of the Subordinate Judge on this part of the case, and hold that 1 anna 8 pie of the property claimed was what Sudaburt Pershad had a title to dispose of to the purchaser.

The only question that remains is as to the 1 pie share; and as to this the Subordinate Judge has held that there was no legal necessity to justify a sale even of this small share of the family property. We agree with the Subordinate Judge in thinking that, with one exception, all the grounds relied upon by the defendant as constituting the legal necessity fail. But it was established that there was due by the ancestor, Dakhin Sahoo, to his brother, Bhugwan Lall, a debt which his family was bound to discharge. We also think it established that a sum of Rupees 3,645 was borrowed by Sudaburt under a bond from Bhikun Sahoo on the 3rd January 1862; and as appears from the roobokaree of the Principal Sudder Ameen of the 25th February 1862, Rupees 1,491 were paid to the widows of Bhikun Lall, who had actually obtained a decree, and were about to put this very Mouzah Ruhimpore up to sale. This bond of Rupees 3,645 was paid off in 1864, by money raised on a zur-i-peshgee lease of Mouzah Ruhimpore granted to Ram Gobind; and the last-mentioned debt is one of the debts paid off by the purchase-money re-

ceived from the defendants under the purchase which is now sought to be set aside. We think it is established, therefore, that there was a debt for which the family was liable, and that the debt has been discharged in the manner above stated, *i. e.*, under legal necessity by the sale of this 1 pie share of the family property. It does not appear that the value of that share was greater than the debt to the liquidation of which it had been applied; and we think, therefore, that as to this 1 pie also the defendants' purchase can be maintained.

It is unnecessary, therefore, to consider the other points raised in appeal; and the result is that the decision of the Lower Court so far as it regards the 1 anna 8 pie share is affirmed, and the cross-appeal dismissed; and that the said decision of the Lower Court so far as it regards the 1 pie share is reversed, and the plaintiff's suit in regard to that share dismissed. In other words, the plaintiff's suit is dismissed *in toto*. The appellants are entitled to their costs of this appeal.

There is, however, one other question of law which was argued in this case by the appellant, *viz.*, that the Court of Wards acting on behalf of the minor could not maintain the present suit, because the minor after attaining majority might ratify the father's acts. We think that this objection is quite untenable, and that the Court of Wards have a perfect right to maintain this suit on the minor's behalf, if the defendant, not having a good title to the property, is in possession of the lands which belong to the minor.

The 8th June 1870.

Present:

The Hon'ble L. S. Jackson and E. Jackson, *Judges.*

General Mookhtears—Notice of sale—Regulation VIII. of 1819.

Case No. 198 of 1870.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 10th November 1869, reversing a decision of the Subordinate Judge of that District, dated the 9th July 1869.

Hurry Kisto Roy (Plaintiff), *Appellant,*

versus

Motee Lall Nundee and others (Defendants), *Respondents.*

Mr. W. A. Montriou for Appellant.

Baboo Onookool Chunder Mookerjee for Respondents.

Where a general mookhtear empowered to act on behalf of co-sharers does formal acts to enforce the rights of his principals (the zemindars), it is not necessary to trace back his authority in each case to the explicit sanction of every single member of the family. Mookhtears must be considered to have a certain discretion, and unless the contrary is shown, to do such acts as come within the ordinary scope of their duty, with authority.

In a case of a sale under Regulation VIII. of 1819, where the putnee was a small piece of land upon which there was no town or village or cutcherry of any kind, and the peon stuck up the notice in the Collector's office, and also at the sudder cutcherry of the zemindar, and obtained the receipt of the defaulter in the latter place, he was held to have carried out substantially, as far as he could, the provisions of the law regarding notice.

L. S. Jackson, J.—This was a suit by a putnee talookdar to obtain the reversal of a sale made at the instance of the zemindar on various grounds. The putnee, which consists of 62 beegahs of land, was created by a bynamah, dated 26th Kartick 1272; and the sale complained of took place on the 13th May 1868, or about two and a half years afterwards.

The plaintiff succeeded in the Court of the Subordinate Judge, but that decision was reversed on appeal to the Zillah Judge; and the strength of the contention raised by Mr. Montriou for the appellant lay in his objections to the mode in which the evidence and the facts of the case had been handled by the Lower Appellate Court.

I think the principal matters we have had to deal with in this appeal, were the misapprehension and misconception of the evidence by the Judge, which, it is contended, were sufficient to invalidate his judgment, and to entitle the special appellant to a new trial; and the particular grounds on which the plaintiff is considered to have been entitled to the judgment of the Court, and upon which the Judge is considered to have miscarried, were: first, that the putneedar had paid the rent; next, that some of the zemindars under whom he held had not given their sanction to the proceedings; then, that the sale was void for want of due publication of the notice under Regulation VIII. of 1819; and there was another, that the order of sale in the lotbundee under which this and other putnees were sold had been departed from.

As to the mode in which the Judge has treated the evidence, I am bound to say that I cannot consider his decision altogether satisfactory. There is, no doubt, considerable ground for observation in the description, so to say, which the Judge has given of the evidence, and some of the conclusions which he has drawn; and I think that, if we could perceive, upon a consideration of the whole of the case and of the evidence, that such misapprehension, as I suppose it must be called, had led to a failure of justice, we should be bound to remand the case and to order a new trial; but I am bound to say that upon the whole case it appears to me that the Judge has not come to an improper conclusion. The plaintiff came into Court to obtain the reversal of a sale held by the Collector under Regulation VIII. of 1819. In commencing this suit, therefore, he had to contend, in the first place, with the presumption which, I think, ought not to be lightly disturbed, that the proceedings of the Collector in conducting that sale had been correctly and regularly held; and in the next place he undertook to show that the sale had been brought about by fraud and misrepresentation.

We have been told by the learned Counsel that it is a serious matter to convict of perjury, as we should, by implication, do one of the witnesses, who is also one of the zemindars in this case, Sreekristo; but it must not be forgotten that it is quite as serious a matter to convict by our verdict other of the zemindars who are parties concerned of the fraud of which they would be undoubtedly guilty if they had brought about this sale by suppression of the receipt of rent.

As to the question of the payment of rent, I think I am bound to say that the Judge had sufficient grounds for holding that the payment was not proved. Whether or not the Collector's and Commissioner's offices were the proper places in which the defaulter should have alleged that he had made payment; and whether or not he was, in the first instance, bound to apply for the summary enquiry provided in Clause 2, Section 14, Regulation VIII. of 1819, I think it contrary to all experience of the dealings of suitors in this country to suppose that a man who was conscious of having paid the whole of his rent should not, in complaining of the sale of his tenure, have conspicuously stated that fact from the very outset. The witness Sreekristo, who is one of the zemindars, has, no doubt, stated that he had received the rent in full, and, of course, if his evidence on this point can be believed, it would be not merely a strong piece of evidence, but would also be an admission upon the record of one of the defendants, and of a defendant who, as a co-sharer, might bind his co-sharers, the other defendants; but I think there is very good reason for refusing belief to that evidence. We are not now trying a regular appeal. I do not, therefore, propose to go fully into the considerations of fact which lead me to consider that the Judge was justified in refusing to believe that witness. It is sufficient to say that I think there was fair ground upon that evidence to refuse belief to Sreekristo.

Then there is the question of the non-sanction of Sreekristo to these proceedings. I do not know what kind of sanction it is supposed that Sreekristo ought to have given. The application for sale in this case was made by a person who, it is admitted, was the am-mookhtear of the co-sharers. If it was necessary for him to exhibit any distinct authority on the part of his employers, probably the authority must have been in writing, and not from Sreekristo alone, but from the whole of the co-sharers. As far as my acquaintance with proceedings of this nature goes, I believe that persons who act as am-mookhtears do habitually and constantly present petitions and applications to the Collector by virtue of their general authority, without showing any specific authority to act under Regulation VIII. of 1819.

Then we have the evidence of that mookhtear. He states that he received the direct instruction of the eldest and managing member of the family, and that Sreekristo, although he did not give express instructions, was yet cognizant of what was going on, and gave his sanction impliedly by handing to the mookhtear the various documents necessary to carry out that procedure. It may or may not be that the eldest member of the family, Ram Komul, had a direct interest in the particular property; but that would not be inconsistent with the fact of his giving instructions in a matter which concerned the family-interests to the family-mookhtear; nor would the circumstance of the mookhtear receiving verbal instructions from the eldest member of the family take away from the character of his act as the general mookhtear empowered to act on behalf of the co-sharers. I think, therefore, there is

nothing in the want of direct sanction of Sreekristo.

But I am bound to say, further, that, if in all the cases in which formal acts have to be done by mookhtears to enforce the rights of the zemindars, their principals, it were necessary to trace back the authority of the mookhtear in each case to the explicit sanction of every single member of the family, both the mookhtears and the officers of Government concerned would be very seriously embarrassed. I think that persons in the situation of ammookhtears must be considered to have a certain discretion, and, unless the contrary is shown, to do such acts as come within the ordinary scope of their duty with authority.

Then the next point is the non-publication of the notice. Mr. Montriou laid a great deal of stress on the use of the word "service," which occurs in the judgment. He contends that the officer who took this notice into the mofussil failed in his duty, because he brought back a return of "service" on the defaulter.

Now, what the Regulation requires in this matter is, that the zemindar shall cause to be stuck up in the Collector's office and in his own sudder cutcherry a general notice of all tenures of defaulters which he intends to be put up for sale by reason of default, and then for the information, as I understand, of each separate defaulter, an express notice is to be posted on the cutcherry or any principal town or village upon the particular putnee. The putnee in this case, it so happens, is not a distinct mouzah or collection of mouzahs, but a small piece of land upon which there is no town, or village, or cutcherry of any kind. It was impossible, therefore, to carry out literally the words of the Regulation in that respect. What the peon did was to take the notice to the sudder cutcherry of the zemindar, and there to obtain for it the receipt of the defaulter whom, it appears, he found there. It appears to me that, in doing that, he carried out substantially, and as far as he could, the provisions of the Regulation; because notice was given in the office of the Collector and the sudder cutcherry of the zemindar, which was a sufficient notice to purchasers to attend. A notice was also given to the defaulter himself, there being no town, or village, or cutcherry of his upon the property.

Then it is said that the putnees were not put up for sale in the order in which they stood in the lotbundee. I asked the learned Counsel whether it was contended that, by reason of this departure from form, the plaintiff had suffered any injury. He told us that it must be presumed to have resulted in some injury. He considers the price at which the property was sold was insufficient, and that the plaintiff was the best judge of that matter.

It seems to me that that is not a sufficient answer to the question. In the analogous case under the Procedure Act, a sale is never set aside for informality in conducting the sale, unless it be shown that substantial injury has been suffered. There is no authority for saying that the sale of a putnee talook must be set aside, because breach of form has taken place, unless substantial injury has resulted.

But beside this, we see that this property for which 21 rupees was paid by way of bonus has been sold for 180 rupees. Mr. Montriou suggested that the land might have been uncultivated, and that the consideration given in the first instance would be no guide to the value of the property on which jungle was possibly growing at that time. As to that, the putnee had only been in existence two and a half years. It is not likely that the plaintiff could have done anything in that time to improve the property to any large extent. But, moreover, the amount of "*pou*" (consideration-money) given on these occasions is almost entirely regulated by the rent reserved. If a putnee is granted at what is a fair rent for the land, the *pou* is usually small; but if, on the other hand, the zemindar's necessities oblige him to sacrifice a large portion of the rent he might receive, he always gets consideration for it in the shape of a larger sum of money down; and consequently I see no reason for supposing that any injury accrued to the plaintiff from this departure from the order in the lotbundee.

On the whole case, therefore, it seems to me that there is no error in the decision of the Judge, such as would entitle us to set aside his judgment, and order the sale of the plaintiff's putnee to be set aside. The special appeal must be dismissed with costs.

E. Jackson, J.—I concur with Mr. Justice Jackson, both in the conclusions at which he has arrived, and in the argument which he has stated for those conclusions. I am

quite satisfied on all the three points on which this special appeal has been argued before us, that the Lower Appellate Court had before it sufficient evidence upon which it could legally arrive at the judgment at which it has arrived upon each of these points. On the question of arrears, I think there can be very little doubt that the decision is quite correct; in fact we have heard a great portion of the evidence upon it read. Upon the question of authority, there is evidence that Sreekristo did assent to the application to the Collector, namely, the evidence of the mookhtéar. As to the publication, I think that all necessary publication, under the law, considering the special circumstances of this case, was proved by the evidence before the Court. I would, therefore, also dismiss the appeal.

The 8th June 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Execution.— Jurisdiction — Res judicata—Section 11, Act XXIII. of 1861.

Case No. 149 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 18th December 1869, reversing a decision of the Subordinate Judge of that District, dated the 3rd December 1868.

Jogendro Narain Koonwar (Defendant), *Appellant,*

versus

Ranee Surno Moyee (Plaintiff), *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Baboos Sreenath Dass, Bhuggobutty Churn Ghose, and *Motee Lall Mookerjee* for Respondent.

Possession of certain lands having been given to a decree-holder in execution, the judgment-debtor appeared before the Court, which had jurisdiction to execute the decree, and complained that illegal possession had been taken of land not covered by the decree. The Court determined that the decree did cover the land and rejected the complaint. The judgment-debtor then brought the present suit to recover possession of the excess land which had been made over to the decree-holder.

HELD that the question was one which arose in the former suit between the parties, and which related to the execution of the decree in that suit, and must, therefore, under Section 11, Act XXIII. of 1859, have been determined by the Court executing the decree, and could not be gone into in this separate suit.

Hobhouse, J.— THE plaintiff in this suit, who is the special respondent before us, sued to recover certain lands under the following circumstances. The defendant, who is the special appellant before us, held a decree of date the 17th July 1860 for the recovery of certain lands from the plaintiff within certain boundaries specified in the decree. In execution of that decree, that is, on the 22nd April 1856, the present defendant, then the decree-holder, took possession of the lands now in dispute, averring that they were covered by the decree. This possession, it is admitted, was given to the present defendant through an officer of the Court—that is, through the Civil Court Ameen. Thereafter, that is, sometime in May 1866, the present plaintiff, then the judgment-debtor, appeared before the Court which had jurisdiction to execute the decree of the 17th July 1860, and complained that the present defendant, then the decree-holder, had illegally taken possession of the lands now in dispute, because they were not covered by the decree of the 17th July 1860. The Court determined that the decree in question did cover the lands in question, and rejected the present plaintiff's complaint to the contrary. This was on the 28th May 1866.

In the present suit, the plaintiff sues to recover possession of these same lands, setting up as his cause of action the decision of the Court in execution of decree of the 28th May 1866. The first Court thought the suit would not lie, and dismissed it. The Lower Appellate Court is of opinion that the suit will lie, and has remanded the case for a decision on the merits.

In my opinion the Lower Appellate Court is in error. By the provisions of Section 11, Act XXIII. of 1861, it is declared that certain questions as to mesne-profits are to be determined by the Court executing the decree. And then the Section goes on to provide, in so many words, as follows: "And any other questions arising between "the parties to the suit in which the decree "was passed, and relating to the execution "of the decree, shall be determined by "order of the Court executing the decree, "and not by separate suit, and the order "passed by the Court shall be open to ap-"peal."

Now, it is to be remarked that these last provisions of this Section were enacted by

way of amendment of Section 283, Act VIII. of 1859, and it is further to be remarked that whereas the words I have quoted form no part of the provisions of Section 283; on the other hand, the provisions of that said Section were not in any way general, as is the additional provision now before us, but were restricted so as to give to the Court executing the decree jurisdiction only to determine certain specified matters, and none others. It is essential to remark this distinction between the two Sections, because, when such distinction is remarked, then the enormous extension of jurisdiction which the words I have quoted in the amended law give is at once the more apparent.

Then, what we have to see for the determination of the point now before us is simply this, whether the question as to whether or not the lands in dispute were covered by the decree of the 17th July 1860, was a question which arose between the parties to the suit in which the decree was passed, and which related to the execution of the decree? It seems to me impossible not to say, but that this was a question arising between the parties to the suit, and that it did relate to the execution of the decree. The decree was, as I have said before, for landed property within specified boundaries. The plaintiff in that case, who is the defendant in this case, sued to oust the present plaintiff from the lands in question, and I understand that the ouster, or rather the re-entry, for which he prayed, was an actual manual re-entry by the eviction of the present plaintiff, then the defendant. Then in order to execute that decree, that is, to obtain manual re-entry upon the property decreed to him within a specified boundary, it was necessary that he should apply to the Court which had jurisdiction to execute the decree. Having so applied, it was then incumbent upon that Court to order delivery of the property covered by the decree, and within the four corners of the boundaries expressed in the decree to the plaintiff, now defendant, by putting him, or any person whom he might appoint to receive delivery, in possession of the land, and, if need be, by removing any person who might refuse to vacate the same. This procedure on the part of the Court was rendered incumbent upon the Court by the provisions of Section 223 of the Code of Civil Procedure. Then the defendant in this case, the plaintiff decree-holder in that case, did apply to the Court to be put in actual possession of the properties covered by the decree. He was put in such possession by that Court. Having been so put in possession, the present plaintiff, then the judgment-debtor, applied to that Court and raised the present question. It is almost too obvious to need repetition that the question then raised before the Appellate Court executing the decree was a question arising between the parties and relating to the execution of the decree. *In fact*, if we consider it, it was the most essential question of all, the very question upon which it depended whether the decree was to be executed or not. It was then, therefore, I consider a question arising between the parties and it related to the execution of the decree. Then the law goes on to say in so many terms that such question *shall* be determined *by the Court executing the decree and not by a separate suit.* Beyond all doubt, these words expressly declared that there cannot be, and *shall* not be, any separate suit upon such a question, and yet that question is the very question which it is now sought in a regular suit to raise before us. We are confirmed in this opinion by the case to be found in page 331, Gap Number of the Weekly Reporter, and that decision is, no doubt, directly in point and in favor of our view.

But it is said that in the cases to be found at page 516 of the 11 Weekly Reporter, and at page 85 of the 12 Weekly Reporter, there are decisions of Division Benches of this Court in which the learned Judges entertain a different view.

On reading the decision to be found at page 85, 12 Weekly Reporter, it seems to me that to whatever extent it is in point, it is directly in favor of our view of the case. For the learned Judges seem to me distinctly to say, by taking the converse of what they do say, that if possession of property shall have been given under an order of Court by an officer of Court to a decree-holder, and to whatever extent such possession shall have been given, then and to that extent the possession must be considered to have been awarded under a competent Court having jurisdiction in execution of its own decree and cannot be disturbed. For what the learned Judges say is this, that if and to whatever extent possession shall not have been so given, and if the decree-holder shall have taken something in excess of that which was given to him by the Court executing the decree through its officers, then that something would rightly form the sub-

ject of a second suit. But that is not the case before us. On the contrary, the case before us comes exactly within the converse of what I understand the learned Judges in that case to have intended to imply.

The case to be found at page 516 of 11 Weekly Reporter would seem, at first sight, to be somewhat against our views. But in the first place, the facts of that case are not given in such detail that we can exactly understand what they were; and in the second place, the decision would seem to have proceeded on a state of facts which is not the state of facts before us. There the learned Judges would seem to have said that the decree-holder had taken something which neither the Court executing the decree nor the decree itself gave him; and then it was held that for that something a separate suit would lie to recover it. If this is the meaning, and I understand that it is so, of the decision in question, I do not at all dissent from it. On the contrary, I say that it is in exact accordance with the precedent to be found at page 85, 12 Weekly Reporter, which I have above quoted, and is a precedent which I am quite ready to follow.

But a great deal has been made of the illustration made use of by the learned Chief Justice, who was the Judge who delivered the judgment in that case. Supposing, the learned Chief Justice said, the decree should be for a cow, and in execution of that decree a horse should have been given to the decree-holder, could it be said that such an absurd thing would be supported, or would it not rather be the subject of a separate suit—a suit, as I understand it, for the recovery of that which was wrongly taken under color of the decree. But, as I understand the law, the illustration, however absurd the case may be which it is intended to illustrate, does not at all show how the law would be. The question before us is not what is to be the thing delivered in execution of a decree, but what is the Court which has jurisdiction to deliver that thing; and, therefore, however absurd might be the order of the Court which directed the thing delivered to be delivered, still, unless jurisdiction were given, no other Court would have the power to alter the direction in question. So that however absurd the illustration in question may make out a possible order to be, still that illustration is no guide to us, and ought not to be any guide to us in determining what the proper Court is which has jurisdiction to determine a particular matter. But however that may be, I have no sort of doubt that the question which is now before us was a question which arose between the parties to the decree of the 17th July 1860, and which related to the execution of that decree; and, therefore, in the words of the Act, it was a question which must be determined, as it was determined, by the order of the Court executing the decree, and not by a separate suit such as is the one before us.

In this view of the case, I would reverse the judgment of the Lower Appellate Court, and confirm the judgment of the first Court, and direct that the special respondent plaintiff's suit be dismissed, and he should pay the costs of this Court and of the Lower Appellate Court.

Loch, J.—I concur.

The 8th June 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Possessory suit—Civil action—Clause 6, Section 23, Act X., 1859—Section 15, Act XIV., 1859—Damages—Crops.

Case No. 2726 of 1869.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Rungpore, dated the 21st July 1869, modifying a decision of the Moonsiff of Bhotmaree, dated the 27th March 1869.

Ram Mohun Doss (one of the Defendants), *Appellant,*

versus

Jhupproo Doss and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondents.

In an ordinary civil suit, not brought under Clause 6, Section 23, Act X. of 1859, or under Section 15, Act XIV. of 1859, a plaintiff cannot recover possession as against the undisputed owner merely by proving his previous possession and dispossession. But he may

claim damages for the value of crops taken away which had been raised by him on the land, whereof he was at the time in lawful possession.

Mitter, J.—We are of opinion that the plaintiffs' claim, so far as it relates to the possession of the lands in dispute in this case, ought to be dismissed. The defendant, special appellant, is the undisputed owner of those lands; and it was for the plaintiffs to prove that they are entitled to obtain possession of the same, either by virtue of a lease granted to them by the zemindar, or by virtue of a right of occupancy acquired under the provisions of Section 6, Act X. of 1859. The plaintiffs have not produced their alleged lease, and there is nothing on the record to show that they were entitled to the possession of the lands in question at the time when this suit was brought. The Lower Appellate Court has distinctly found that there was no proof on the record to establish the fact that the plaintiff Howreah had acquired a right of occupancy. Under these circumstances, it seems to us quite clear that the plaintiffs have no right to treat this suit merely as a possessory suit. The action was not brought under the provisions of Clause 6, Section 23, Act X. of 1859, nor was it brought under the provisions of Section 15, Act XIV. of 1859. It was brought in the Civil Court as an ordinary civil suit, and the plaintiffs cannot recover possession of the lands in dispute as against the undisputed owner of those lands, merely by proving their previous possession and dispossession.

The claim for damages stands on quite a different footing. The Lower Appellate Court has found that the plaintiffs Jhupproo Doss and Bhujoo Doss were in lawful possession at the time when they were dispossessed by the defendants Nos. 1 to 9, and that those defendants had no right whatever to take away the crops raised by the plaintiffs Jhupproo Doss and Bhujoo Doss upon those lands of which they were at that time in lawful possession. This finding is quite sufficient to justify the verdict for the value of those crops.

With this modification, the decrees of both the Lower Courts will be reversed, and the plaintiffs Jhupproo Doss and Bhujoo Doss will be entitled merely to recover the value of the crops taken away by the defendants Nos. 1 to 9 in the mode prescribed by the order of the Lower Appellate Court. Each party will bear his own costs in all the Courts.

The 8th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Notice under Section 21, Act XI., 1865—Deposit —Construction.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Kishnaghur, dated the 5th May 1870.

Koylash Chunder Sannel and others (Defendants), *Petitioners,*

versus

Asalut Shaikh Gharamee and others (Plaintiffs), *Opposite Party.*

Where notice of application for a new trial under the latter provision of Section 21, Act XI. of 1865, is given, without a deposit of the amount of the decree which has been passed against the applicant, a subsequent deposit made within seven days will not entitle him to ask for a new trial.

The words "the next sitting of the Court" in the same proviso mean the next sitting after the decision complained of, and apply where the sittings of the Small Cause Court are not held consecutively, but the same Judge sits in more than one Court.

Reference.—In these cases, which were contested ones, plaintiffs obtained decrees. Defendants filed "notices" under Section 21, Act XI. of 1865, on the following day, but unaccompanied with the amounts decreed and costs as required by that Section. Within seven days of the original decision, *i. e.*, seven open days (*vide* reference from this Court, Grijabhusan Halder, decided 26th January last) * applications for new trials were filed, and along with these applications the amounts decreed and costs were deposited in each case. I have refused the applications on the ground that the amounts decreed and costs were not deposited along with the notices as required by Section 21. Defendants urge that as they are allowed seven days from the decision within which to file the notice along with which deposit is to be made; and as the latter was made within the seven days, though not along with the notices, the latter are notwithstanding valid. The question on which I have to solicit the opinion of the High Court, is whether a notice by a defendant under Section 21, Act XI. of 1865, to apply for a new trial in a case which has not been decided *ex parte*, is valid, though unaccompanied by the deposit of the amount decreed and costs, if that amount has been deposited within seven days from

* 13 W. R., p. 105.

the date of the decision. My own opinion is that such notice is not sufficient.

I think the deposit is intended to be a test of the *bona fides* of the notice, without which the Court should not act on it; in fact, that the presentation of the notice without the deposit would be equivalent to no notice at all, in which case the application for new trial could not be entertained (*vide* Pitambur Sadhukhan *versus* Doya Moyee Dassee, 12 Weekly Reporter, 16.)

Judgment of the High Court:

Jackson, J.—I am of opinion that a party applying under the latter provision of Section 21 of the Mofussil Small Cause Court Act for a new trial must deposit in Court, with his notice of application, the amount for which a decree shall have been passed against him; and that where the notice has been given without such deposit, a subsequent deposit, if made within seven days, will not entitle the party to ask for a new trial. It appears to me that the Judge of the Small Cause Court at Kishnaghur, in making this reference, has possibly not considered the full effect of the words with which the proviso commences; they are: "Provided also that it shall be "competent to the Court, if it shall think "fit, in any case not falling within the "proviso last aforesaid, to grant a new "trial, if notice of the intention to apply "for the same at the next sitting of the "Court be given to the Court within the "period of seven days from the date of the "decision, and if the same be applied for at "the next sitting of the Court."

I understand the words "the next sitting of the Court" not to mean the next sitting after the notice, but the next sitting after the decision complained of; and that the words "within the period of seven days from the date of the decision," apply to cases in which the sittings of the Small Cause Court are not held consecutively by reason of the same Judge being the Judge of more than one such Court; so that in case of the absence of the Judge himself after giving the decision, the notice, together with the deposit of the amount of the decree, must be given to the Court within seven days, and the application must, in all cases, be made at the next sitting of the Court.

Glover, J.—I concur.

The 10th June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Lessor and lessee—Ejectment.

Case No. 188 of 1870.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 13th November 1869, reversing a decision of the Moonsiff of Mozufferpore, dated the 25th July 1868.

Gobind Chand Juttee (one of the Defendants), *Appellant*,

versus

Mun Mohun Jha (Plaintiff), and another (Defendant), *Respondents*.

Mr. C. Gregory for Appellant.

Baboos Mohesh Chunder Chowdhry and *Bhowanee Churn Dutt* for Respondents.

In a suit by an ejected lessee to recover a year's balance of rent from his lessor, who had given a lease to another party and dispossessed plaintiff:

HELD that, by granting the later lease, defendant had made himself responsible for any loss which might thereby be occasioned to plaintiff, even though he (the lessor) had not collected the rent himself.

Couch, C. J.—IN this suit, the plaintiff's case was that the present appellant, one of the defendants, having given a lease to the plaintiff and afterwards given a lease to Kanto Jha, the plaintiff had been dispossessed, and had only collected rents for the year 1271 to the amount of 31 rupees 9 annas, and he claimed the balance of the rents for that year. The Judge says that he finds as a fact upon the evidence "that the respondents" (that is to say, the lessors, the present appellants Gobind Chand Juttee and others) "ejected the plaintiff, and that "they, as well as Kanto Jha, collected the "rents for 1271." Now, if the present appellant did, as is found by the Judge, eject the plaintiff by granting this lease to Kanto Jha who took possession under it, he would be liable to make good to the plaintiff the rents for that part of the year

for which the plaintiff was so ejected. There was an implied obligation on the part of the appellant that the plaintiff should enjoy the property and take the rents during the lease, and it is not necessary that the rent should have been collected by the present appellant himself; for by granting the lease to Kanto Jha he made himself responsible for any loss which might be occasioned to the plaintiff by that act. Now, the Judge having found these two facts says: "The lessors are, therefore, answer-"able in damages, not only for their own "wrongful collections, but also for those "made by Kanto Jha to whom they had "wrongfully granted a second lease for the "same village. I, therefore, repeat my "decree of the 6th March 1869, making "the lessors liable for the sum claimed." The sum claimed was the balance of the rents, and whether the Judge calls it damages or the balance of the rent does not affect the merits of the case, provided that he has not awarded to the plaintiff more than the balance of the rent. There is nothing in his decision which affects the merits. The plaintiff has only recovered that which he was entitled to receive, and of which he was deprived by the act of the present appellant.

It appears to us, when we look at the judgment given when the case was remanded, that the Court may have thought that the Judge, when he awarded damages, might have awarded something more than the rent; that he might have taken into consideration the wrongfulness of the act and awarded something on that account, as a case where the amount to be awarded for damages was in his discretion; and therefore it was right to direct his attention to the circumstance that what the plaintiff was entitled to recover was the amount of the rent which had been collected by these parties for that portion of the year during which the plaintiff himself had been unable to collect.

There is no ground for appealing to this Court on the present occasion; nor is there any reason for saying that the plaintiff should sue Kanto Jha for that portion of the rent which he might have collected. The appellant having granted the lease to Kanto Jha, must be responsible for the loss which the plaintiff has sustained by reason of it.

The decree of the Lower Appellate Court must be affirmed with costs, including the costs of Kanto Jha.

The 10th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Sale in execution—Jurisdiction—Notice—Irregularity.

Case No. 136 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Nuddea, dated the 14th April 1870.

Hubeebool Hossein (Judgment-debtor), *Appellant,*

versus

Mr. W. O. Allender, manager on behalf of The Land Mortgage Bank (Decree-holder), and another (Purchaser), *Respondents.*

Mr. W. A. Montriou and *Baboo Chunder Madhub Ghose* for Appellant.

Mr. R. T. Allan and *Baboo Juggadanund Mookerjee* for Respondents.

The Subordinate Judge of Nuddea having confirmed an execution-sale of an estate in the towjee of that District, of which fifteen mouzahs were included within the 24-Pergunnahs: HELD that the question as to how far a valid title to the fifteen mouzahs was created in favor of the purchaser, was one which must be raised between him and the judgment-debtor elsewhere and otherwise than before the High Court in the exercise of its superintending powers.

Where an estate has been sold at auction for less than its market-value, the judgment-debtor is not entitled to have the sale set aside, unless he can show that such inadequate price has been directly and presumably the result of the irregularity of which he complains.

Where the sudder cutcherry of the zemindar was beyond the jurisdiction of the District Court, the publication of the notice of sale at one of the inferior cutcherries was held to be legal and sufficient.

Jackson, J.—WE are asked in this appeal to reverse the order of the Subordinate Judge, by which he confirms the sale of an important estate belonging to Hubeebool Hossein, the judgment-debtor, which was sold in execution at the suit of the Land Mortgage Bank, and was purchased by Dinonath Bose Mullick for the sum of three lakhs of rupees.

The first point which we have had to consider is one which was somewhat differently placed before the Court below and before us.

Originally, it was taken as a ground of objection to the regularity of the sale though

raised not within the 30 days prescribed by law for making such objections, but before the sale had been confirmed.

Before us, however, it has been argued rather in the shape of an objection to the legality of the sale, and as a ground on which we ought to proceed in the exercise of our powers of superintendence to set aside the sale altogether as made without jurisdiction. That ground is that although the estate is so far situate in the district of Nuddea that it is entered in the towjee of that district, and the revenue is paid to the Collector of Nuddea; in point of fact, by a notification of the Government of India in the year 1863, the boundary line separating the districts of the 24-Pergunnahs and of Nuddea was so altered, as to include 15 mouzahs of the estate within the civil jurisdiction of the 24-Pergunnahs; and that, consequently, if not the whole of the estate, at any rate these 15 mouzahs, were beyond the competency of the Civil Court of Nuddea to sell, and that, therefore, the sale is invalid.

It has to be observed that this was a sale held in execution of a decree of the 24-Pergunnahs Court; and on the application of the decree-holder the Judge granted a certificate stating that execution had not been had in that district; upon which certificate, the decree-holder went for execution to the Court of Nuddea, and there application was made for the sale of this estate. As remarked by the Subordinate Judge in affirming this sale, the sale does not deal with any of these mouzahs as such, but is a sale of this estate bearing a particular name on the Collector's towjee.

Looking upon this objection as affecting the regularity of the proceedings, it appears to me that the Subordinate Judge was quite right in declining to take notice of it, inasmuch as it was preferred after the lapse of 30 days. It also appears to me very doubtful whether this was a ground such as the judgment-debtor would be entitled to avail himself of, as constituting irregularity in conducting the sale. At the same time, I have no doubt that if the Subordinate Judge has found that, in making this sale, he had done an act completely beyond his jurisdiction; he would have been right to stay his hand and refuse to confirm the sale. But it appears to me by no means clear, that he did go beyond his jurisdiction. At any rate, the estate being one upon the rent-roll of the Collector of Nuddea, the Judge of that district would have *primâ-facie* jurisdiction to sell it. However this may be, it seems to me that this is not a ground upon which we are called upon to set aside the sale under the extraordinary powers of the Court. The Subordinate Judge has sold this estate in so far as he could sell it; and it appears to me that the question how far those mouzahs are conveyed to or a valid title to them created in favor of the purchaser, is a question which must be raised between him and the judgment-debtor in another place and in a different way. I do not think, therefore, that we are called upon to exercise the superintending powers of this Court to set aside the sale upon this ground.

The learned Counsel for the judgment-debtor then went into the other matters, which are purely grounds of objection to the regularity of the proceedings in conducting the sale. It was suggested to him (and he acquiesced in the suggestion) that it would be desirable first to inquire whether, supposing such irregularity to have occurred, any substantial injury has been thereby caused to his client: and Mr. Montriou thereupon read to us the evidence of the witnesses called for the judgment-debtor to show what the gross returns of the estate were; and what the net profits had been and were, and to show also what overtures for the purchase of this estate had been made by different parties, and what negotiations for its sale were actually on foot immediately before the sale; and the purport of that evidence, of course, was to show that the price which the estate fetched was, in fact, far from commensurate with its real value.

I confess that I was not at all satisfied by the evidence as to the collections, that the judgment-debtor had given a true statement of the returns of the property. As to the offer by the person who has now actually purchased the estate to give three lakhs of rupees for the zemindaree, and leave the estate in the hands of the judgment-debtor in the shape of a putnee, that offer was contingent upon the purchaser being satisfied as to the actual returns and profits of the propery. It turned out that he never was so satisfied, and for that reason alone, so far as I can see, the offer came to nothing.

But it is not because an estate has been sold at auction for less than its market-value, even if that were shown to be the case, that the judgment-debtor is entitled to have the

sale set aside, and property put up for sale again. He must show that such inadequate price has been directly and presumably the result of the irregularity in the sale of which he complains. It appears to me that there is nothing of the sort shown here.

It is contended, in the first place, that the proclamation of attachment and sale were never made. Now, the evidence on both sides on that point has been read to us; and I confess I see no reason to discredit the evidence which Mr. Montriou characterizes as being formal, frivolous, and good for nothing. I really see not much to choose between the evidence upon the one side or the other. As to the evidence of the decree-holder being formal, it is to some extent what that evidence must always be. It is not to be expected that independent, respectable, and educated persons are to be found who will come forward to depose to service and execution of processes of this kind. The Courts have to depend to a great extent on the testimony of their own officers, and the persons who accompany those officers on the part of the decree-holder to see to the proper service of the process. I confess I see good reason to believe that the proclamations, both of attachment and sale, were made in the manner in which they are alleged to have been made, and I think there is reason for that belief. *A priori*, we should be inclined to believe that where important interests are at stake, where the debt was large and the property considerable, the decree-holder would take every care that the formalities prescribed by law were carried out. This is not a case of an obscure judgment-debtor and trivial property, which some creditor or mookhtear desires to get into his hands, by suppressing the usual formalities, and having the sale to take place in a hole-and-corner fashion. The parties in this case could not be supposed to do this. The fact that this important property was about to be put up for sale would, in all probability, be known to many persons. I think, therefore, that the decree-holder on the one hand would have nothing to gain by suppressing the usual notice, and, on the other hand, would be desirous that the sale which would result in the payment of his debt should not be questioned on formal grounds.

Then it is said that the publication of this notice was made at an improper place, and that the requirements of the law were not carried out. The evidence shows that the notices were published at a place called Bainkhura, where there is not the principal or sudder cutcherry of the proprietor, but one of the inferior cutcherries used by the collecting gomashtah when he goes to that village to make collections. Now, the law does not prescribe in what particular place, or in what sort of place, notices are to be published. It merely says that "when the property ordered to be sold may consist of land, or of any right or interest in land, the proclamation shall be made on the spot where the property is attached," and that, by Section 239, is to be some place on or adjacent to such lands. And there seems to have been in this case a very obvious reason why the peon did not proceed to Hyderpore, which is, as we are told, the place where the sudder cutcherry is; and that is, that Hyderpore is not in the jurisdiction of the Nuddea Court but in that of the 24-Pergunnahs Court. It is very improbable that the peon would leave the jurisdiction of the Court to which he belonged for the purpose of making the publication of the notice, even if he could do so, in the jurisdiction of another Court. It seems to me, therefore, that the publication of the notice in that particular place was legal and quite sufficient: and we find that the judgment-debtor was himself present in the Zillah Court at the time when the sale took place. I have no doubt, therefore, that he was fully informed; and moreover there is no attempt to show that persons who would have bid were kept away, or had no information that the sale was about to take place. In fact, we know very well that such persons derive information on these subjects from the far greater publicity which results from the notices being stuck up in the Court-house and the Collector's cutcherry, than from their being published on the property itself. Information of that sort is almost always disseminated by mookhtears who attend the offices of the Courts, and who convey such information to the clients for whom they act with much greater certainty than any mofussil publication of them would do. Therefore, I do not believe either that there was any defect in the publication of this notice, or that there was the slightest want of publicity or any sort of prejudice to the judgment-debtor in what took place. I think, therefore, that the Court below was quite right in refusing to set aside the sale, and that this appeal must be dismissed with costs.

Glover, J.—I concur.

The 13th June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Appeal—Refund of Stamp-duty.

In the Matter of

Mr. G. H. Grant, Appellant in Regular Appeal No. 73 of 1870, *Petitioner*.

Mr. R. E. Twidale for Petitioner.

Where excess stamps had been filed in consequence of an over-valuation of the appeal, the surplus amount was ordered to be refunded.

Note by the Deputy Registrar.—THE original case, as appears from the papers on the record, was instituted in the Court of the Subordinate Judge of Beerbhoom, and was valued at 29,224 rupees and 4 annas.

The Subordinate Judge decreed that part of the claim which was estimated at 22,876 rupees.

The defendant, who now appeals to this Court against that part of the Lower Court's decree which was in favor of the plaintiffs, has valued his appeal at the full amount of the plaintiff's claim, and has used stamps for the engrossment of the appeal of the value (Rupees 975) indicated by the value of the appeal; whereas had the appeal been correctly valued, that is to say, valued with reference to that part of the Subordinate Judge's decree appealed from, the fee leviable, under the Court Fees Act for stamps for petition of appeal, would have amounted to 835 rupees, or 140 rupees short of what has been expended on that account.

Couch, C. J.—The valuation of this appeal will be considered 22,876 rupees, and the sum of 140 rupees, being the amount of excess stamps filed by the appellant, will be refunded.

The 13th June 1870.

Present:

The Hon'ble E. Jackson and Sir Charles Hobhouse, *Bart.*, *Judges*.

Suit for a receipt — Dissolution of partnership—Evidence.

Case No. 169 of 1870.

Special Appeal from a decision passed by the Commissioner of Cooch Behar, dated the 7th July 1869, affirming a decision of the Subordinate Judge of Darjeeling, dated the 16th April 1869.

J. C. Elijah (Defendant), *Appellant*,

versus

Aratoon Brothers (Plaintiffs), *Respondents*.

Messrs. R. E. Twidale and *G. A. Twidale* for Appellant.

Mr. C. Gregory and *Baboo Hem Chunder Banerjee* for Respondents.

Plaintiff and defendant entered into a contract with a view to trade, by which each was to contribute a certain sum either in cash or goods. A trading concern was opened accordingly; but after a very short time the parties fell out. Defendant then obtained through the Magistrate the return of certain goods which, as he alleged, he had placed with the plaintiff independent of the partnership-speculation. Plaintiff thereupon sued for a declaration that the goods were the partnership-goods, and to obtain a receipt for them as such.

HELD that there was no cause of action, and a suit for a receipt did not lie.

HELD that in the absence of books and accounts or any other evidence, the suit could not be converted into one for dissolution of partnership.

Jackson, J.—IT is quite clear that the Lower Courts should have rejected this suit when the plaint was first brought into Court. The plaint discloses no cause of action; states no injury to have resulted to the plaintiff from any act of the defendant; and asks for no relief which any Civil Court can give.

The facts are these: The plaintiff, the defendant, and a third party entered into a trading speculation at Darjeeling. The plaintiff was to contribute 5,000 rupees and the defendant 800 rupees towards it, and the third party 1,000 rupees. Their speculation had hardly commenced when they quarrelled. The defendant complained to the Magistrate that some goods to the value of 200 rupees had been placed by him

with the plaintiff, independent of the partnership-speculation which he had brought up to Darjeeling on his own account, and which the plaintiff would not restore to him. The plaintiff appears to have contended that these were goods which the defendant had contributed in the place of cash towards the speculation. The Magistrate, however, interfered and directed the plaintiff to return these goods to the defendant, and they were returned, the police-officer who made them over giving a receipt for them at the time. The plaintiff has now preferred this suit for a declaration that these goods were the partnership-goods, and to obtain from the defendant a receipt for them as such partnership-goods. The defendant still denies that these articles had any connection with the partnership, and refuses to give any such receipt as is demanded by the plaintiff. The Courts below have raised an issue on the point as to whether the plaintiff's or the defendant's statement as to these goods is the correct statement; and on the ground that the defendant has been unable to satisfy the Courts that he subscribed 800 rupees in cash to the speculation, as he alleges he did, have held that the goods in question were contributed, in lieu of cash, to the partnership, and have ordered that the defendant shall give the plaintiff a receipt for 800 rupees.

On special appeal it is contended that no such suit for a receipt will lie; that the plaintiff has already got a receipt for the goods; and that even in trying the question as between the plaintiff and the defendant as to which of their statements is true regarding these goods, the Courts have gone wholly wrong in not requiring the plaintiff to prove his averments, and in throwing the whole *onus* of proof on the defendants.

I think that the suit of the plaintiff and the decrees of the Lower Courts are open to all these objections. The plaintiff has got a receipt for the goods which he made over. Whether that receipt is signed by the defendant or by the police officer is immaterial. The plaintiff cannot bring a suit for a receipt. The plaintiff is not injured by the defendant not giving him any furtner receipt. If the result of returning these goods had been that the plaintiff had incurred any loss, he might have brought a suit for damages for such loss. But it is not pretended that any loss or injury has been sustained. The goods which the defendant deposited with the plaintiff have been returned to him, whether such goods were the partnership goods or the defendant's own venture goods.

If the question as to which description of goods these articles were had been correctly tried and determined, we might have allowed the declaration of the Courts on this point to stand. But it seems to be quite certain that the plaintiff has produced absolutely no evidence upon the point. He has not put in any of the partnership accounts, and he has called no witnesses to prove that these particular goods were made over to him for the purposes of the partnership. That partnership seems to have no sooner commenced than it was dissolved. In the absence of all evidence on the point from the plaintiff, the suit should have been dismissed. The defendant may be unable to satisfy the Court that he contributed a sum of 800 rupees in cash to the partnership; but on what ground, under such circumstances, the plaintiff can be entitled to receive from the defendant a receipt for 800 rupees it is impossible even to conjecture. There is no evidence that the goods returned were worth 800 rupees.

The real fact is that the plaintiff is under some apprehension that the defendant may bring a suit against him for 800 rupees, and he has brought this suit to prevent any such suit being preferred by the defendant. Had the plaintiff come into Court for an account of the partnership there might have been some ground for the suit; but the accounts are all in his hands, and he has not produced a single paper regarding them or given any information about them.

It seems to us that the proper course is to dismiss this suit as being founded upon no cause of action.

As this objection was not taken in the Lower Court, each party will pay his own costs of this suit.

Hobhouse, J.—I agree that this action cannot be maintained. It is, in reality, as Mr. Gregory is obliged to admit, a suit in the nature of a suit for a dissolution of partnership, and praying for a release in full from such partnership so far as the defendant is concerned. The facts are these :—

The plaintiffs and the defendant entered into a contract, of date the 21st March 1868, by which they were to find certain sums of money, each of them a particular sum either in cash or in goods, these sums of money converted into goods, or these

goods they were to convey to Darjeeling, and were there to reside together as partners for the purpose of disposing of the said goods, each person to receive a certain per centage upon whatever sum of money he might have advanced, and all to receive rateably any profits from the concern.

As a matter of fact, the concern was opened in Darjeeling; and after it had been opened for a very short time, and goods of a very small amount had been disposed of on behalf of the concern, the defendant was turned out of it.

Thereafter, he invoked the aid of the Magistrate to recover certain goods of his own, as he said, and independent of the concern, which the plaintiffs were retaining in what had been the common shop.

Accordingly, certain goods of a value, which the defendant himself apparently assessed at 400 or 500 rupees, were returned to him, and receipt for the said goods was given to the plaintiff. This was dated the 3rd June 1868.

On the 6th June 1868, the plaintiffs instituted the present suit, and the prayer was to receive a receipt for the value of goods delivered on account of the partnership to the amount of 800 rupees, as by the agreement of the 21st March 1868, the said goods being those which had been made over to the defendant by the Magistrate on the 3rd June. The cause of action then was the delivery over to the defendant of the goods in question on the 3rd June 1868. Now, whether those goods were the defendant's own goods independent of the concern, or whether they were those goods which the defendant had put into the concern, they were equally the defendant's own property, and therefore there was no cause of action to the plaintiff, and no suit lay on behalf of the plaintiff to receive from the defendant a receipt for the same goods. In fact, as I have said, they were anyhow the defendant's own goods.

But, in reality, when the plaintiffs asked for a receipt for the said goods, they were, in reality, paying for a dissolution of partnership, and for a receipt in full by way of discharge from such partnership on the part of the defendant.

But to arrive at a decree in such a suit it was necessary for the plaintiffs, who, by the agreement, were to be considered the chief partners in the firm, and who were to keep the books of the firm, and who did, it is admitted, keep such books, it was necessary for them to file accounts showing the cash or goods received from all the partners, showing also a balance of those accounts, and whatever cash or goods was due to each partner; and it was not until this had been done that the plaintiffs would be entitled to claim that the goods received by the defendant were partnership-goods delivered over to him in full of whatever might be due from the firm, and so entitling the plaintiffs to obtain a dissolution of the partnership, and a discharge from the defendant of all liability in the matter of such partnership. But admittedly the plaintiffs have filed no such books and no such accounts, and their suit is not in so many terms a suit for dissolution of partnership and discharge from liability. This being so, there is not any evidence on the record, neither is there any plaint or any written statement on the record, out of which we can convert this suit into a suit for dissolution of partnership, and direct on remand that it may be tried as such a suit. All that remains, therefore, in my opinion, is that the judgments of the Courts below should be reversed, and the plaintiffs' suit be dismissed.

But I agree that, under the circumstances, each party should pay his own costs of all the Courts.

The 13th June 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Inconsistent titles—Registration in Collectorate—Evidence.

Case No 225 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 30th September 1869, affirming a decision of the Subordinate Judge of that District, dated the 19th November 1868.

Ameeroonissa Bibee (Defendant), *Appellant,*

versus

Woomarooddeen Mahomed Chowdhry and another (Plaintiffs), *Respondents.*

Baboos Grija Sunkur Mojoomdar and *Issur Chunder Chuckerbutty* for Appellant.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondents.

Where a Hindoo widow claimed property on the ground that it had been held as benamee for her husband, and also that a hibbanamah had been executed in her favor in order to remove certain difficulties, it was held that the titles were not inconsistent, and that, even if the titles were inconsistent, there was nothing to prevent her succeeding on the strength of the hibbanamah.

The mere fact of registration in a Collector's books is no evidence of title.

Mitter, J.—We see no reason to interfere with the judgments of the Lower Courts in this case. It is argued that the plaintiff, now special respondent, cannot be permitted to sue upon two inconsistent titles. We find, however, that there is no inconsistency in the titles set up by the plaintiff. Her case was that the property in suit was held by one Kylash Chunder as benamee for her husband, and that a hibbanamah was afterwards executed in her favor in order to remove certain difficulties which had arisen in consequence of certain disputes between the parties. There is nothing inconsistent in these allegations; and even if there were any such inconsistency, we do not see any reason why the plaintiff should not succeed in this case on the strength of the hibbanamah, even if she is not to be permitted to fall back upon her original title as the heiress-at-law of Ram Gopal.

It has been further contended that the Judge has come to no distinct conclusion on the genuineness or otherwise of the hibbanamah relied upon by the plaintiff. We see no reason for accepting this contention as correct. The Judge has gone through all the evidence in the case, and he repeatedly refers to the hibbanamah as a genuine document which has been fully acted upon by the parties.

It has been further argued that the plaintiff is bound by a certain admission made by her predecessor, Anund Moyee, in a previous suit between her and some third parties. This objection is manifestly untenable. The Judge has found as a fact that the alleged admission was not proved by evidence; and even if it had been proved by evidence, it is perfectly clear that it would not operate as an estoppel either against Anund Moyee, or against the plaintiff who derives her title from her.

Lastly, it has been argued that the special appellant is a *bond-fide* purchaser for valuable consideration without notice. It is extremely doubtful, as their Lordships in the Privy Council have remarked in the case of Varden Seth Sam *versus* Luckpathy Royjee Lallah, reported in page 483, Sutherland's Privy Council decisions, whether the doctrine of *bond-fide purchaser for valuable consideration without notice*, which is a doctrine peculiar to the Courts of Equity in England, is applicable to cases arising in this country. But even if it were so applicable, it was for the special appellant to take the plea most distinctly in his pleadings, and to prove it to the fullest extent required by the Courts of Equity in England. In the present case, the plaintiff has given no evidence whatever that he made any reasonable enquiries to ascertain who the real proprietor was. The only argument which his pleader has been able to bring forward is that the names of the special appellant's lessors were registered in the Collector's books, and that the special appellant was, therefore, justified in assuming those persons to be the true owners of the property. This very point was raised in the case of Varden Seth Sam, already referred to; and it has been held by the Lords of the Judicial Committee that the mere fact of a person's name being registered in the Collector's books is no evidence of title, and that a purchaser from such a registered person would not be justified in relying upon the fact of such registration, as sufficient to entitle him to treat the recorded owner as the real owner.

It is, therefore, needless for us to enter into any further discussion on this point; but we should like to add that the facts of this case, as found by the Judge, are quite sufficient to show that the special appellant did not make any reasonable enquiries at the time when he made the purchase in question.

For the above reasons, we dismiss this special appeal with costs.

Loch, J.—I concur in rejecting the special appeal, sufficient grounds for admitting it not having, in my opinion, been made out.

The 15th June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Ancestral property—Possession—Title.

Case No. 39 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 29th November 1869.

Tekait Hurro Narain Singh (Defendant), *Appellant*,

versus

Boykunt Narain Singh (Plaintiff), *Respondent*.

Baboos Sreenath Dass and *Ram Chunder Mitter* for Appellant.

Mr. R. T. Allan and *Baboo Chunder Madhub Ghose* for Respondent.

Possession of ancestral property is good evidence of title against a co-sharer, if shown to be exclusive and to be inconsistent with the co-sharer's having any right in the portion claimed.

Couch, C. J.—The first ground of appeal is that "inasmuch as the estate of the plaintiff is under the surveillance of the Court of Wards, the plaintiff is incompetent to bring this suit himself." Now, the answer to that is that the estate is not under the Court of Wards. By whatever authority the Commissioner of the Sontnal Pergunnahs has taken charge of the estate, it is not as the Court of Wards that he has done so. There is nothing in the circumstances under which the estate has been placed in his charge, which disqualifies the plaintiff from bringing this suit. It does not come at all under Regulation X. of 1793. The plaintiff's statement in the plaint must be taken with reference to what really appears to be the fact. When he speaks of his estate being under the Court of Wards, it is clear that it is not a correct term to use. It is not under the Court of Wards, and therefore there is no ground for that objection to the decree of the Court below.

Then the next objection taken is that the suit is barred by the Law of Limitation. Now, that depends upon what evidence there is with regard to the date of the dispossession of the plaintiff by the defendant. It being admitted by the plaintiff that the dispossession took place at least 11 years before he brought his suit, it is incumbent upon him to show by satisfactory proof that the dispossession was within 12 years; and by satisfactory proof, I understand to be meant what appears from the judgment of the Privy Council in the case that has been quoted, Moharaj Kooer Baboo Nitressur Singh *versus* Baboo Nund Lall Singh,* VIII. Moore's Indian Appeals, 199—we must look at the evidence, and see whether upon the balance of it dispossession did take place within 12 years. Now, here the evidence is all one way. The plaintiff's evidence all tends to show that the dispossession was contemporaneous with the execution of the order of February 1857, which was executed in July 1857. The defendant has given no evidence to show a dispossession before this time. Such of the witnesses as speak to the dispossession all point to its having taken place at that period. We think that what the judgment of the Privy Council, which was upon Regulation III. of 1793, Section 14, and not the present Limitation Act, requires with regard to dispossession being shown within 12 years, has been completely satisfied by the evidence adduced in this case. That then disposes of the objection as to the Law of Limitation.

The third question is whether the plaintiff has given such proof of his title and possession, as to entitle him to recover that portion of the property for which the Lower Court has passed a decree. It is shown that he was in possession for some time anterior to the dispossession by the defendant. This is ancestral property, and possession is probably the only evidence which he could give of his title—possession or receipt of rent; and if it were to be said that that is not evidence against the defendant, the plaintiff, although he might have a perfectly good title, must fail in his suit. We see no reason for saying that because the defendant is a co-sharer, the plaintiff's possession shall not be evidence of title against him, if it is shown to be exclusive on the part of the plaintiff, and to be a possession inconsistent with the defendants, notwithstanding he is a co-sharer in the estate, having any right to that portion of the property which is the subject of the suit. If the plaintiff's possession of the property in suit was exclusive, it is as good evidence of title in the plaintiff's possession as would be in the case of a defendant who did not claim to be a co-sharer. There does appear

* 1 W. R., P. C., p. 51.

to be evidence of such possession in this case, sufficient to justify the Court in saying that the plaintiff is entitled to recover, the defendant not having met it by any evidence on his part. And the plaintiff's evidence with regard to his exclusive possession, and thus, to his title to some of the mouzahs entirely and not jointly with the defendant, is considerably strengthened by the defendant's admission that there had been at some time a partition of some of the property. It is true that the whole of the statement of the defendant is to be looked at; but we may believe that portion of it which is consistent with the other evidence in the case, without being bound to believe that which is not so consistent. We can take so much of it as is likely to be true, and reject that which, looking at the other evidence in the case, is not likely to be true. That admission of the defendant, as to a partition having been made, tends very much to support the case of the plaintiff. I feel, no doubt, that the decree which has been made by the Court below is a right decree, and must be confirmed with costs. The cross-appeal preferred by the plaintiff, respondent, is withdrawn by his pleader.

The 15th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Attachment of moveable property—Claim under Section 246, Civil Procedure Code.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 17th May 1870.

Deanuth Biswas, *Plaintiff,*

versus

Issur Gine and others, *Defendants.*

Hur Chunder Gine, *Intervenor.*

A Court is bound to investigate a claim made by an intervenor under Section 246, Act VIII. of 1859, to a share of moveable property attached in execution of a decree.

Reference.—THIS is a claim under Section 246 of Act VIII. of 1859 to a share of the moveable property attached in execution of the decree in the above case; and the question arises whether a Court ought to proceed to investigate the same under the Section cited.

It has been already held by the Full Bench in Raj Koomar Roy *versus* Kadumbinee Debea and others, Weekly Reporter, Full Bench Reports, Volume XIII., page 63, that when intervenors claim a share of immoveable property which has been attached, the Court should define the respective shares of the debtor and the intervenors, and sell the debtor's definite share only; but I am doubtful whether this ruling will apply to intervenors, who claim a share of moveable property which has been attached in execution of a decree.

Now, Section 214 of Act VIII. of 1859 says that the application for an attachment of moveable property may be general, or may be accompanied with an inventory of the property to be attached. Section 233 says that when the property shall consist of goods, chattels, or other moveable property in the possession of the defendant, the attachment shall be made by actual seizure, and the Nazir or other officer shall keep the same in his custody or in the custody of his subordinates, and shall be responsible for the due custody thereof. Section 249 (amongst other things) says that in all cases of intended sale by public auction, whether of moveable or immoveable property, in execution of a decree, the proclamation shall also declare that the sale extends only to the right, title, and interest of the defendant in the property specified therein. Then Section 251 points out the mode of payment on sale of moveable property, and adds, "that on payment of the purchase-money, the officer holding the sale shall grant a receipt for the same, and the sale shall become absolute." Then Section 261 says that where the property sold shall consist of goods, chattels, or other moveable property in the possession of the defendants, or to the immediate possession of which the defendant is entitled, and of which actual seizure has been made, the property shall be delivered to the purchaser; and Section 262 says that where the property sold shall consist of goods, chattels, or other moveable property to which the defendant is entitled subject to a lien or right of any person to the immediate possession thereof, the delivery shall, as far as practicable, be made by giving notice to the person in possession, prohibiting him from delivering possession of the property to any person except the purchaser thereof.

There is no allegation in the application of the intervenor that he was in possession of the property attached. It, therefore, appears to me that I ought not to proceed to investigate the claim under Section 246, as the intervenor admits that the judgment-debtor has some interest in the property attached for sale, which could be seized and disposed of in execution of the decree passed against him. Consequently, any enquiry into the extent of such interest, under the Sections cited, is altogether unnecessary.

In speaking of how partnership-property is seized and sold under a *fieri facias*, Mr. Serjeant Atkinson, in his Treatise on the Office of Sheriff, says, page 183: "As to "partnership-property, the Sheriff seizes "the whole, or a part in the name of the "whole, and sells the debtor's undivided "interest therein; the vendee is tenant-in-"common with the other partner. Note "well—the property of the other moiety is "not affected by the judgment nor by the "execution. The actual or formal seizure "of the whole arises from the necessity of "the case." And it appears to me that this is the proper procedure to be adopted by me in the present case, *i. e.*, that I should proceed to sell what interest the defendant has in the property attached, and the purchaser must find out what that interest is in the best way he can. I have, accordingly, rejected the intervenor's application subject to the opinion of the Hon'ble the Judges of the High Court.

The judgment of the High Court was delivered as follows by

Jackson, J.—It appears to me that, in the case put, the Court is bound to investigate the claim preferred to the moveable property which has been attached in execution of the decree.

Section 246, Act VIII. of 1859, makes no distinction in this respect between moveable and immoveable property; and it appears to me also that the judgment delivered in the Full Bench case, referred to by the Judge of the Small Cause Court at Jessore, applies equally to the case of moveable as to that of immoveable property. The Section declares that, if the Court shall be satisfied that the moveable property at the time of attachment was in possession of the party against whom execution is sought, not on his own account or as his own property, but on account of, or in trust for, some other person, the Court shall pass an order for releasing the said property from attachment. I think these words will include a share of the property attached as well as the whole of the property; or, to put it in another way, it appears to me that the words directing the release from attachment will be equally satisfied, so far as the share of the objecting party is concerned, if it should appear that the property was in the possession of the judgment-debtor not wholly as his own property; and this interpretation may be applied also to the succeeding clause of the Section—"if it shall appear to the satisfaction of "the Court that the moveable property was "in possession of the party against whom "execution is sought as his own property," that is to say, that the whole of it was in his possession as his own undivided property, "then the Court shall disallow the claim;" but if the objector shall succeed in making out what he alleges, and the Court shall find that he was in possession of it as his own property, that is, absolutely his own property, the Court, I think, is bound to investigate the claim.

Regard being had to the nature of the property and the mode in which parties exercise their right to the enjoyment of moveable property, a further question will, no doubt, arise upon the claimant making out his case, namely, whether the Court ought to proceed to a sale of the property at all.

Glover, J.—I concur.

The 15th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Nikasee balances—Jurisdiction.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 17th May 1870.

Srishteedhur Bose, *Plaintiff,*

versus

Shama Churn Ghose and others, *Defendants.*

A suit to recover the balance of nikasee papers furnished by defendant in his capacity of tehsildar, there being an allegation in the plaint that the defendant ver-

bally promised to pay part of the sum claimed under the circumstances mentioned therein, was held not to be cognizable by a Court of Small Causes.

Reference.—THIS is a suit to recover from the defendant No. 1 Rupees 51-5, being the balance of Nikasee papers furnished by him to plaintiff in his capacity of tehsildar; and there is an allegation in the plaint that the said defendant verbally promised to pay Rupees 37-6-3, part of the said sum of Rupees 51-5, in Assar 1274, under the circumstances mentioned in the plaint, which runs as follows:—

"This is a suit to recover Rupees 51-5, "being the balance of Nikasee papers. The "plaintiff acquired Kismut Booykora, &c., "of Pergunnah Chingootea, and Kismut "Shomuspore of Pergunnah Bhatta, as "well as mowrosee, gatee, and mortgaged "jummas in villages Cholisa, &c., in "the name of Mothooranath Bose, the third "defendant, and is in enjoyment of possession "thereof. On the 2nd Srabun 1273, B. S., "the plaintiff appointed the defendant Shama "Churn Ghose to collect rent of the said "mehals, on the receipt of a kubooleut from "him to the address of Mothooranath Bose "and Tarinee Churn Sein, who served for "the whole year of 1273 and furnished his "accounts in Assar 1274, in which it was "discovered that there was a balance of "Rupees 51-5 in the hands of the defend-"ant Ghose, who out of the amount enter-"ed Rupees 37-6-3 in the account as lent "to other defendants Sein and Bose with-"out confrontation, but as Bose and "Sein disacknowledged having received the "loan, the defendant Ghose subsequently "in the said month of Assar admitting that "it was his due and not having liquidated "the same afterwards—the plaintiff is en-"titled to recover the amount through "the strength of the account-papers and "kubooleut."

It is said by Norman and Kemp, JJ., in Chowdhry Chutter Pal Singh and others *versus* Fouzdar Roy, Hay's Reports for April 1863, page 509, that if an agent delivers an account showing himself to be indebted, a new cause of action arises upon the admission by the settlement of accounts; and that an action for the balance on the account would probably be maintainable, not under Act X. of 1859 (now Act VIII. of 1869) but under the rules regulating to ordinary civil suits subject to the limitation of Act XIV. of 1859; but this decision is, I find, opposed to Grant and Collis, executors to the estate of Mackilligan *versus* Ram Tanoo Bhoomick, Weekly Reporter, Civil Rulings, Volume X., page 83, in which it was held by Peacock, C. J., and Mr. Justice Mitter, that a suit to recover from defendant an amount of rent, collected by the latter on behalf of the plaintiff in his capacity of tehsildar, was maintainable in the Revenue Court and not in any other Court.

As the present case is on all fours with that reported in Volume X., page 83 of the Weekly Reporter, I have held that it is not maintainable in a Small Cause Court, contingent on the opinion of the High Court which is now solicited.

I think it makes no difference that the defendant No. 1 verbally agreed to pay the amount, as on the adjustment of the accounts the law implied a promise to pay on request, and no express promise made in respect of that consideration can be enforced, if it differ from the promise which the law would imply from the same consideration. See Chitty on Contracts, 8th Edition, page 51, and the cases there cited. Consequently, the plaintiff's remedy lay in the Revenue Court and not in a Civil Court.

Judgment of the High Court.

Jackson, J.—We think that the opinion of the Judge of the Small Cause Court in this case is correct, in so far as he decided that the suit before him was not cognizable by the Court of Small Causes.

The 15th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Section 273, Act VIII., 1859—Concealment of property.

Case No. 129 of 1870.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 19th February 1870, reversing an order of the First Subordinate Judge of that District, dated the 31st January 1870.

Gunga Gobind Mundul and others (Decree-holders), *Appellants,*

versus

Bonomalee Paul (Judgment-debtor), *Respondent.*

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Baboo Bhowanee Churn Dutt for Appellants.

No one for Respondent.

Where a judgment-debtor arrested in execution of a decree applied for his discharge under Section 273, Act VIII. of 1859, but, while pretending to furnish a complete statement of his property, was shown to have concealed a portion, the Lower Court was held to have acted properly under Section 8, Act XXIII. of 1861, in ordering him to prison.

Jackson, J.—It appears to me that the decision of the Subordinate Judge in this case was quite right; and that the decision of the Judge reversing his order is erroneous.

The judgment-debtor, Bonomalee Paul, was arrested under a warrant, in execution of a decree, and he applied to the Court under Section 273, Act VIII. of 1859, for his discharge, on the ground that he was willing to place whatever property he possessed at the disposal of the Court. With that application he was bound to submit to the Court a full account of all property of whatever nature belonging to him, whether in expectancy or possession or held exclusively by himself, and so forth; and the application must be subscribed and verified by the applicant. On the presentation of such application under Section 8, Act XXIII. of 1861, the Court is directed to examine the applicant in the presence of the plaintiff or his pleader, as to his then circumstances and as to his future means of payment; and to call upon the plaintiff to show cause why he does not proceed against any property of which the defendant is possessed, and why the defendant should not be discharged; and should the plaintiff fail to show such cause, the Court may direct the discharge of the defendant from custody.

Now, that enables the Court, provided it is satisfied of the truth and *bona fides* of the debtor's application, if he failed to show cause to the contrary, to direct the discharge of the defendant from custody.

In this case the judgment-creditor, the plaintiff, showed, as it seems to me, excellent cause to the contrary, namely—he showed that the defendant, while pretending to furnish a complete statement of the property which he had, and desiring to be discharged on the ground of his readiness to give up such property, was, in fact, concealing a quantity of other property in his possession. That being so, it appears to me that the contingency which the Section contemplates did not arise, and that the Subordinate Judge very properly ordered that the law should take its course, namely—that the defendant should go to prison. If, on the other hand, the application of the defendant has been shown truly to contain a full account of his property, the Judge would have been right in saying that the plaintiff would be bound to proceed by the attachment and sale of that property, and that the defendant should be discharged.

I think the judgment of the Judge should be reversed, and that of the Subordinate Judge should be affirmed with costs.

Glover, J.—I am of the same opinion. The judgment of the Judge appears to me to assume the fact that the judgment-debtor had fraudulently concealed property. It is clear, therefore, that the Judge ought not to have interfered with the decision of the Court below—ordering the judgment-debtor to prison.

The 15th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Act X., 1859—Procedure—Notice—Admissions.

Case No. 219 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 25th August 1869, affirming a decision of the Assistant Collector of that District, dated the 31st March 1869.

Bhoobun Chunder Shome (Defendant), *Appellant,*

versus

Ram Dyal Shanunto and others (Plaintiffs), *Respondents.*

Baboos Bhuggobutty Churn Ghose and *Umbica Churn Banerjee* for Appellant.

Baboo Mohendro Lall Mitter for Respondents.

In a suit for enhancement of rent, a plaintiff must frame his suit, and prove his case in exact conformity with the provisions of the law which enable him to increase his profits; and a Court administering a law like Act X. of 1859 is bound to satisfy itself that its decrees are exactly borne out by the provisions of the law.

The system of procedure in this country is not such that, if a defendant fails to dispute or contest a point, he thereby admits it. On the contrary, if he allows judgment to go by default, the plaintiff is just as much bound to prove his case.

Jackson, J.—It appears to me that the decision of the Lower Appellate Court in this case cannot be supported with reference to the authorities on the point before us.

The suit was for enhancement, and was tried before the Assistant Collector of Burdwan, who, after hearing the evidence on both sides, and finding that evidence to be contradictory, ordered an enquiry by an Ameen, and on the report of that Ameen made a decree in favor of the plaintiff.

The decree made did not confirm precisely the rates claimed by the plaintiff, but took as it were a middle course between the allegations of the plaintiff and those of the defendant. The Ameen reported that the land of the village in which the defendant's tenure was situated was divided into four classes; and he found, not precisely in conformity with the whole of the evidence, but upon such part of the evidence as recommended itself to him, that those four classes of land paid certain rates which he stated; and as the greater portion of lands of the defendant was found to belong to the second of those classes, he reported that the defendant was liable to pay that rate on that quantity of land, and at that rate accordingly the decree was given.

The defendant: upon this, appealed to the Zillah Judge, and the ground that he seems to have taken before the Judge was that the evidence upon which his lands had been found to belong to the second quantity or class was not sufficient to support the finding of the Court below. The Judge, however, affirmed the judgment of the Lower Court, and, upon review, only modified his own judgment and the judgment of the Court below, so far as to give the defendant a slight allowance in respect of certain lands alleged to have been taken for public purposes.

The defendant comes before us in special appeal, and for the first time takes the ground that neither the notice nor the evidence given by the plaintiff complied with the provisions of the law under which enhancement was sought for.

That provision was the first clause of Section 17, Act X. of 1859, which describes the ground of enhancement as being that "the rate of rent paid by such a ryot is "below the prevailing rate payable by the "same class of ryots for land of a similar "description and with similar advantages "in the places adjacent."

Now, it is not disputed by the plaintiff, respondent, before us, that the notice and the evidence fell greatly short of those requirements; and the only question upon which we have had a doubt is, whether the defendant ought to be allowed to prevail upon this ground taken for the first time in special appeal.

No doubt, if the objection referred only to the notice, we should have been inclined to hold that the defendant, by his silence upon this subject in the Court of first instance, as well as in the Court of appeal, and by his going to trial contesting the case upon the evidence, had waived that objection; but nothing can get over the want of evidence; and with some reluctance I find myself compelled to follow the decisions which have been repeatedly given upon this point, namely—that a defect of this kind is fatal to a suit for enhancement.

But I think that, upon consideration, it is not unreasonable that such an objection should prevail. In the first place, we must bear in mind that the suit brought by the plaintiff before us is one of the commonest kind, and that such suits probably form a very large proportion of the whole number of suits brought in Bengal. It is very little indeed to ask from a plaintiff who is seeking, as part of a system, to increase his receipts derivable from his tenants, that he should frame his suit, and also prove his case in exact conformity with the provisions of law which enable him to increase his profits; and I think there is no hardship at all, so far as he is concerned, in binding him to an exact observance of the law.

Then, as regards the Court, it appears to me that a Court administering a law, like Act X. of 1859, is bound to satisfy itself that the decrees it makes are exactly borne out by the provisions of the law.

If the conclusion of the Deputy Collector and of the Judge had been fully and completely stated in this case, it must have amounted to something like the following. Upon the evidence adduced by the plaintiff and by the defendant—and the word evi-

dence, of course, includes admission—I find that the defendant, who holds a certain quantity of land of a particular description, is paying rent at a rate which is below the prevailing rate payable by the same class of ryots for lands of a similar description and possessing similar advantages in the places adjacent, and consequently, by the first clause of Section 17, Act X. of 1859, he is liable to have his rent enhanced. I find that the measure of enhancement is so much, and consequently I give judgment for the plaintiff at so many rupees and so many annas. That, stated fully, I think, would be the conclusion at which the Court would have to arrive before it could give the plaintiff a decree in the present case.

Now, is there any thing on the record which would justify the Collector's Court in giving such a decree to the plaintiff? It would appear there is nothing. It is said that the defendant did not dispute these points; but the system of our procedure in this country is not such, that if a defendant fails to dispute or contest any point he thereby admits it. On the contrary, if the defendant fails altogether to appear and allows judgment to go by default, the plaintiff is bound to prove his case just as much as if the defendant had appeared and denied the claim.

I think, therefore, we are bound to say that the judgment of both the Courts below in this case of enhancement are not in accordance with the law. At the same time, it seems to me that the defendant has been extremely remiss in failing to take this ground of objection in any stage of the proceedings below; and therefore, while I think we ought to reverse the decisions of the Deputy Collector and of the Judge and to order the dismissal of the plaintiff's suit, we ought to do so without making any order as to the costs of this appeal.

Glover, J.—I am of the same opinion.

The 15th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Possessory Suit—Presumption.

Case No. 207 of 1870.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 23rd September 1869, reversing a decision of the Subordinate Judge of that District, dated the 7th July 1869.

Rufautoollah Chowdhry and others (Defendants), *Appellants,*

versus

Shushee Shikhur Banerjee and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Tarucknath Sein for Respondents.

In a suit to recover possession of the beds of tanks which, though gradually reclaimed and made fit for cultivation by defendant, were situate within plaintiff's mâl estate, and had been measured and recorded in the zemindary chittahs as their *khas khamar* and unfit for cultivation:

HELD that plaintiffs being unable from the nature of the ground to show any direct acts of ownership, the presumption was that, until the act of defendant dispossessing them, they were sufficiently in possession to enable them to maintain their right of suit.

Jackson, J.—I THINK we are not called upon to disturb the decision of the Lower Appellate Court.

The subject of dispute was some land forming the beds of three tanks which had been gradually reclaimed and made fit for cultivation. This process of bringing under cultivation was found by the Judge to have taken place within the last four or five years; and it seems that the land, which appears to be situate within the mâl estate of the plaintiff's was measured and recorded in the zemindary chittahs of the year 1224 as being their khas khamar, and was then described as being *nalaik* or unfit for cultivation.

This being the nature of the ground, and therefore the plaintiff being necessarily unable to show any direct acts of ownership exercised during that time, I think that we ought to presume that the plaintiff was sufficiently in possession to maintain his right of suit until the act of the defendant took place, having the effect of dispossessing

the plaintiff, which, by the Judge's finding, was within the last four or five years.

The circumstance is rendered the more probable by the fact that the defendant about that time occupied the position of gomashta, which would give him an opportunity of appropriating to his own use lands belonging to his employer, which were not in actual cultivation and use.

I think the chances are that the Judge has decided correctly; at any rate, no ground has been shown for our interference. I think the appeal ought to be dismissed with costs.

Glover, J.—I am of the same opinion.

The 16th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Witnesses—Appellate Court—Benamee purchase—Tenancy— Dispossession.

Case No. 245 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 3rd September 1869, reversing a decision of the Moonsiff of Kulnah, dated the 22nd February 1869.

Mussamut Hoymobutty Dossee (Plaintiff), *Appellant,*

versus

Sreekishen Nundee and another (Defendants), *Respondents.*

Baboos Mohendro Lall Shome and *Hem Chunder Banerjee* for Appellant.

Baboo Gopal Lall Mitter for Respondents.

Where credit has been given to witnesses by the Court of first instance before which they have been examined, the Appellate Court is not at liberty to say that it disbelieves them without stating reasons.

In the case of a benamee purchase, the mere use of the *furzee* name is sufficiently disposed of if the party whose name is used sets up no claim, and if there appears to have been long continued possession on the part of the person claiming to be the beneficial owner.

Where a zemindar so interferes with the possession of a tenant not personally occupying the land, as to induce the under-tenants to pay rent to him (the zemindar), his interference amounts to dispossession.

Jackson, J.—It appears to me that the special appellant in this case has established a substantial error in law, in the investigation of the case which justifies us in setting aside the decision of the Lower Appellate Court.

I do not think it would be our duty in such a case as this to support the conclusion to which we come, merely by a comparison between the judgment of the Court of first instance and that of the Lower Appellate Court, and by merely giving the preference in point of clearness and cogency to that of the Court of first instance; but we must be satisfied that the Lower Appellate Court, in reversing the judgment of the Court of first instance, has so departed from the proper rules of investigation and trial, as to have been guilty of that substantial error which is referred to in the 372nd Section of the Code of Civil Procedure.

The first duty of the Court which tries a case, whether originally or by way of appeal, is to ascertain what the contentions of the several parties are, and what are the questions for decision.

In this case, we find the Subordinate Judge starting with the observation that "both the parties have admitted that the disputed property has been purchased in the name of Bykunto Nath Pal, and that the plaintiff is a common poor woman without any means and depends upon service, and that she is neither wealthy nor a zemindar; hence why did such a personage purchase the disputed property with her own money in the benamee of Bykunto Nath Pal." Now, it would be a very unfair statement to commence with, that the whole of this resulted from the admissions of both parties. In point of fact, the parties were not agreed upon this admission or any part of it. The plaintiff alleged that she had, so long ago as the year 1854, purchased the property in dispute; but that, for reasons of convenience, the name of Bykunto Nath had been used. The defendant's allegation, on the other hand, was, that this property had been actually purchased by Bykunto Nath for himself, and that 4 years afterwards, or in the year 1258, the defendant had re-purchased it from Bykunto Nath. But besides that, it is giving an extremely unfair complexion to the case, to set up an *à priori* improbability as against the plaintiff, by stating that she is

her a wealthy person nor a zemindar, and efore, unlikely to make this purchase, fact being that this property was origi- y purchased for a payment down of 16 es, and a further *barrat* (assignment) to the whole amount of rent due to the indar which amounted to 59 rupees only. ppears that the plaintiff, who is, no doubt, poor woman in humble circumstances, had en for many years a servant in the employ of the zemindars themselves, of whom the defendant is one, and 16 rupees is certainly not an unreasonable sum to have accumulated after a service of many years; and it is quite conceivable that the state of accounts between the plaintiff and her employers might have given her the means of paying off the further sum of 59 rupees. I think, therefore, that the Subordinate Judge starts both with an incorrect statement of the admissions of the parties, and also with an unwarranted assumption of improbabilities weighing against the plaintiff.

The next part of the judgment states that "from the evidence of Nobo Koomar, "Surbo Mundle, and Ram Doyal, subscrib- "ing witnesses to the kobalah, on the basis "of which this suit is laid by the plaintiff, "the payment of consideration money (co- "vered by the kobalah) by the plaintiff "has not been proved. The witnesses stat- "ed that the plaintiff paid 16 rupees."

Now, if this means to say that the proof of payment down of 16 rupees is not a proof of payment of the consideration-money, I think the reasoning is altogether inconclusive because 16 rupees was the whole amount that was to be paid in cash by the plaintiff to her vendor. Therefore, if the witnesses proved that, they proved all that the plaintiff for that purpose required.

But it is contended that the Subordinate Judge meant to say that he did not believe those witnesses. I do not find any trace of that meaning in the words he uses, but even if it be admitted that that was what he meant, I must observe that he is not at liberty to say that he disbelieved the witnesses to whom credit had been given by the Court of first instance before which they were examined, without stating reasons for disbelieving them.

The next observation which the Subordinate Judge makes is that "the plea of bena- "mee transaction advanced by the plaintiff is "unfit for hearing by a Court of justice, be- "cause, agreeably to general principles, the "party in whose favor a deed is executed "must be considered as the grantee of the "deed. The plaintiff has not been able to "adduce any documentary evidence to show "how her right has accrued to the property "covered by the deed in the name of By- "kunto Nath Pal," and then he repeats the "observation, nor has she been able to prove, "even by oral evidence, that she has paid the "consideration-money specified in the said "document."

Now, the evidence would show, unless it was disbelieved, and that for some substantial and reasonable cause, that she had paid the consideration-money; and then, as to the question of benamee, the Subordinate Judge must be well aware that benamee purchases occur every day, and that, if the party whose name is used sets up no claim, and if there appear to have been long continued possession on the part of the person claiming to be the beneficial owner, that would quite sufficiently dispose of the mere use of the *furzee* name in the transaction..

The Subordinate Judge goes on to say: "The averment of the plaintiff with reference "to her having been forcibly ousted from "the disputed property in the year 1270, "B. S., has not at all been proved by the "testimony of the witnesses examined by "her." Now, forcible outster, if it was alleged at all, was not in the least degree a material allegation. The plaintiff would be perfectly entitled to recover the land if she could make out her right to it, and if that right was not barred by limitation, whether the defendant forcibly ousted her or not.

The judgment goes on: "Almost all the "witnesses have stated that the plaintiff held "possession by letting out to under-tenants, "and thereby she has been ousted. I do "not agree with the Lower Court in hold- "ing as proof that, which is opposed to "plaintiff's own allegation." I do not know what is meant by "being opposed to plaintiff's own allegation." If the plaintiff did not personally occupy the lands, but rented them to under-tenants, and the defendant so interfered with the possession of the plaintiff as to induce those under-tenants to pay rent to him, he would in that way dispossess the plaintiff.

Then he says: "Moreover, the plaintiff is "of poor circumstances, so if the disputed "property had been actually purchased and "held by her, then why would she remain

"quiet for five or six years after her dispos-"session in the year 1270: hence, when she "has brought this suit after such delay, it "is apparent that her suit is false and col-"lusive." I am bound to say that this is an inference which seems to me wholly unwarranted. Litigants in this country are not remarkable for promptitude in commencing their suits: especially is that the case when the plaintiff is poor and in humble condition in life, and the defendant is a person, not only very much her superior in wealth and position, but actually a person who has been her employer and master.

The next observation of the Lower Appellate Court is, that "the vakeel of the "plaintiff argues that the said kobalah has "been attested, and the Lower Court also "holds the said fact; but I cannot agree with "the said finding, because it has been held "that the witness Nobo Koomar has attested "the kobalah, but I cannot find his name "in the deed."

Now, this appears to me a very unreasonable observation. This document appears to have been roughly handled, and upon inspection I find that the part of the paper in which the names of the attesting witnesses are written has been so torn that only the names of two of the witnesses at the bottom are to be found, and, palpably, the names of three or four have altogether disappeared. This comment, therefore, appears to be unaccountable.

Further, it is said "the vakeel of the "plaintiff argues that the heir of Bykunto, "in whose favor the kobalah was executed, "has been made a defendant. To this I "have to say that the defendant cannot be "bound by the words of either Bykunto "or his heirs."

Well, no doubt, it must be allowed that the admission of a defendant will not prejudice a co-defendant. On that point, I have nothing to say; but there is another observation of the Subordinate Judge which does not appear to be so reasonable. He says: "It is not very difficult on the part of "the plaintiff to secure pottahs and dakhillas, "because it appears from the proofs on the "record that the plaintiff is a maid-servant "in the house of the zemindar."

Now, it would have been at least fair to the plaintiff to state that, if she was a maid-servant in the house of the zemindar, she was so in the house of the defendant himself; and, therefore, it ought to have been shown how it was that she had facilities of obtaining such documents as are referred to, to the prejudice of the defendant and some of his co-sharers. If there was anything in this allegation, it ought to have been fairly stated and made a tangible ground for his judgment.

Then the Subordinate Judge says: "The "plaintiff has in a manner admitted the "long possession of the defendant." Now, no such admission has been pointed out to us, and if no such admission was made, the plaintiff has been seriously prejudiced by the last observation of the Judge.

I do not think it necessary to carry comment on this judgment further. I think quite sufficient has been shown to make it clear that the Subordinate Judge, in dealing with this case, has not placed himself in a proper judicial attitude towards it, and has allowed his mind to be influenced by what are not sound and proper reasons, and the judgment based upon such reasons ought not to be allowed to stand. That judgment, therefore, is set aside, and the case is remanded for trial before the Zillah Judge.

Glover, J.—I am of the same opinion.

The 17th June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Sir Charles Hobhouse, *Bart.*, *Judge.*

Grounds of enhancement—Waiver—Remand—Pleadings—Parties.

Case No. 54 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 28th September 1869, reversing a decision of the Deputy Collector of that District, dated the 30th April 1869.

Bonomalee Churn Mytee and another (Plaintiffs), *Appellants*,

versus

Shoroop Hootait (Defendant), *Respondent.*

Mr. C. Gregory and *Baboo Bhyrub Chunder Banerjee* for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

In a suit for enhancement of rent upon different grounds, the fact that at the hearing the plaintiff relies on one of the grounds only, and that in the judgment of the first Court the whole case was rested on that ground only, is not a safe warrant for the inference that the other grounds were waived.

A case should not be remanded when the Appellate Court is of opinion that the Lower Court cannot properly come to a different decision upon the evidence than that to which it has already come.

Although in a suit for enhancement, the plaintiff should not be tied down too strictly to his statements, yet he must, to some extent, be limited to the case made in the plaint.

Couch, C. J.—In this case the Judge, on appeal, held that the notice was informal, and dismissed the suit. It is not now contended for the appellant that he was wrong in holding that the notice was informal in the respect in which he held it to be, but it is said that the notice claimed the enhancement upon three different grounds, and that all those three grounds were stated in the plaint, and therefore although the Judge found the notice was informal as regards one of the grounds, yet he ought to have tried the case upon the other two grounds, and that we should remand the case for that purpose.

Now, it might be that although all the three grounds were stated in the plaint, yet, upon the hearing of the case, the plaintiff relied only upon the first ground; and certainly, in the judgment of the first Court, we find that the whole case was rested upon the first ground, and there does not appear to be any allusion to the other two grounds. But we do not think that we can safely infer from this that the other two grounds were waived. It might be that the Deputy Collector having made up his mind to decide the case upon the first ground, and being about to pass a decree in favor of the plaintiff upon that ground, although the plaintiff sued upon three grounds, did not consider it necessary to discuss the other two points. This being possible, we think that we cannot from the judgment infer that there was any waiver of the other two grounds on the part of the plaintiff.

No doubt, the case might have been so conducted in the Lower Courts that the party, although matters were contained in his plaint, would be precluded from raising them when the case came up before us in special appeal. But we think that we may decide upon the question whether the suit ought to be remanded upon another ground. If the evidence with regard to the second ground of enhancement is such, as, in our opinion, the Court could not upon a remand properly find for the plaintiff, and make a decree for enhancement, we think we ought not to remand the case. If the Court could not upon a remand properly find for the plaintiff, the error which has been made is not one which has affected the decision of the case upon the merits. We think it would not be right for us to remand the case to the Lower Court when we are of opinion that the Lower Court could not properly come to a different decision upon the evidence from that to which it has already come. And there is certainly no ground for our sending the case down to receive fresh evidence, because the plaintiff has had the opportunity of producing all the evidence that he could produce, and probably did so. For this reason we think that although the Judge, on appeal, did not come to any decision upon the second ground of enhancement, the decree which he has made ought not to be disturbed.

Then, with regard to the third ground, the claim which the plaintiff made for the enhanced rate of rent referred to 31 beegahs. The claim as regards the increased measurement is mixed up with the other claims, and we are now asked that the suit may be remanded that he may have a decree, not as regards 31 beegahs, but a decree for the difference between 31 and 19 beegahs at the old rate. This is not the case which the plaintiff made in his plaint, and he ought not to be at liberty to make a different case from that which he originally made—which he neither made in his notice nor in his plaint. It is quite possible that if he had originally made this case either in his notice or in his plaint, the defendant might have taken a different course, and not have disputed the plaintiff's right to have the rent paid for the 12 beegahs at the former rate. No doubt, there is some looseness in the pleadings in these suits, and it would not be right to tie the parties down too strictly to the statements made by them: yet they must be, to some extent, limited to the case which they make in the plaint. This is a wholesome rule, which, we think, ought to be acted upon in all cases. Therefore the appeal must be dismissed with costs.

The 17th June 1870.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Interest—Alteration of decree—Delay—Review.

Case No. 33 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Subordinate Judge of Tirhoot, dated the 8th November 1869.

Shaikh Abdool Ali (Judgment-debtor), *Appellant,*

versus

Bibee Ashruffoon and another (Decree-holders), *Respondents.*

Messrs. R. E. Twidale and *G. A. Twidale* for Appellant.

Mr. C. Gregory for Respondents.

Where a Subordinate Judge, after the lapse of two years from the hearing of a case, altered his decree in respect of interest, he was held to have made a substantial alteration and to have substantially, if not in form, granted a review ; and some good ground for the delay ought to have been shown.

The grant of interest is in every case a matter for the judicial determination of the Court which grants the decree.

Markby, J.—It seems to us that this judgment cannot be supported. That which is called the rectification of an error in a decree is really a substantial alteration in it. It is not a mere matter, of course, to give interest in a decree, and it is still less a matter, of course, to give interest at any particular rate. The grant of interest is in every case a matter for the judicial determination of the Court which grants the decree.

We do not mean to lay down that if the parties apply promptly to correct an oversight, when the whole of the argument and all the facts of the case are fresh in the mind of the Court, that an obvious error or omission may not in some cases be corrected without the tedious and expensive process of a review. But the Subordinate Judge does not, as we understand him, say that there is anything before him which brings the circumstances of the particular case back to his mind, so that he can say that this was a mere clerical error or omission ; and looking to the time which had elapsed (two years) since the case was heard, it would evidently be impossible that he could have any independent recollection of it.

We think that the Subordinate Judge was in this case making a substantial alteration in the decree ; and that he was substantially, if not in form, granting a review, and that, therefore, some good ground for the delay ought to have been shown.

According to the decisions of this Court, therefore, the alteration made in the decree was made illegally, and the order of the Subordinate Judge must be set aside. The appellant will get his costs in this Court and the Court below.

The 17th June 1870.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Under-valuation of a suit—Appeal to Privy Council.

In the Matter of
Ranee Bhugobutty Debia, *Petitioner.*

Baboo Bhyrub Chunder Banerjee for Petitioner.

Where a defendant, having the means of proving the real value of property, made no objection to the plaintiff's under-valuation ; and also herself in special appeal knowingly under-valued the property by valuing the subject-matter at 675 rupees.

Held that she could not be heard to represent the real value of the property to be over 10,000 rupees for the purpose of securing admission for an appeal to Her Majesty in Council.

Jackson, J.—This is an application for leave to appeal to Her Majesty in Council against a decision of this Court made in a case of special appeal.

The petitioner before me was the special appellant ; and on her special appeal she valued the subject-matter at Rupees 675.

The ground on which leave to appeal is now applied for is, that the real value of the property in dispute exceeds 10,000 rupees ; and it is proposed to show that this is the real value by putting in a kubooleut under which the property is held by a tenant, in which a rent is reserved of Rupees 1,016.

The suit and the appeal in this case were commenced when Act XXVI. of 1867 was in force, and, therefore, the valuation both

of the suit and of the appeal were regulated by the provisions of that Act. That Act provides in Note (*a*) appended to the 11th Article of the schedule annexed to the Act that "in suits for immoveable property the stamp-duty payable shall be computed according to the market-value of the property in suit." The note goes on: "In suits for "immoveable property paying revenue to "Government, where the settlement is per-"manent, ten times the revenue so payable "shall be taken to be the market-value "thereof, unless and until the contrary shall "be proved." Therefore ten times the revenue payable to Government in this case was *primâ facie* the market-value; but it was in the power of the defendant to object on the ground of valuation; and it was obvious that the objection was a material one, because a difference of valuation would have entirely altered the form both of original suit and also of the appeal, because, if proved, the suit ought to have been instituted in the Court of the Principal Sudder Ameen, and the appeal should have been a regular appeal to this Court.

Now, the defendant, according to her own showing, had in her hands conclusive means of proving what the real value of the property was, but she made no objection to the valuation put upon it by the plaintiff; and not only this, but she came up to this Court in special appeal; and although, as it now appears, she well knew that the real value of the property was over 10,000 rupees, she valued her appeal at Rupees 675.

I have held in similar cases before this, that a party who has so acted ought not to be heard to represent that the real value of the property is over Rupees 10,000, for the purpose of getting an appeal to Her Majesty in Council admitted. It appears to me that the present case is a much stronger one than those which have come before me previously; and if I were to allow the petitioner leave to appeal in the present circumstances, I should not be merely allowing the parties to defeat the law which would give the decision in regular appeal on the facts in such a case to the High Court, but also abetting a gross fraud on the revenue of Government.

I think, therefore, that this application is inadmissible, and leave to appeal must be refused.

The 20th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Compromise—Conditional decree.

Case No. 116 of 1870.

Miscellaneous Special Appeal from an order passed by the Judge of Patna, dated the 15th January 1870, reversing an order of the Sudder Moonsiff of that District, dated the 12th August 1869.

Bolakee Lall (Decree-holder), *Appellant,*

versus

Mahomed Hossein Khan (surety for the Judgment-debtor), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Mr. C. Gregory for Respondent.

A compromise embodied in a kind of decree was to the effect that defendant should pay to plaintiff the principal sum within a specified period, and that, if he (defendant) were successful in another suit against a different party, he would also pay the interest. He succeeded in his suit in the first Court, but his suit was dismissed in appeal. The judgment-debtor subsequently paid the principal, but was afterwards arrested, and *M. H.* became surety for his production and for the payment of the interest, if the order of the Moonsiff releasing the judgment-debtor were set aside in appeal.

HELD that the money which was to go to pay the interest was the money realizable by the decree; and as that decree was reversed in appeal, the suit could not be deemed a success.

*SEMBLE (*by Markby, J.*) that the decree on the compromise was not one upon which execution could be carried out, at any rate, for the sum which was only conditionally due; as the inquiry relative to the fulfilment of the condition could only be made in a regular suit, and that execution could not be taken out against *M. H.*, the surety, the arrangement between him and the judgment-creditor not falling within Section 204, Act VIII. of 1859, which applies to persons who have become security for the performance of *a decree or any part thereof.*

Bayley, J.—I AM of opinion that this appeal must be dismissed with costs.

The plaintiff Bolakee sued one Yusuf Beg. In that suit there was a compromise which had been embodied into a kind of decree. The terms of that compromise were that Yusuf Beg should pay to the plaintiff Bolakee the principal sum within three months, and that, if he (Yusuf Beg) be successful in a suit which he, as the plaintiff, was carrying on against one Khojah Juwan, he should also pay the interest,

Rupees 401. Subsequently, the principal was paid in by the judgment-debtor, and no question now remains with regard to that.

The judgment-debtor, Yusuf Beg, was afterwards arrested, and the special respondent Mahomed Hossein executed a surety-bond to the effect that he would undertake to produce the judgment-debtor whenever necessary, and pay the amount of the interest, Rupees 401, if the order of the Moonsiff releasing the judgment-debtor from arrest should be set aside in appeal.

The Judge in the Lower Appellate Court has now stated his view in these terms: "The arrangement was if Yusuf Beg "succeeds in his suit he is to pay; if he "does not, the interest is to be remitted. "He did not succeed. The respondent "refers to his success in the first Court, "but I have no doubt that eventual success "was what was contemplated, and conse-"quently the agreement to pay interest up "to date of decree falls through."

Against this order of the Judge, Bolakee appeals specially, urging—

1st.—That Syud Mahomed Hossein had been surety unconditionally.

2nd.—That the Judge has misconstrued the terms of the compromise.

3rd.—That the decree in favor of Mahomed Yusuf had, in fact, been satisfied by his sale of that decree, and therefore no further liability was contemplated in the event of the subsequent reversal of the Moonsiff's order by the High Court.

The compromise and the surety-bonds, in my opinion, show that the agreement was not contingent upon the order of the first Court in either instance. The money which was to go to pay the interest was money realizable from the decree. If the decree then were reversed on appeal, the money available under the decree would cease to be available, and it can hardly, therefore, be supposed that what the parties contemplated was only the event of Yusuf Beg being successful in the first Court.

I see no error in law in the order of the Lower Appellate Court, and would dismiss this miscellaneous special appeal with costs.

Markby, J.—I also think the special appeal should be dismissed. If there was a decree at all in this case, it was a conditional decree, *viz.*, a decree providing that money should be paid on the happening of a certain event, and I think that the Judge, in deciding whether or not that event had happened, was right in confining his attention to the event itself, and not taking into consideration the conduct of the parties; and I also think that the Judge was right, when he found that the event contemplated was that a certain suit should be decided in favor of a certain person, in holding that that event had not happened when the decree which was originally given by the Court of first instance was set aside by the Court of appeal.

But I do not think it would be desirable to pass over this case without observing that, in my opinion, it is a matter of considerable doubt whether the Judge was right in the first part of his decision which was in favor of the appellant, *viz.*, that this was an arrangement which could be enforced without a regular suit. In the first place, it does not appear to me that there was even in the original suit between Bolakee and Yusuf any decree at all so far as regards the second sum of money which was to be paid. The suit was compromised upon an agreement to pay a certain sum of money down and a further sum, in case the defendant should succeed in a suit which he was then carrying on.

It does not appear to me, as at present advised, that that was a decree upon which execution could be taken out at any rate for the sum which was only conditionally due. It was a compromise upon one portion of which a decree might have issued without any further proceeding. But upon the other portion, no decree could issue at all without an inquiry whether the condition had been fulfilled; and I do not see how that inquiry could have been made except in a regular suit. But even if this were otherwise, still I think there is a further difficulty, namely, that the arrangement between Mahomed Hossein and Bolakee by which execution was stopped on this so-called decree was not one which fell within the provisions of Section 204, Act VIII. of 1859, and unless it was so, no execution could be taken out against Mahomed Hossein as surety. Section 204 only applies to persons who have become liable as security *for the performance of a decree or any part thereof*, but in

this case Mahomed Hossein was not simply a surety for the performance of any decree, but for the payment of a sum of money, or, in the alternative, for the production of a certain person in the event, not of the failure of any person to "perform a decree," but of the order for his release passed by the first Court being set aside by the Court of appeal. But neither of these points have been argued before us, and therefore it is not necessary to give any further opinion upon them. I only advert to them because I think great trouble and confusion has been caused in this case by a misapplication of the rules and principles of procedure. However this may be, there is, in my opinion, no ground for this special appeal, and I agree in dismissing it with costs.

The 20th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Execution—Sections 208 and 285, Code of Civil Procedure.

Case No. 120 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Shahabad, dated the 6th January 1870.

Sheo Narain Singh (Decree-holder), *Appellant,*

versus

Hurbuns Lall (Judgment-debtor), *Respondent.*

Baboos Romesh Chunder Mitter and *Taruck-nath Paleet* for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

Where a certificate of non-satisfaction and a copy of the decree are transmitted by the Court which granted the decree to another Court for execution under Section 285, Civil Procedure Code, any application for the revival of execution after the proceedings have been struck off the file or for the substitution of the name of an assignee for that of the original decree-holder should be made to the Court which passed the decree. The word "Court" in Section 208 does not extend to the Court to which the decree is transmitted, but is limited to the Court which passed the decree.

Markby, J.—This is a regular miscellaneous appeal from the decision of the Officiating Judge of Shahabad. The appeal is by the person who describes himself as the decree-holder. It appears that, on the 14th May 1866, a decree was obtained in the Small Cause Court at Calcutta by Bhikun Chund and Jyte Pal against Hurbuns Lall and Rama Pershad. On the 13th April 1869, a certificate of non-satisfaction was asked for and obtained by the decree-holders, and the certificate with a copy of the decree was forwarded to the Judge of Shahabad for execution under Section 285 of the Civil Procedure Code. There were various applications with reference to the execution of this decree, but the execution-proceedings were ultimately struck off on the 21st August 1869. On the 31st August, the decree was sold by the decree-holder to Sheo Narain Singh, who is the appellant before us; and then on the 11th September 1869, on his application to the Judge of Shahabad, the proceedings in execution were ordered to be revived, and on the 23rd September 1869 his name was substituted for that of the decree-holders in the execution-proceedings.

Now, upon this statement of the facts, it was suggested that Sheo Narain had no *locus standi* before us as an appellant in these proceedings, and that, in fact, he had no *locus standi* before the Judge of Shahabad to put the Court in motion for the execution of the decree; and after hearing the arguments of Baboo Romesh Chunder Mitter for the appellant, we think that this objection ought to prevail.

Section 208 gives power, when a decree is transferred by assignment to the assignee to apply for execution, and if the Court thinks proper to grant the application, the decree may be executed in the same manner as if the application were made by the original decree-holder.

The question, then, that we have to decide is whether the term "Court" in that Section includes the Court to which the execution of the decree may have been transferred under Section 284. Section 287 is the Section which indicates the duty of the Court to which a decree may have been transferred for execution, and says: "The "copy of any decree, when filed in the Court "to which it shall have been transmitted for "the purpose of being executed, shall for "such purpose have the same effect as a "decree or order for execution made by such "Court." A question has been raised somewhat similar to this in reference to the power of the Court to which a decree is trans-

mitted for execution to enquire into the question of limitation; and it has been held that this Court has that power, the enquiry into the question of limitation being considered to be an enquiry "for the purpose of "the execution," within the meaning of Section 287. We in no way dissent from that decision, but it does not decide the present case, because it is clear from Section 290 that for some purposes, even as regards the execution, the Court which passed the decree is the Court which controls the proceedings. The Court to which a decree is transmitted for execution is empowered by Section 290 to stay the execution pending an application to the Court which granted the decree "for an order to stay the exe-"cution or for any other order relating to "the decree or the execution thereof." It is necessary, therefore, to determine whether this being an application connected with the execution ought to have been made to the Judge of Shahabad or to the Small Cause Court at Calcutta.

It seems to us that this application ought to have been made to the Small Cause Court at Calcutta, and not to the Judge of Shahabad. It seems to us that any other construction of the law would give rise to great confusion. For all purposes except that of execution under the certificate and copy of decree, and as already pointed out, for some purposes connected with execution, the decree remains in the original Court which passed it. A copy only of the decree and none of the proceedings in the suit are transmitted under Section 285. The decree itself and the whole record of the suit remain in the original Court, and we think the Court which receives the decree for execution should execute it exactly as it receives it, or not at all. We think it would lead to the greatest difficulties if in one Court one party was recognized as being the holder of, and having the control over, a decree, and at the same time in another Court another party was recognized as being in that position. Further, under Section 208, it is entirely in the discretion of the Court to grant the application of the assignee or not, and the application is one which, under some circumstances, clearly ought not to be granted, and in no instance ought it to be granted merely as a matter of course. Now, the only Court which can have the proper knowledge and materials to deal with the application is the Court which tries the suit and passes the decree. Looking, therefore, generally to the terms of the law, and particularly to those of Section 290 which show that even for some purposes connected with execution the proceedings remain in the original Court, we think that this application was wrongly made in the Shahabad Court, and ought to have been made in the Small Cause Court at Calcutta. Had it been likely that the original decree-holders were about to proceed to execute the decree in fraud of the assignee, the latter might probably, by an application to the Court of Shahabad, have stayed the execution pending his application to the Court of Small Causes.

The result is that Sheo Narain, not being on the record, and not having even obtained the permission which is necessary to enable him to execute the decree, had no right to appear in the Court below or in this Court. Without, therefore, entering into the merits of the case, we dismiss this appeal with costs.

The 21st June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Witnesses—Jurisdiction—Mortgage-accounts—Evidence of mortgagees.

Case No. 2724 of 1869.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 7th August 1869, affirming a decision of the Subordinate Judge of that District, dated the 24th February 1869.

Ram Phul Pandey (Plaintiff), *Appellant,*
versus

Wahed Ali Khan and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee, Mohesh Chunder Chowdhry, and *Bhowanee Churn Dutt* for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A Court has no power to refuse to summon witnesses when expressly requested by a party to do so, unless the witnesses are required to be summoned in such a manner or in such numbers as clearly indicates a vexatious desire of obstructing the course of justice.

Mortgagees in actual possession should, under Section 11, Regulation XV. of 1793, be examined as to the truth of mortgage-accounts, excluding persons who, according to the manners and customs of the country, are unable

to appear in Court, or others who, from their position, are not likely to be acquainted with the actual state of facts. Where one of the co-sharers has a competent knowledge of the facts, his deposition is sufficient to prove the truth of the accounts.

Bayley, J.—THE grounds taken in this special appeal are two: *firstly*, that the first Court refused to summon the witnesses named by the plaintiff, special appellant, and this order was upheld by the Lower Appellate Court; and, *secondly*, that Section 11, Regulation XV. of 1793, requires the mortgagees in possession to swear to the truth of the accounts, and in this case that provision of the law has not been attended to.

The case is one not uncommon in the Behar districts where the original transaction first assumes the character of a mortgage-bond, and simultaneously with it is executed a lease either in the name of the co-sharers or a dependant. In this case the original mortgagee was Kasim Ali—the mortgage being of so late a date as the year 1845. Ameenooddeen and Ashruf Ali were the holders of the lease simultaneously executed as above-mentioned. The defendants Nos. 1 to 4 were the sons of the original mortgagee.

It appears that by a petition, dated the 29th January 1869, the plaintiff requested that nine witnesses (ryots) and two witnesses (putwaree and mootsuddee) might be summoned and examined; and on the 1st February 1869, the first Court recorded an order to the effect that, as the putwaree and the mootsuddee were acquainted with the accounts and collections, they might be summoned; but that, as it was not likely that the ryot witnesses were acquainted with them, it was unnecessary to call them.

This order was clearly made a ground of appeal to the Lower Appellate Court, but the objection was overruled.

I am of opinion that a Court has no power to refuse to summon any witnesses when expressly requested by a party to do so, or to infer or conjecture that they are not likely to prove the case for which they are called. Whether they are so or not, it is not for the Court but for the party to consider.

The only exception that I know of to this rule is in cases where the witnesses are required to be summoned in such a manner or in such large numbers as would clearly indicate a vexatious desire of obstructing the course of justice; but no such thing happened here, and the Lower Appellate Court, therefore, was wrong to refuse to summon the witnesses that were asked to be called. I would go so far as to say that a Court ought not to decline to call witnesses even in a case where even, on inspection, certain documents appear to it to be fabricated; because, until it has heard all the witnesses, and has before it the real state of things, it cannot finally come to a right determination. It might well happen, for instance, that the same indicia of fabrication which may have led the Court on mere inspection to consider a certain document forged might be shown by further evidence to exist in papers admitted by the parties or the Courts themselves.

I think, therefore, that the case ought to be remanded to the Lower Appellate Court to remit it to the first Court to call and examine those witnesses.

As to the *second* point, it appears that one of the co-sharers has deposed to the truth of the accounts; and it has been held in a case cited in page 210, last edition of Macpherson on Mortgages, that, where one co-sharer has a competent knowledge of the facts, his deposition is sufficient for the purpose. It is, however, pressed upon us by the pleader for the special appellant, now that the case is going back for re-trial, that it would be more satisfactory to have the other co-sharers examined. I think that the Court should have such mortgagees as are in actual possession examined in the case, excluding, of course, persons (such as females) who, according to the manners and customs of the country, are unable to appear in Court, or other parties who, from their position, are not likely to be acquainted with the actual state of facts. Such was the position contemplated in the case of Shah Makhun Lall, reported at page 19, Privy Council Rulings, Weekly Reporter, Volume XI.

In this view, I would remand the case to the Lower Appellate Court to remit the case to the first Court to be re-tried with reference to the above remarks.

Markby, J.—I also think this case should be remanded.

I might not, without further consideration, be prepared to act upon the authority of the decision of the Agra Court cited in Macpherson on Mortgages, but the Privy Coun-

cil have held that Section 11, Regulation XV. of 1793, is to receive some latitude of construction; and I cannot say as a matter of law that the Courts below have in this case exceeded that latitude.

With regard to the other objection, it appears that the Court below did refuse to summon the witnesses whom the plaintiff wished to have summoned, because the Court considered that their evidence would not avail the plaintiff in his contention. I think that the Court is absolutely without discretion upon such a point. Of course, every Court may prevent its process being abused; but I can hardly conceive a case in which a summons to witnesses could be refused on this ground.

The 21st June 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Registration—Kubooleut.

Case No. 651 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 4th February 1870, reversing a decision of the Deputy Collector of that District, dated the 29th May 1869.

Jugdesh Chunder Biswas and others (Defendants), *Appellants,*

versus

Abedollah Mundul and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Nuleet Chunder Sein* for Appellants.

Baboos Issur Chunder Chuckerbutty and *Grija Sunkur Mojoomdar* for Respondents.

A kubooleut in which a ryot agreed to hold land under a pottah for a specified year, the agreement between the parties being that, at the close of that period, a fresh settlement would be made, was held to be a lease for one year, and not to need registration under Act XX. of 1866 as being a lease for more than a year, although a clause intervened between the above clauses to the effect that year by year the ryot would pay rent at the above rate.

Loch, J.—In this case it appears that the defendant served a notice upon the plaintiffs, bearing date the 29th Chyet 1274, calling upon them to execute a kubooleut for 133 beegahs at a jumma of 304 rupees; and the defendant in this suit, which is brought under the provisions of Section 14, Act X. of 1859, to contest the plaintiff's liability to pay enhanced rent, states that a kubooleut bearing date the 17th Bhadro 1275, for 133 beegahs at a jumma of 305 rupees, was executed by the plaintiff; and also the *nericknamah* bearing date the 19th Srabun 1275.

The first Court held that the kubooleut and the *nericknamah* were genuine documents, and on the evidence before it dismissed the plaintiff's suit. The Lower Appellate Court, however, has considered that the kubooleut is inadmissible in evidence, because it has not been registered—and the *nericknamah* is also inadmissible as not being stamped; and with regard to the oral evidence it has held that it can be of no weight, and it cannot be looked at, it being secondary or corroborative evidence when the principal evidence is not receivable.

The grounds taken in special appeal are that the kubooleut being only for one year is not required to be registered under the provisions of Act XX. of 1866; *secondly*, that the *nericknamah* having been admitted by the first Court on payment of the penalty, it was not open to the Judge to take up that question in appeal; *thirdly*, that the Judge should not have rejected the oral evidence, because the documents were inadmissible; and, *fourthly*, that, as the objections to the admissibility of the documents on the ground that they were not registered and not stamped were not taken in the first Court by the opposite party, they should not have been allowed to be taken in appeal.

The Judge holds that the kubooleut should have been registered, because, though it certainly specifies that it was granted for one year, yet it also contains a clause in which mention is made of *year by year* (সন সন); and in support of his opinion he quotes a judgment of the High Court reported in Volume X. of the Weekly Reporter, page 411. Looking at the case to which the Judge refers, and which is more fully reported in II. Bengal Law Reports, pages 75 and 76, and in which a translation of the pottah is given, we find that the terms of the pottah in that case are entirely different from the terms of the kubooleut filed in the present case. The pottah in that case runs in these general terms—that the land men-

tioned in the pottah is to be held at an annual rent of 16 rupees. "According to "the instalments you shall pay the rent *year after year*." And the Judges held that "the term of this pottah is expressed by the common form (সন বসন) *shun-ba-shun*. This has been invariably interpreted by this Court to mean a year-by-year tenancy, that is, a tenancy which is certain for the period of one year, and will continue beyond that period until it is properly put an end to by either party. We think that a pottah, the term of which is defined by these words, falls within the fourth clause of Section 17, Act XX. of 1866, and that it is a lease for a term exceeding one year."

In the kubooleut before us the ryot agrees to hold the land under the pottah for the year 1275; and it is also agreed between the parties that at the close of that period a fresh settlement will be made. No doubt a clause intervenes between these clauses to the effect that year by year he will pay rent at the above rate; and it is contended for the respondent that the object of drawing up the kubooleut in this form was that, though it professes on its face to be only a kubooleut for one year, it was intended to continue in force for any number of years.

But it appears to me that this contention is incorrect, for from the words which immediately follow, *viz.*, that at the close of the period (which period is at the end of the year 1275) a fresh settlement will be made, we may judge what was the intention of the parties, *viz.*, that it was a kubooleut for one year ending in 1275, and that at the close of that year a fresh settlement will be made. Such being, in our opinion, the meaning of the terms of the kubooleut, we think that the Judge is wrong in saying that this kubooleut should be registered, and we, accordingly, set aside his judgment upon that point.

With regard to the *nericknamah*, we think that the first Court had full authority to determine whether the party filing it should be permitted to use it as evidence on paying the proper stamp; and as the first Court had admitted it, we think the Judge had no jurisdiction to enter into this point in appeal. This has been ruled by this Court and by the Madras High Court in several cases. We think, therefore, that the Judge's ruling upon this point should also be set aside.

We direct, therefore, that the case be remanded to the Judge who will enter into the merits, and after going into the whole evidence produced by the parties, will determine whether the kubooleut and the *nericknamah* are or are not genuine documents, and dispose of the case accordingly. The costs will follow the final result of the case.

Miller, J.—I concur in the order of remand.

The 22nd June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Remand—Issues—Sections 351 and 352, Act VIII. of 1859.

Case No. 295 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 9th February 1870, reversing a decision of the Moonsiff of Munglecote, dated the 24th September 1869.

Shaikh Futtehoollah (one of the Defendants), *Appellant,*

versus

Oomdanissa Bibee and others (Plaintiffs), *Respondents.*

Mr. G. A. Twidale for Appellant.

No one for Respondents.

Where no preliminary point has been wrongly decided by the Court of first instance and no evidence has been excluded, and the Appellate Court considers the issues nevertheless to have been defective or insufficient, it is the duty of the latter not to remand the case, but to re-settle the issues and to determine the case itself.

Jackson, J.—It appears to me that the decision of the Lower Appellate Court in this case is contrary to law.

The plaintiffs, being females, sued the defendants to recover possession of some land, alleging that the land in question had been mortgaged to the defendants as security for a loan granted for six months by a kut-kobalah; that this loan had been repaid; and that the mortgagors had re-entered on possession, but had been subsequently dispossessed by the defendants.

The Moonsiff was of opinion that the plaintiffs had failed to make out their alle-

gation; and that the defendants' allegation that the sale was an out-and-out one was fully proved. He thereupon dismissed the suit.

The Subordinate Judge's decision is in these terms: "In this case, the decision "passed by the Lower Court and the issues "fixed by it are too brief, indistinct and "unintelligible. He has been very severe "in throwing at first the onus of proof on "the plaintiffs, appellants, inasmuch as the "defendant admits that the disputed land "constitutes the ancestral property of the "plaintiffs, contending simply that he has "acquired the property by a kobalah, and "that he holds possession of it accordingly. "He also states that even subsequent to the "date of the alleged kobalah, the plaintiffs "were in possession." And thereupon he proceeds to frame certain issues on which he directs the Moonsiff to adjudicate "with great care and diligence," and to remedy the omission which he considers to have taken place in passing over other material points. He accordingly reverses the decision of the Court below, and remands the case for a re-trial with those directions.

Section 351, Act VIII. of 1859, declares explicitly upon what ground a case may be remanded in regular appeal; and section 352 declares that it shall not be competent to the Appellate Court to remand a case for a second decision by the Lower Court, except as provided in the last preceding Section; and Section 351 provides that "when the Lower Court shall have "disposed of the case upon any preliminary "point, so as to exclude any evidence of fact "which shall appear to the Appellate Court "essential to the rights of the parties, and "the decree of the Lower Court upon such "preliminary point shall be reversed by the "decree in appeal, the Appellate Court may, "if it think right, remand the case."

Now, nothing of the sort has taken place in the present instance; and it is not contended that any preliminary point had been wrongly decided by the Court below, or that any evidence whatever had been excluded. It was the duty of the Subordinate Judge if he considered the issues defective or insufficient, to have re-settled the issues and to have determined the case himself. His decision therefore is annulled, and the case will go back to him in order that he may dispose of it according to law

And with reference to the observations that he has made upon the mode in which the Moonsiff tried the suit, it seems right to observe that the Moonsiff went into the evidence adduced on either side as to the real character of the transaction between the defendants and the plaintiffs' husbands, and that, as throwing light upon that transaction, he referred to a previous suit brought by those husbands against the defendants, the suit being one for the recovery of the remaining portion of the consideration-money, and instituted on the allegation of purchase. It is difficult to conceive a stronger piece of evidence on such a point as this, than the admission in that suit by the plaintiffs' husbands.

The case must be remanded to the Subordinate Judge, that he may try the case upon such issues as he thinks necessary, and upon the evidence adduced by the parties.

Glover, J.—I am of the same opinion.

The 22nd June 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Costs—Contribution.

Case No. 1956 of 1869.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 25th May 1869, modifying a decision of the Sudder Ameen of that District, dated the 12th March 1867.

Kristo Chunder Chatterjee (Defendant), *Appellant,*

versus

Mr. J. P. Wise and others (Plaintiffs), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Anund Chunder Ghossal for Respondents

In a suit for possession, an intervenor claimed the lands in dispute upon a title distinct from that of plaintiff; whereupon the intervenor was made a defendant, and a decree was ultimately passed in plaintiff's favor with costs payable jointly and severally by all the defendants. The original defendants having been obliged to pay the whole amount of those costs in execution, they brought a suit for contribution against the legal representatives of the intervenor:

HELD that, in the absence of any contract or agreement, there was no equity between the parties to justify a suit for contribution.

Mitter, J.—THE facts out of which this litigation has arisen are as follow :—

The special respondents before us, who were plaintiffs in the Court below, were sued by one Ameeroonissa Begum for the possession of certain lands. One Bykuntnath Chatterjee, since deceased, intervened in the suit, and claimed the lands in dispute upon a title quite distinct from that which was set up by the special respondents. Upon this intervention, Bykunt was made a defendant by Ameeroonissa, and a decree was ultimately passed in her favor with costs payable jointly and severally by all the defendants. The special respondents have been obliged to pay the whole amount of these costs in execution, and they have accordingly brought the present suit for contribution against the heirs and legal representatives of Bykunt.

The Sudder Ameen of Backergunge, who tried this case in the first instance, gave a decree to the special respondents to the extent of one-fourth of the costs awarded to Ameeroonissa, upon the ground that as there were four defendants in the original suit, it was just and equitable that the liability should be divided between them in equal proportions. On appeal the Judge of that district has increased the amount to one-half; and the only reason assigned in support of this decision is that as there were two distinct defences set up—namely, one by the special respondents, and one by Bykunt, the representatives of the latter are equitably liable to bear one-half of the burden.

I am of opinion that the decisions of both the Lower Courts are erroneous, and that the suit brought by the special respondents ought to be dismissed. I see no equity between the parties which can justify this action for contribution. The special respondents were the original defendants in the suit of Ameeroonissa, and it was in consequence of an unjust award under Act IV. of 1840 in their favor that she was compelled to bring that suit.

It is true that Bykunt had intervened and claimed the lands in dispute upon a title adverse to that of Ameeroonissa's. But the special respondents did not even pretend to say, much less to prove, that this intervention had entailed any additional costs upon Ameeroonissa, which they, the special respondents, have been obliged to pay. Under these circumstances, it is perfectly clear that the special respondents have paid nothing more than what they were justly liable for; and although the failure of Bykunt's intervention might have been a good and valid ground for awarding costs against him in favor of Ameeroonissa, the special respondents cannot avail themselves of that circumstance to maintain this action for contribution against his legal representatives. To apportion the costs in question according to the number of defendants, or to divide them into two equal parts merely because two distinct defences were set up, seems to me to be a perfectly arbitrary proceeding; and there is no more reason for adopting the one course than for adopting the other. In order to support a claim for contribution, there must be either some contract or agreement between the parties, or some equity arising from the consideration that the claimant has satisfied the whole of a common liability, a portion of which ought to have been justly borne, not by him, but by the opposite party. There is nothing whatever in the facts of this case to show that there was such a contract or such an equity between the special respondents and Bykunt; and I am, therefore, unable to see how this action for contribution can be maintained at all.

It has been argued that the costs in question were decreed jointly and severally against all the four defendants, and that the representatives of Bykunt are not, therefore, competent to deny their liability for contribution in the face of a decree which has become final and conclusive by operation of law. But this argument is altogether fallacious. All that was determined by that decree, and all that could be determined by it, was a matter between Ameeroonissa on the one side and the four persons who opposed her claim on the other; and so far as this determination is concerned, there can be no question whatever that it is final and conclusive. The present suit, however, stands on a quite different footing. The question to be determined in this suit is one between the special respondents on the one side and Bykunt on the other; and no such question could have been possibly raised or determined in the previous suit in which they were all arrayed as co-defendants.

The learned Judge in the Court below seems to have been somewhat surprised to find it

laid down in some decisions of this Court, that the parties to a suit of this description are at liberty to go behind the decree from which it has arisen. But all this surprise might have been easily avoided, if he had carefully looked into the principle upon which a claim for contribution is founded. Suppose, for instance, that a joint and several decree for mesne-profits is passed against two persons—a zemindar and his gomashta; and suppose also that the whole amount due under the decree is realized from one of them, namely, from the zemindar. If the zemindar sues the gomashta for contribution, is the latter to be prevented from showing that every pice of the mesne-profits in question had been made over by him to the former as soon as it was collected from the ryots? Would the mere fact that the decree was a joint and several decree against both of them, prevent the Court from entering into the question as to which of them is justly liable as between themselves to satisfy it? Such a plain case as this does not require any argument. Both of them might have been justly liable to the decree-holder, if they had both joined in the wrongful act by which he was kept out of possession; but if one of them has appropriated the whole of the mesne-profits in question to his own exclusive use, it would be simply absurd to allow him to maintain an action for contribution against the other, merely because they were both made liable by the decree.

In the present case, the special respondents have not even attempted to show that they have paid anything more than what they were justly liable for; and I would, therefore, decree this special appeal, and dismiss the suit with costs in all the Courts.

Loch, J.—I concur with my colleague in reversing the judgments of the Lower Courts, and dismissing the plaintiff's suit with costs. There was no contract either expressed or implied between the parties when they were before the Court as respondents in Ameer-oonissa's case. It is true that the decree made them jointly and severally liable to her for her costs; but this joint liability to her did not create any privity or obligation between them, so as to render the defendants in this case liable to contribution for the costs realized from the present plaintiff in that case.

The 22nd June 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Hindoo Law — Ancestral property — Legal necessity.

Case No. 255 of 1870.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 12th November 1869, reversing a decision of the Officiating Subordinate Judge of the District, dated the 25th February 1869.

Sheoraj Kooer and others (Defendants), *Appellants,*

versus

Nukchedee Lall (Plaintiff), *Respondent.*

Baboos Doorga Doss Dutt and *Mohendro Lall Mitter* for Appellants.

Baboo Kalee Kishen Sein for Respondent.

When ancestral property is to be sold or mortgaged, all that the purchaser has to do is to see that there is sufficient pressure upon the estate to render the transfer necessary. The fact of there being a decree, an attachment, and a proclamation for sale, is sufficient pressure.

Loch, J.—We think all that the Judge had to do in disposing of this case was to look whether at the time when the special appellant purchased and took a mortgage of the property in dispute, there was any pressure upon the estate of the plaintiff which rendered the sale or transfer of the property necessary.

Now, it appears that there was a decree against the minor through his guardian passed in 1858, and in execution of that decree the whole of the minor's property was attached and advertised for sale, and in order to stop the sale of that property, the special appellant purchased a portion and took a mortgage of another portion of the property, and so the remainder of the property was saved. We think that the fact of there being a decree, an attachment, and a proclamation for sale, is a sufficient pressure upon the estate to warrant the guardian to mortgage and sell a portion of the property, and to warrant the special appellant to advance his money upon it. It was quite unnecessary for the Judge to look behind the decree, and go into the transactions of former years to ascertain

whether the original debt was incurred by the father of the plaintiff. The purchaser had nothing to do with those transactions; all that he had to do was to see that there was a necessity arising from the pressure upon the estate at the time he made the purchase. We think that he has satisfactorily shown that there was such a pressure. We, therefore, reverse the order of the Lower Appellate Court and affirm that of the first Court, and decree this appeal with costs in this Court and the Lower Appellate Court.

The 22nd June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Suit by reversioners—Section 2, Act VIII., 1859—Declaratory order—Contingent rights.

Case No. 8 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 2nd October 1869.

Mohun Lall Bhaya Gyal and another (Plaintiffs), *Appellants,*

versus

Luchmun Lall (Defendant), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboos Chunder Madhub Ghose and *Mohendro Lall Shome* for Respondent.

A suit by reversioners against a childless widow as being without title, where the answer was that she had a title as next of kin to her brother, was held to be no bar, under Section 2, Act VIII. of 1859, to a suit by the same plaintiffs, after the death of the widow, to obtain possession of the same lands held by defendant as the alleged adopted son of the widow.

Bayley, J.—I AM of opinion that the judgment of the Lower Court is wrong, and must be reversed.

The plaintiffs in this case are the sister's sons of one Seeta Ram Meherwar. They sue for certain landed property left by Seeta Ram. They state that their cause of action arose on the death of Indur Koonwar Dai, the sister of Seeta Ram, and was the retention by the defendant of the property on the allegation of heritage by right of adoption. They say that the defendant in this suit is a stranger, and has no right whatever to the property in dispute.

The answer of the defendant is that he is the adopted son and heir to the property of Indur Koonwar; and that, according to the family custom and usage of Gyals, a widow is competent to make adoption, and the party adopted becomes her and her husband's heir and successor.

The Lower Court dismissed the plaintiffs' suit with costs, on the ground that, according to certain precedents of this Court, the provisions of Section 2, Act VIII. of 1859, applied to this case; that it could not therefore be heard.

The one ground of appeal to which we find it necessary after argument to direct attention in this case is the first, *viz.*, that the Court below has erroneously considered that the present suit is barred by Section 2, Act VIII. of 1859, inasmuch as the cause of action in the present suit is different from that in the former.

The terms of Section 2 are these: "The "Civil Courts shall not take cognizance of "any suit brought on a *cause of action* which "shall have been *heard and determined* by "a Court of competent jurisdiction, in a for-"mer suit between the *same parties* or be-"tween parties under whom they claim."

The general current of decisions has established that the cause of action should be the same; that the case should have been heard and determined by a competent Court; and that the parties must be the same either actually or by representation.

Now, the cause of action in this case was clearly alleged by the plaintiffs to be the retention of certain property, of which the defendant by averment of his right of inheritance by adoption prevented the plaintiffs, as sister's sons, from obtaining possession; and it was clearly stated in the plaint that thus the plaintiffs' cause of action arose on the death of Indur Koonwar.

The former suit which the Lower Court holds to be a bar to the plaintiffs' present suit, is Regular Appeal No. 150 of 1864, decided by this Court on the 1st September 1864. In that suit the present plaintiffs sued Indur Koonwar, alleging that the said Indur Koonwar, as a childless Hindoo widow, had no right to hold the property in suit under the Hindoo Law.

The answer of Indur Koonwar to that suit was that the circumstance of her being a widow was no bar to her succeeding as heir to the property left by her deceased brother, because she was the heir of her brother while the plaintiffs were mere strangers.

The decision of the Lower Court in that case was that Indur Koonwar should retain possession so long as she lived on the property left by Seeta Ram, but that she would be incompetent to waste it or to do an act calculated to cause its loss, and that, after her death, the plaintiffs should be entitled to possession.

From that decision Indur Koonwar appealed, and it is quite clear from the following judgment passed by Morgan and Pundit, *JJ.*, that the only objection taken in that case was that the Lower Court was wrong in decreeing that, after the death of Indur Koonwar, the plaintiffs were entitled to possession of the property. The learned Judges say: "The objection taken to this "decree by the appellant is correct. The "decree should have been simply a decree "of dismissal, instead of which the Court "has gone on (at the instance of the plaint-"iff who has failed to prove any right of "suit) to declare the nature of the defend-"ant's estate, and further to declare that "the plaintiff shall be entitled to possession "of the property after the widow's death. "It is clear that the proper decree is a "decree simply dismissing the plaintiff's "suit. That is the decree which we shall "make, allowing this appeal with costs."

Some arguments have been attempted to be made to the effect that this decision shows that the plaintiff failed to prove his right of suit, because it was held that as a sister's son he had no right to maintain it; but it must be observed that the sentence is parenthetical, and no one can fail to see that the judgment disposed of the case only on one point, *viz.*, that the Lower Court was wrong in ordering that the plaintiffs were entitled to possession after the death of Indur Koonwar.

Having now put in juxtaposition the cause of action in the suit of 1864 and that of the present suit, it is clear that in the first case the plaintiffs sued Indur Koonwar as a childless widow, and thus without any title, and was met by the answer that she had a title as the next of kin of her brother.

But in this case, after the death of Indur Koonwar, the plaintiffs sue as sister's sons to obtain possession of lands held by the defendant as an alleged *adopted* son. Besides this, I think that the cause of action may be seen in another point of view, *viz.*, when the plaintiffs sued Indur Koonwar, there was no question of the right of the adopted son; but in this case the contest against the plaintiffs' claim is on the question of the right of the adopted son. Another question which was raised in the second issue of fact accepted by both the parties was whether, after the death of Seeta Ram, Mussamut Indur Koonwar only held subject to the plaintiffs' reversionary right, or whether the right of inheritance was declared. Now, the right of inheritance which was claimed in the former suit was that of Indur Koonwar, whereas that claimed in this suit is that of the adopted son. In fact, this issue of the right of the adopted son could not be raised and tried in the former suit at all.

Taking then the plaint, the issues, and the judgment in the previous suit, I cannot think that the causes of action in the two suits are the same.

We have heard at great length a good deal of argument on matters outside these decisions, but we do not think that the pleaders had any right to go beyond them. The observation was made by the Court during the argument, and I think it right to repeat it here.

I have to add one other point which was raised, but not seriously pressed by the pleader for the respondent, *viz.*, that there was a decision on the merits.

I have carefully read the judgment twice over. The whole is in substance one argument put in different ways; and when we read the whole, it is clear that the Lower Court begins with Section 2, continues its argument on Section 2, and ends holding Section 2 bars the plaintiffs' suit. But the respondent contends that, by an order of the 4th August 1869, the defendant has been allowed a certificate and declared the *locum tenens* of Mussamut Indur Koonwar.

In the first place, I think that the plaintiff's suit against Indur Koonwar claiming as heir of her brother is one thing, and that against the adopted son claiming as heir of his mother is another; but irrespective of that, I cannot subscribe to the

doctrine that a miscellaneous order granting a certificate or declaring one person *locum tenens* of another, can, taken by itself, be considered any decision of title on the merits so as to be adduced as evidence in this case; and when we consider that the whole substantial part of the decision of the Lower Court has proceeded on the argument of the plea in bar, and this remark as to the substitution of the parties appears only as an incidental remark, I have no doubt that the Lower Court did not decide the case on the merits.

Holding then on the grounds above stated that the decision of the Lower Court on the plea in bar is wrong, I would reverse it, and remand the case for re-trial.

Markby, J.—I also think that the decision of the Judge is wrong. The point for our decision is very short, *viz.*, whether, in consequence of the provisions of Section 2, the Lower Court ought not to take cognizance of this suit.

The suit is to recover possession of property which the plaintiff claimed by right of inheritance of one Seeta Ram.

The defendant, who is in possession, claimed the property as the adopted son of Indur Koonwar, who, as sister of Seeta Ram, had been in possession of the property ever since his death.

The Court below has raised a variety of issues—which he calls issues of law and issues of fact; but only one of these issues of law which he tried (except an unimportant one as to the value) is the one which arises under Section 2.

I may observe that Section 3 has also been referred to by the Lower Court, but that seems to be an error.

The Court below has held it right not to take cognizance of this suit, because of the decision in a suit, No. 150 of 1864, in which the present plaintiff was also plaintiff, and Indur Koonwar Dai, the defendant. In that suit this issue was raised: "As "alleged by the plaintiffs, is the assertion "that the plaintiffs are entitled, under the "Hindoo Law current in the Behar district, "to inherit after the death of their ma-"ternal uncle, Seeta Ram, the property left "by him, true; or, as alleged by defendant "Indur Koonwar Dai, is the plea that a "sister's son is not entitled, under the Hindoo Law current in Benares and Mithila, "to inherit so long as she is alive, correct?"

The Court found upon this issue that the plaintiff was not entitled to obtain possession so long as Indur Koonwar was alive, but that he was entitled to that property after her death, and gave the plaintiff a declaratory decree to that effect.

That decree came up to this Court in regular appeal by the defendant, who contended that the suit ought simply to have been dismissed. It appears that that appeal was disposed of on one objection only; and I have not the least doubt that the one objection upon which the appeal was disposed of was that taken in the last ground of the grounds of appeal then filed, *viz.*, that an action merely for the declaration of a contingent right could not lie, and that consequently the decree of the Lower Court was illegal; and I am quite clear that the contention there was that the Lower Court, as was obviously the case, ought not to have gone beyond the question whether the plaintiff's present right to recover possession from Indur Koonwar was proved, and that, on failure of that proof, it had simply to dismiss the plaintiff's suit.

The question is whether the Lower Court is right in saying that that decision bars the cognizance of this suit. I will not attempt to define what is meant by the term "cause of action" in Section 2. I have never yet been able to arrive at any accurate definition of that term, either as used in Section 2 of the Civil Procedure Code or in Section 1 of the Limitation Act; but I think it clear that, at any rate, this suit ought to have been tried, and that its cognizance is not barred if the plaintiff can arrive at a result favorable to himself, without bringing himself in direct conflict with the decision in the former suit. I take it that all that the former suit decided was that the plaintiff had no right of present possession in 1864. It seems to me that it was perfectly open to the plaintiff to allege and to prove, if he could, that since 1864 some new title had accrued to him, and the only question is as to whether he did allege that. If he did, I think he should be allowed an opportunity of proving his allegation. To determine that point, it is not necessary to go beyond the second issue of fact raised in this case. It seems to me that, comparing this issue with the statement made in the plaint, it is clear how the issue arose;

for in the plaint the plaintiff distinctly says that his cause of action arose on the death of Indur Koonwar, and I have no doubt that one question which the plaintiff intended to raise was that, whatever interest Indur Koonwar may have had in 1864, that interest was only a limited interest, that it expired at her death, and at her death the estate came to the plaintiff.

The simple question is, did the plaintiff allege a new title? If he did, I think it would be perfectly possible to arrive at a decision in favor of the plaintiff without in the least raising any conflict with the previous decision in 1864. I think, therefore, that this suit ought to be tried.

This decision leaves entirely open the question which may arise whether, independently of Section 2, some of the questions which arise in this suit have not been settled between the parties, and cannot now be re-opened; but I am at present confining myself entirely to the question under Section 2, *viz.*, whether the cognizance of the suit is barred by reason of the decision in 1864; and I think that, as the plaintiff alleges, not the same title which he alleged in that suit, but one which accrued to him since the death of the defendant in that suit, that it is not so barred.

We think the appellants must get their costs of this appeal.

The 22nd June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Mesne-profits—Right of action—Joint judgment-debtors.

Reference to the High Court by the Judge of the Small Cause Court at Backergunge, dated the 3rd March 1870.

Suttya Nundo Ghosal, *Plaintiff,*

versus

Suroop Chunder Doss and others, *Defendants.*

As a general rule, a suit for wassilat will lie against parties who have been found, in a previous suit for recovery of the land, to have been in wrongful possession, and against them only. If the plaintiff has recovered a decree against several persons as joint wrong-doers, he is not at liberty to single out one or more of them only as defendants in the suit for wassilat.

Reference.—In this case plaintiff sues for mesne-profits.

Defendants in their answer dispute the jurisdiction of this Court on the grounds that howlah rights are brought into question by plaintiff's asserting the howlahdars as rashutdars, and that, while in the case originally instituted for possession of lands of which the mesne-profits are claimed there were 18 defendants in the present suit, the whole claim is made upon three individuals only, among whom one was only a benameedar, another a mere intervenor, and the third alone one of the substantive defendants, who appears in the case, but not to defend. It is the two others who raise the question and plead their non-responsibility.

This Court, after overruling the plea of limitation raised by defendants' pleaders, thinks there remain three more questions of bar to the hearing on the following grounds:—

1st.—That in the High Court's Ruling, *vide* Weekly Reporter, Volume X., page 375, in the case of Ram Pearee Debiâ, it is held that wassilat are damages cognizable by Small Cause Courts when no questions are raised about title. But in this case it appears that such questions unavoidably arise, because in the civil suit for possession plaintiff had asked for khâs dukkhul after setting aside spurious ousut talook and howlah tenures on the strength of which they (defendants) had dispossessed him; while in their decision both the Courts of first instance and appeal, upon hearing only Suroop Chunder Dass, the ousut talookdar's defence, and in the absence of other defendants, gave decree for khâs possession after setting his (Suroop's) ousut talookdary tenure alone, and said nothing about the howlahs of the others. Under such circumstances, howlahdars' tenures appear not to have been affected by the decision of those Courts. Notwithstanding, plaintiff wants to realize mesne-profits from rashutdars, who are actual cultivators by right of khas possession. Before determining the claim for mesne-profits, when I must first see if the howlahs have been virtually set aside, I would thereby go to decide a question of title in immoveable property, which, I think, I have no jurisdiction to do under the above ruling of the High Court, or Section 6, Act XI. of 1865.

The case also requiring long and intricate local investigations (and already a local investigation has been made), under the precedent laid down in page 66 of Sutherland's Small Cause Court References, I think is again not cognizable in the Small Cause Court.

There were 18 defendants as dispossessors in the original case, whereas the mesne-profits are now claimed from two of them only besides the intervenor; and hence also, under the High Court ruling, *vide* Weekly Reporter, Volume XII., page 354, in the case of Shama Sunkur Chowdhry *versus* Sreenath Banerjee, such case cannot proceed in the Small Cause Court.

The judgment of the High Court was delivered as follows by—

Jackson, J.—It appears to me that the questions put by the Small Cause Court in this case introduce a very unnecessary complication into the suit. Whatever may be the design of the plaintiff, it is the duty of the Court to take care that it is not led into investigations, which are not properly its province.

As a general rule, a suit for wassilat would lie against parties who have been found, in a previous suit for recovery of the land, to have been in wrongful possession of that land, and against them only.

It appears to me also that the plaintiff is not at liberty, if he has recovered a decree against several persons as joint wrong-doers, to single out one or more of those persons as defendants in a suit for wassilat, but must bring a suit against the parties who kept him out of possession. What he may do in execution of his decree is a distinct matter, because if a decree for damages has been obtained against several persons, and execution is had against one or more of those persons, those persons against whom execution has been taken out can recover what they have been obliged to pay over and above their just liabilities in a suit for contribution against the remainder.

This, it appears to me, is all the answer which it is necessary to make to the questions put by the Judge of the Small Cause Court.

Glover, J.—I am of the same opinion.

The 22nd June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

House-rent—Execution—Possession.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Kishnaghur, dated the 2nd June 1870.

Poorno Chunder Bose, *Plaintiff,*

versus

Nobin Chunder Ghose, *Defendant,* and Huree Mohun Pramanick, *Intervenor.*

Baboo Khettro Mohun Mookerjee for Plaintiff.

The Intervenor present in person.

P got a decree on a mortgage-bond in the terms of a compromise by *C* and others, to the effect that the amount due should be paid by instalments, the property mortgaged remaining hypothecated. Meantime one *M* got a decree against *C*, and in execution sold part of the property, *viz.*, a house, subject to the lien of *P*, bought it in herself, and sold it again by private sale to plaintiff, who realized rent for some months. When *M* was put in possession, *P* petitioned the Court objecting; but being referred to a regular suit, he executed his original decree, bringing the hypothecated property to sale, and bought it in himself without, however, getting possession from the Court till many months later. Plaintiff now sues the tenant of the house in the Small Cause Court for rent, and *P* intervenes as a party to the suit, claiming the rent which has fallen due from the date of his getting possession.

HELD that the plaintiff is not in a position to maintain the suit; his possession having been put an end to by *P*, whose lien on the property was anterior to the sale under which plaintiff purchased.

Reference.—THIS is a suit for house-rent. Huree Mohun Pramanick got a decree on a mortgage-bond being in the nature of a simple mortgage against Doorga Pershad Chatterjee and others in May 1867, in the terms of a compromise or solehnamah entered into by Doorga Pershad and others, to the effect that the amount due should be paid by instalments, and that the property mortgaged in the bond should remain hypothecated till the instalments were paid. Meantime one Sona Monee got a decree against Doorga Pershad, and in execution of it brought to sale and herself bought in part of the hypothecated property, *viz.*, the house of which the rent is now in dispute, in August 1868, and she got possession from the Court in December 1868. At the time of the sale, there was a notification to the effect that the sale would be made subject to the lien of Huree Mohun Pramanick,

When Sona Monee was put in possession as purchaser at the sale, a petition by Huree Mohun Pramanick, setting forth his title under the decree of May 1867 and objecting to Sona Monee being put into possession, was rejected by the Court which ordered the sale, and petitioner was referred to a regular suit. Sona Monee having got possession sold the house by private sale to plaintiff, who got possession in so far as the occupying tenant attorned to him and paid the rent for some months. Huree Mohun Pramanick did not execute his decree of May 1867 till October 1868, when he brought the hypothecated property to sale, and bought it in himself at auction on 30th October 1868, but did not get possession from the Court till the 12th August 1869, since which he appears to have paid the Municipal tax for the house, but never received any rent from the occupier.

Plaintiff now sues the tenant of the house for rent, and Huree Mohun Pramanick intervenes as a party to the suit, claiming the rent which has fallen due from the date of his getting possession as above, *viz.*, the 12th August 1869.

The question which I have to refer for the decision of the High Court, is whether plaintiff or intervenor is entitled to the rent since the latter date. Subject to the High Court's opinion, I think intervenor is not entitled to the rent which he claims. It seems to me that plaintiff's vendor, Sona Monee, and intervenor have seized, sold, and bought in the same identical thing, *viz.*, the right, title, and interest of the mortgagor Doorga Pershad, and that plaintiff's sale and possession thereunder being prior to intervenor's, the latter is not entitled to oust him from the rent which he has been enjoying. The terms of the decree obtained by intervenor in May 1867 were that the debt due by Doorga Pershad should be paid off by instalments, and that the mortgaged property of which intervenor had never got possession should remain hypothecated till the instalments were paid. That decree did not put the intervenor in possession of the property, nor did it declare that in default of payment he should get possession; and when the intervenor afterwards executed that decree, he did so as an ordinary judgment-creditor, not seeking to obtain possession, but bringing to sale the mortgaged property, and purchasing like any ordinary purchaser the rights of his debtor therein.

Under such circumstances, his remedy, if he wishes to enforce his lien, would seem to be a regular suit against the previous purchaser (plaintiff)—*vide* the Full Bench Ruling, Gopeenath Singh *versus* Sheo Sahoy Singh, 1 Weekly Reporter 315.

The judgment of the High Court was delivered as follows by—

Jackson, J.—From the facts stated the question put to us by the Judge is, whether the plaintiff or the intervenor is entitled to the rent accruing subsequent to the date on which this person, called the intervenor, was put into possession by order of the Court.

This person has been made a defendant, and it seems quite clear that he, being a defendant in the suit, cannot recover a decree for rent against his co-defendant.

On the other hand, the vakeel who addressed us for the plaintiff seems to me to go too far when he contends that the so-called intervenor has no *locus standi* in the Court; but on his being placed upon the record as a defendant, the Court was bound to take notice of the facts which he proves and of the rights which he establishes. According to the statement of the Judge, it seems clear that this intervenor-defendant, Huree Mohun Pramanick, who had a lien upon this property secured by his decree of May 1867, which was anterior to the sale under which the present plaintiff purchased, which was in August 1868, has availed himself of his rights, and caused the right, title, and interest, formerly of Doorga Pershad, and consequently of this plaintiff, to be put up for sale, and has himself become the purchaser, and has been put into possession by the Court in August 1869.

It is not for the Small Cause Court to go into the circumstances under which Huree Mohun Pramanick had been put into possession of this property, or had procured the property to be sold. For the purposes of this suit, I conceive those proceedings must be assumed to have been correct. The present plaintiff who might, as representing Doorga Pershad, have paid off the debt to Huree Mohun Pramanick, and so relieved the property of the lien upon it, did not do so but has allowed it to be sold.

It seems to me, therefore, that Huree Mohun Pramanick in the same manner as he has put an end to the possession of

Doorga Pershad has, in fact, displaced any possession on the part of the present plaintiff; and that the plaintiff, therefore, is not in a position to maintain the suit for rent against the tenants of the property. We think, therefore, that the present suit ought to be dismissed.

The 22nd June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Right of way—User.

Case No. 294 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 11th December 1869, reversing a decision of the Moonsiff of Kulna, dated the 29th July 1869.

Huree Doss Nundee (Defendant), *Appellant,*

versus

Judoonath Dutt (Plaintiff), *Respondent.*

Baboo Komala Kant Sein for Appellant.

Baboo Boykuntnath Paul for Respondent.

A right of passing freely over another's land requires to be kept up by constant use; if not exercised for a considerable period, *e. g.*, 6 years, it cannot be re-established by suit.

Jackson, J.—It appears to me that the decision of the Lower Appellate Court in this case was erroneous, and that it is much to be lamented that the careful and well-considered decision of the Moonsiff was reversed.

The plaintiff, it seems, had purchased a dwelling-house which formerly belonged to one Joy Kristo Nundee; a relative of the defendant Joy Kristo Nundee having died, his widow sold the house which appears to have remained unoccupied for the space of six years. The plaintiff has now discovered that the defendant is building a privy which crosses a pathway leading to a tank, which had formerly been used by the female members of Joy Kristo's family; and he brings his suit asking for possession of the pathway, and for the pulling down of this construction erected by the defendant.

The Moonsiff took evidence, and went to the spot, and he ascertained that the pathway in question lay over ground belonging to the defendant; that in the lifetime of Joy Kristo, and after his death in the time of his widow, the members of both families had been accustomed to use this pathway and a *khirkee* or private door communicating therewith; but that for some years since Joy Kristo's widow had left the place, this pathway had not been used by any person residing in that house. He found that the land belonged to the defendant; and considering that by six years' non-user the plaintiff had lost the right to claim that easement, he dismissed the suit so far as it related to the pathway, but he ordered the defendant to pull down the privy on the ground that it was a nuisance or inconvenience to the defendant, and likely to interfere with his occupation of his own purchased premises.

The plaintiff did not appeal against that part of the decision by which the land was found to be the property of the defendant, but he appealed on the ground that his non-user for six years did not deprive him of the right to the pathway. On that, the Subordinate Judge states: "I think a portion of "the Lower Court's decision is incorrect and "erroneous, for the existence of a pathway "the use whereof is contested has been "admitted by all parties as well as by the "Lower Court on personal observation by the "Lower Court. That only defendant and "not plaintiff used this pathway, defendant "has failed to satisfy the Court by any "particular evidence. Besides, I see no "law providing that the non-user of a path-"way for six years shall destroy the right to "use it. And as regards the judgment of "the Lower Court holding the privy to have "been unjustly made by defendant on that "pathway, no appeal has been taken on "this point."

Now, that which the Moonsiff found was, not that the previous occupants of the house purchased by the plaintiff had a right of way over the land in question, but that when that house was occupied by a family nearly related to that of the defendant, the members of both families were accustomed to go over that path. This, it seems to me, is far from implying the right of way claimed by the plaintiff; and in this point of view the observation made by the plaintiff's vakeel is not altogether out of place, namely, that the widow of Joy Kristo did not affect to convey to the plaintiff any such easement

as this right of way in question. Presumably, I think, it was a license given to the family of Joy Kristo by reason of their relationship to the defendant. But whether this be so or not, it seems to me that a right of the description claimed by the plaintiff, namely, of passing freely over the land of the defendant, is one which requires to be kept up by constant use; and if the plaintiff discontinues the use of such right, if there were any, for the space of six years, I think he is not in a position to maintain a suit to re-establish it

I think, therefore, that the decision of the Moonsiff in this case was reasonable and right, and that the Subordinate Judge has reversed it on insufficient and invalid reasons. I think the decision of the Lower Appellate Court must be set aside with costs.

Glover, J.—I concur.

The 23rd June 1870.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Hindoo Law—Sale of ancestral property—Consent of co-sharers—Legal necessity.

Case No. 342 of 1870.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 16th November 1869, reversing a decision of the Officiating Moonsiff of Pooree, dated the 26th July 1869.

Juggurnath Khootia and others (Defendants), *Appellants,*

versus

Doobo Misser (Plaintiff) and another (Defendant), *Respondents.*

Baboo Umbika Churn Banerjee for Appellants.

Baboo Mohendro Lall Mitter for Respondents.

Where the validity of a sale of ancestral property is objected to on the ground that it was effected without the consent of all the members of the joint Hindoo family, the objection can only be made by the member who did not consent.

A member of a Hindoo family may mortgage his undivided share of the joint property without the consent of his co-sharers, in order to raise money for the benefit of the family, *e. g.*, to pay debts or liquidate demands under legal necessity.

Glover, J.—The plaintiff in this case, one Doobo Misser, sued to recover possession of a dwelling-house which he had acquired by purchase from Kripa Sindhoo on the 26th June 1860. His kobalah is attested by Juggurnath, the son, and Guddadhur, the grandson of Kripa Sindhoo. The plaintiff alleges that, from the date of his purchase, he had allowed Juggurnath and Guddadhur to remain in the house, paying him rent under a kubooleut. His cause of action is said to be the sale, in execution of a decree, of this dwelling-house as the property of Juggurnath, notwithstanding the plaintiff's objection. He, therefore, brings this suit to have it declared that he, Doobo Misser, has purchased the property.

The defendants, who are the sons and grandsons of Kripa Sindhoo or their representatives, and one Lokenath Khootea, who is the purchaser from Juggurnath, alleged that the sale to the plaintiff was a simple *benamee* transaction in fraud of creditors; that the property has all along remained in the family, which is a joint family governed by the Mitakshara law; and that Kripa Sindhoo, as being a member of a joint family, had no right under that law to make away with any of the family property without the consent of all the members.

The first Court found against the plaintiff and dismissed the suit, holding that the sale was a *benamee* and fraudulent one; that the kubooleut which the plaintiff alleged the defendants had given to him was fabricated; and that the defendants were in possession in their own right. The Judge, however, reversed this decision, considering it clearly proved that the deed of sale was genuine; that consideration had passed under it; that the members of the family had, by attesting that deed of sale before the Registrar, shown their acquiescence in the deed; that the sale had been made for such purposes as the Hindoo Law allowed; and that the plaintiff was, therefore, entitled to recover this property.

It is urged in special appeal, although the point has not been strongly pressed before us, that the Judge was wrong in considering the attestation of Juggurnath and Guddadhur on the deed of sale as an estoppel preventing their contesting the

genuineness of it in this suit. But the Judge has done nothing of the sort. He has merely said that the attestation of the kobalah by these witnesses, considering that the kobalah recites the reason why the sale was made, and that these witnesses, having full knowledge of the contents of that instrument, appeared before the Registrar and attested it; that that fact was enough to prevent them now putting forward the plea that it was not executed. This is a different thing from saying that it stops them from making any defence in the present suit.

Another objection taken was that inasmuch as there was another member of the family, one Mokoond, likewise a grand-son of Kripa Sindhoo, who is not shown to have consented to the sale, therefore, under Hindoo Law, as laid down in the case* reported in III. Bengal Law Reports, page 31, Full Bench Rulings, the sale is invalid.

Now, in the first place, we observe that this Mokoond, although made a defendant, did not put in an appearance or make any answer to the suit; and, in the next place, whatever objections there might be as to the validity of the sale on the ground that one of the members did not consent to it, that objection, of course, could only be made by the member who did not consent to it. It is quite clear that the present defendants, special appellants, Juggurnath and the representative of Guddadhur, who are proved to have consented to the sale, are not in a position to make the objection that Mokoond did not consent.

Then, with regard to the Full Bench Ruling quoted, it does not appear to go by any means to the length which is contended for by the special appellant's pleader. No doubt, it says that a number of a joint Hindoo family cannot, without the consent of his co-sharers, mortgage, and, of course, *à fortiori*, cannot sell his undivided share in the joint property in order to raise money on his own account: but there is a special exception made in that case where the sale is not made on his own account, but for the benefit of the family to pay debts; for instance, as to liquidate such other demands as the Hindoo Law makes it necessary to liquidate. In this case, the Judge has found from the recitals in the deed of sale and from the evidence that there was a legal necessity for making this alienation. Therefore, the ruling does not apply.

On the whole, we think there is no reason to interfere with the decision of the Judge, and we dismiss the appeal with costs.

Mitter, J.—I concur in rejecting this appeal with costs.

* 12 W. R., Full Bench, p. 1.

The 23rd June 1870.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Remand—Right of suit—Sections 2 and 110, Act VIII. of 1859.

Case No. 347 of 1870.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 16th November 1869, affirming a decision of the Moonsiff of Ghatal, dated the 17th June 1869.

Rughoonath Singh (Defendant), *Appellant,*

versus

Ram Coomar Mundul (Plaintiff), *Respondent.*

Baboo Nubo Kishen Mookerjee for Appellant.

No one for Respondent.

A suit in which the plaintiff obtained a decree was appealed and resulted in a remand: on the remand, no one appeared either for plaintiff or defendant, and the suit was dismissed on default.

HELD that the plaintiff was not precluded by Section 2 of the Code of Civil Procedure from bringing a fresh suit.

Glover, J.—THE point taken in this special appeal is that the suit is barred by Section 2, Act VIII. of 1859, it being one on a cause of action which had been previously heard and determined by a Civil Court.

It appears that on a former occasion, the plaintiff sued the defendant and got a decree in the Court of first instance. On appeal, however, to the Judge, the case was remanded, and on the remand no one having appeared either for the plaintiff or the defendant, the suit was dismissed on default. This is the case which is relied upon by the special appellant's pleader as barring the plaintiff's suit.

Now, it is quite clear by Section 110, Act VIII. of 1859, that a case dismissed, under these circumstances, would allow of the plaintiff's bringing a fresh suit, unless precluded by the rules for the limitation of actions. And it is not contended that the plaintiff is so precluded. Even if it be supposed for the sake of argument, as the pleader for the special appellant has contended, that Section 110 only refers to original cases and not to cases remanded, still in no case could Section 2 of the Act apply, inasmuch as that Section refers to causes of action which have been *heard and determined* by a Court of competent jurisdiction in a former suit between the same parties. In this case, it is clear that there was no case determined at all. It was simply dismissed for default of appearance of the parties.

The special appeal is dismissed, but without costs, as nobody appears for the respondent.

The 24th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

Wassilat—Cause of action—Limitation—Allegation.

Case No. 15 of 1870.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 22nd September 1869, affirming a decision of the Subordinate Judge of that District, dated the 23rd April 1868.

Luckhee Kant Doss (Plaintiff), *Appellant*,

versus

Deen Dyal Doss and others (Defendants), *Respondents*.

Baboo Kalee Mohun Dass for Appellant.

Baboo Bungshee Dhur Sein for Respondents.

Where a party is dispossessed of immoveable property to which he is entitled, the cause of action as to wassilat accrues to him on the date on which he would, but for the fact of dispossession, have received such wassilat; and he is entitled to recover on any cause so accruing within 6 years next preceding the commencement of his suit.

A plaintiff in such a suit is not bound by an allegation as to the extent of the land or the amount of the wassilat, which he made in any previous suit.

Jackson, J.—The plaintiff, special appellant, urges two grounds of special appeal, both of which appears to me to be valid. The first ground is that the Court below has erroneously decided the question of limitation.

The suit was for wassilat. It was commenced on the 12th Assin 1274, corresponding with September 1867; and the wassilat claimed were for a period of 5 years 5 months and 18 days, commencing with the commencement of the year 1263.

The Judge on appeal has held, in concurrence with the opinion of the Court of first instance, that the suit in respect of wassilat for the 5 months and 10 days was barred by limitation; and he conceives that the limit of wassilat which the plaintiff is entitled to recover would be from the 10th Assin 1268 or 26th September 1861.

In respect to a plaintiff who has been dispossessed from immoveable property to which he was entitled, the cause of action as to wassilat accrues, it appears to me, on the date on which the plaintiff but for the fact of dispossession would have received such wassilat; and when, consequently, they have been or might have been received by the defendant, and the plaintiff is entitled to recover on any cause of action so accruing at any time within six years next preceding the commencement of the suit, that is, in this case on or after the date before mentioned in the year 1861 or 1268. It would, of course, depend upon local custom what proportion of the yearly rents are paid at particular times; and if, therefore, on or after the 12th Assin 1268, the rent of the whole year or any particular kists of the rent would have been receivable, the plaintiff would have been entitled to recover accordingly.

The second point raised is that the Judge, overruling the report of the Ameen of the Civil Court, which report, however, he considers entitled to credit, has cut down the claim of the plaintiff to wassilat, by reference to the quantity of land which he stated himself to be suing for in a previous suit. It has been contended before us that the plaintiff would not be at liberty to recover either more wassilat, or wassilat upon a larger quantity of land than he had specified in his plaint, or in previous proceedings.

I think it quite clear that the plaintiff is not bound by an allegation as to the extent of the land, or as to the amount of the wassilat which he made in any previous suit. Such allegation by a party out of possession must be only conjectural; and even in respect to the claim as stated in the plaint with which the present suit commenced, it appears to me that that would be subject to the result of further investigation.

The Court Fees' Act, Section 11, makes an express provision for the case of a party who is found upon enquiry to be entitled to a greater amount of mesne-profits than he has claimed in his plaint. It says that "in suits for mesne-profits, if the profits decreed are in excess of the profits claimed, "the decree shall not be executed until the "difference between the stamp-duty actually "paid, and the stamp-duty which would "have been payable had the suit comprised "the whole of the profits so decreed, shall "have been paid to the proper officer." And the Stamp Act of 1867 contained a similar provision.

Of course, in like manner, if the amount of wassilat had been left for enquiry in execution of the decree, and in such execution it be found that the amount recoverable was in excess of what had been claimed, the plaintiff would be entitled, on paying in the balance of stamp-duty, to have that amount levied from the defendant.

I think, therefore, that the decision of the Lower Appellate Court was erroneous on both these points; and the case must go back to that Court, in order that the Judge may find what the amount due to the plaintiff is, upon the investigation and evidence had in the present case, and with reference to the dates which I have stated.

I should add that Baboo Lulleet Chunder Sein appeared on behalf of one of the defendants, Mohesh Chunder Goopto, and states that he has been served with notice of this appeal, and he claims his costs. It seems that this defendant was absolved from liability in the first Court, and that decision was not disturbed by the Lower Appellate Court. Probably his being served with notice was an oversight; but, if so, the appellant, who has made him a respondent, must, of course, take the consequences and pay his costs.

Glover, J.—I am of the same opinion.

The 28th June 1870.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Lessor—Lessee—Assignment—Dispossession.

Case No. 217 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Gya, dated the 10th November 1869, reversing a decision of the Deputy Collector of that District, dated the 25th June 1869.

Gour Dyal Singh (Defendant), *Appellant,*

versus

Shaikh Hubeel Hossein (Plaintiff), *Respondent.*

Mr. R. T. Allan for Appellant.

Mr. R. E. Twidale for Respondent.

Where a landlord assigns his right to another, his lessee cannot put an end to the obligation to pay rent, if, after becoming aware of the arrangement, he made no objection. If the assignee dispossesses the lessee, he cannot sue the latter for rent.

Markby, J.—I am not altogether without doubt in this case; but I think that, on the whole, we should be hardly justified in affirming the decision of the Court below, which, although right in one important part, seems to be erroneous in another. I quite agree in the view which the Judge below has taken that, under the circumstances of this case, the first lessee could not put an end to the obligation to pay rent by an arrangement made between the plaintiff and the landlord, after he became aware that the landlord's right had been assigned over to another person—and he made no objection to that arrangement; but the objection was raised in the second issue as defence, that the plaintiff who now sues for rent had got into possession of the lands, and the first Court found, on the evidence of the tehsildar of the superior landlord, that that was so. It seems to me, therefore, that the Judge was wrong when he says that, unless the assignee dispossessed him, the mere fact of non-possession will not protect the defendant against the plaintiff's claim, and that the plea of non-possession cannot bar the plaintiff's claim. If anybody else dispossessed the defendant, or he surrendered possession to any other persons

than the plaintiff, then probably the plaintiff might sue for rent; but if the plaintiff dispossessed him, then the plaintiff cannot sue for rent.

It is urged by Mr. Twidale for the special respondent, that the Lower Appellate Court has found the defendant to be in possession. If that were so, it would, no doubt, be unnecessary to remand the case; but that is a point on which I do not feel myself satisfied. I think that, before a Judge reverses the finding of the Lower Court, he must pay very great attention to the facts; and I cannot say that that has been done in this case, when the Court says either that that question does not arise at all, or, if it arises, that it is immaterial. This makes it scarcely probable that the point has received the consideration which it requires.

I think that this case must go back to the Lower Appellate Court to find whether the plaintiff was, as alleged by the defendant, in possession of the estate since 1275. If it be found that he was not, the decree of the Lower Appellate Court will stand. If it be found that he was, then the suit will have to be dismissed.

Glover, J.—I also think that the case must be remanded.

The 29th June 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Application for review—Duty of Court.

Case No. 45 of 1870.

Application for review of judgment passed by the Hon'ble Justices J. B. Phear and Dwarkanath Mitter, on the 14th February 1870, in Special Appeal No. 2588 of 1869.

The Collector of Tipperah on behalf of Government, Defendant (Appellant), *Petitioner,*

versus

Mussamut Mofeezoonissa Bibee, Plaintiff (Respondent), *Opposite Party.*

Baboo Onookool Chunder Mookerjee for Petitioner.

Baboo Hurry Mohun Chuckerbutty and *Moulvie Murhumut Hossein* for Opposite Party.

HELD (by Phear, J.) that an application for review ought to be rejected, if no matter is brought to notice which might not have been brought before the Court when the appeal was heard.

HELD (by Mitter, J.) that the Court is bound to administer the law as it is, and to take notice of a Full Bench decision applicable to the case, whether it is referred to or not by the pleaders.

Phear, J.—I THINK that this application for review ought to be rejected, because it appears to me that no matter is now brought to our notice for the purpose of inducing us to alter our view, which might not have been brought before us, and fully argued and discussed when the appeal was heard.

I desire to express no opinion whatever as to what bearing the authority, to which Baboo Onookool referred, might have upon the point of law which was involved in the judgment passed by this Bench on special appeal.

Mitter, J.—I am not prepared to say that the ground taken by the petitioner, is not a proper ground for review of judgment—if it is otherwise valid. Whether the Full Bench decision, referred to by the petitioner, was cited before us at the first hearing or not, does not appear to me to be very material.

The Court was, in my opinion, bound to administer the law as it was, whether the pleaders who argued the case on that occasion had pointed out that decision or not.

I express no opinion as to whether the decision, referred to by the petitioner, is applicable to this case or not. I should like to hear further argument on that point. But if that decision has any application to the present case, it was the duty of the Court to take notice of it, whether it was referred to or not by the pleader who argued the case on the first occasion.

Phear, J.—As my learned colleague intimated a desire to hear further argument from the petitioner, Baboo Onookool has addressed us on the merits of the application for review; and after hearing him upon the merits, I have only to remark that I have nothing further to add to the observation which I have already made. I am of opinion that the present application must be rejected with costs.

Mitter, J.—Having now heard the pleader for the petitioner upon the merits of this application, I am of opinion that this suit *was* a suit for damages within the meaning of Section 6, Act XI. of 1865. The Lower Appellate Court has distinctly found that the payment was not a voluntary payment; and as the facts on which this finding has been arrived at cannot be disputed, I have no doubt in my mind that this was a suit for damages. The fact that the plaint did not expressly state that the plaintiff was suing for damages does not make any difference.

The application is rejected with costs.

The 29th June 1870.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Landlord's title—Tenant's obligation—Rent.

Case No. 281 of 1869 under Act X. of 1859.

Regular Appeal from a decision passed by the Officiating Collector of Howrah, dated the 16th September 1869.

Messrs. Burn and Co. (Defendants), *Appellants,*

versus

Rusho Moyee Dossee (Plaintiff), *Respondent.*

Messrs. G. C. Paul and *M. L. Sandel* for Appellants.

Mr. R. T. Allan for Respondent.

As a general rule when a person takes land from another and pays rent to him, he cannot deny the title of his landlord; but he is not precluded or stopped from proving, when sued for rent, that that title has expired. He is not warranted, however, in refusing to pay rent simply on the apprehension that he may be called on to pay the rent by a party who is said to have obtained a decree against the landlord for the lands. Even if a decree has been passed against the person from whom the landlord derives his title, he is entitled to recover his rent until the decree is put in force.

Kemp, J.—This is a suit brought by the authorized agent of Rusho Moyee Dossee for the recovery of arrears of rent from May 1867 to May 1869, amounting with interest to Rupees 5,525-15-10. The plaintiff's agent clearly and distinctly sets out the title under which Rusho Moyee Dossee claims, namely, that at a sale held by the Master of the late Supreme Court she purchased this property, and that, having obtained due possession thereof, she has been holding and enjoying possession, partly in khas possession and partly by the settlement of temporary tenants; that out of the lands thus purchased, the defendants Messrs. Burn and Co. are in possession, on payment of rent at a yearly ticca jumma of Rupees 2,368-5, of about 14 beegahs of land more or less; that the above sum of Rupees 4,933-15-9 on account of principal, and Rupees 592-0-1 on account of interest, being due by the said defendants, and notwithstanding repeated demands, the same not having been paid, the present suit is brought.

The defendants, Messrs. Burn and Co., first take objection to the non-specification of the boundaries of the disputed land; *2ndly*, they aver that they never obtained any settlement from Rusho Moyee Dossee; that they never tendered any kubooleut to her, and consequently that they are not bound to pay her any rent; *3rdly*, that some time ago, they obtained a jotedaree settlement from Rajah Poorno Chunder Roy; that they paid rent for these lands first to him and subsequently to Sreemutty Dossee after her husband Motee Lall Seal's forcible entry into the said lands; that latterly, without specifying any date, Poorno Chunder Roy has obtained a decree from Her Majesty's Privy Council, and that he is now trying to obtain possession under that decree; and, *4thly*, that they have never executed any kistbundee or instalment-bond in favor of the plaintiff, nor even entered into any engagement with her for any thing; and that, under such circumstances, a claim for interest upon lapsed instalments can by no means be sustained.

The Officiating Collector of Howrah, Mr. Makgill, in a very short decision, has decreed the plaintiff's case.

The first point taken in appeal raises the question of the jurisdiction of the Court of first instance; the point being that inasmuch as the lands for which rent is claimed are not lands granted for agricultural purposes, but for making bricks, the Collector had no jurisdiction in the matter. This objection was not taken in the first Court, and the defendants have not given any proof for what purpose the lands were originally granted to them. They have not put in their

pottah, nor have they shown by any evidence for what purposes these lands were granted, or to what purposes they have been appropriated. Mr. Paul for the defence has relied upon a letter of Baboo Ashootosh Dhur, the attorney for the plaintiff. It appears that the Baboo in acknowledging the receipt of rent from the defendants on behalf of his principal Rusho Moyee Dossee "unconditionally," made use of an expression to the effect that the rent was on account of "your brick lands." Mr. Paul contends that as Baboo Ashootosh Dhur was employed for the purpose of receiving the rent on behalf of the plaintiff, and as this letter has been put into his hands and he has admitted it, the letter becomes evidence; and this Court must hold, on this incidental remark in the letter of Baboo Ashootosh Dhur, that the lands are lands not given for agricultural purposes, and therefore that the Collector had no jurisdiction. It appears to me that this Court will assume that the Collector had jurisdiction until the contrary be shown.

Now, with the exception of this remark of Baboo Ashootosh Dhur, there is no evidence whatever that the land was given for any other purposes but for agricultural purposes. The written statement of the defendants themselves would seem to support this view. They do not say that the lands were given for the purpose of making bricks; but they state, as we find on reference to their vernacular written statement, that they were given as jotedaree lands. Now, the usual meaning of that term is that the lands were given for purposes of agriculture. We have many instances in our experience to show, that when a ryot wishes to plead jurisdiction, he states that the lands were given to him for building purposes; or, as in the case of Mr. Blumhardt, for the purpose of building a church; or, as in the instances quoted by the learned Counsel, for the purposes of digging mine or of stone-quarrying. But, in this case, nothing of the kind is pleaded. It is simply said that the land was taken for jotedaree purposes, and nothing further. Moreover, the agent of the plaintiff was examined by the pleader for the defendant, and he also, on a question put to him, described the land as chur land. Nothing was elicited from him in cross-examination as to these lands being leased for the purpose of making bricks, or for any other purposes than those of agriculture.

I am, therefore, of opinion that this question of jurisdiction, which is raised in this Court for the first time, is an after-thought cannot be entertained.

We now come to the question whe looking to the fact of the defendants ha attorned to Rusho Moyee Dossee, and ha paid rent to her on former occasion admitted, they are, on this occasion, en to deny the title of their landlord. as a general rule, there can be no doub when a person takes land from anothe pays rent to him, he cannot deny the ti his landlord; but he is not preclude estopped from proving, when sued for that the title of his landlord has expired nothing of the kind has been done or attempted in this case. It is admitte the defendants that they paid rent to R Moyee, who is the real plaintiff in this in her representative character as the ve of Sreemutty Dossee. Now, there is no d that this is *primâ facie* evidence of her the rightful landlord, and that as suc defendants are bound to pay rent to This evidence, of course, may be rebut but it has not been rebutted. On the con it appears to me that the defendants acted simply on an apprehension that may be called upon by Rajah Pe Chunder Roy, who is said to have obt a decree for these lands in Her Maje Privy Council against Sreemutty Do from whom the plaintiff purchased, to the rent twice over; and the object o argument of Mr. Paul, a very inge argument no doubt, seems to my min have been to obtain some expressio opinion from this Court, that his cl would be entitled to be indemnified, i event of their having to pay this re second time after execution of the de which is said to have been obtained in Privy Council by the Rajah. It is clear that the Rajah, if he has obtained decree from the Privy Council, of w there is at present no evidence on the re as the defendants, although they had a time to do so, have not produced it in Court below or even in this Court, has at all events executed or even, as far as can see from the record, made any atte to execute that decree.

It may be, as suggested by Mr. Allan, some compromise has taken place; o may be that the lady who is the plai in this case is only the Rajah himsel another form; but be that as it may, decree not being before the Court, t being no evidence that the Rajah has obt

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ed that decree which at all events has not been executed; and it being clear that the defendants have attorned to this lady and acknowledged her title as landlord, they must, until they show that her title has expired, pay rent to her. I see no reason to interfere with the decree of the Lower Court which is a correct decree; and I, therefore, affirm that decree, and dismiss this appeal with costs.

Jackson, J.—I concur with Mr. Justice Kemp in holding that, on the merits, the plaintiff is entitled to recover this rent from the defendants.

It seems to me that, under ordinary circumstances, the defendants would have to pay this rent to the plaintiff; and the defendants themselves even do not deny that they would have had to do so. They paid the rent for former years to the plaintiff, and they would, under ordinary circumstances, have to continue to pay the rent to her. But they contend that there has been a law-suit regarding these lands, and that a decree has been passed by the Privy Council against the person from whom the plaintiff acquired these lands; that that decree relates to these lands; and that, under such circumstances, the rights of the present plaintiff have altogether ceased, and the plaintiff cannot recover rent from them. We have not that decree upon the record. All we know about it is contained in one sentence in the examination of the plaintiff's attorney, to the effect that there has been some decree about these lands. It is impossible to say what is contained in that decree. In addition to that, it is not shown that the decree has been executed; and I am not prepared to hold that the rights of the present holder have ceased, until that decree is executed. I think that until that decree is executed, the present plaintiff is quite right in taking every measure in her power to recover any rents due upon the lands or upon any portion of these lands. It has been frequently held in various decrees of this Court, that, if a party so situated should neglect to make any collections of rents due on the lands, he would thereby become liable himself to pay that money which he had neglected to recover. Under such circumstances, I think that, even if a decree has been passed against the person from whom the plaintiff derives her title, the plaintiff would be entitled to recover these rents until that decree is put in force. The defendants have not urged any other ground against the plaintiff's title to recover these rents.

On the question of jurisdiction, my impression is that there is jurisdiction in the Revenue Courts. It is said that there is no jurisdiction, because of a statement in a letter of the plaintiff's attorney, alluding to these lands as the brick lands of the defendants. I think Mr. Paul, in his argument on the point of jurisdiction, has gone far beyond what the Judges intended in the cases quoted by him when he said that, for whatever purpose that land was taken, if it was used not for agricultural purposes but for any other purpose such as brick-making, the rent could not, under these circumstances, be sued for in the Collector's Court. There is nothing in that statement of the plaintiff's attorney to show for what purpose this land was taken, whether it was taken specially for brick-making or for what purpose it was taken. It is possible that it may have been taken for brick-making purposes; and it may be that it was taken without any specific agreement. It does not appear, as far as we can see from the record, that there has been any agreement at all. No pottah has been filed, and there is no statement or allegation as to the existence of any agreement. There was no contest as to jurisdiction in the Court below, and the ground on which the jurisdiction is contested here is, in my opinion, untenable.

Upon the whole, I would not interfere with the decision of the Lower Court, and would dismiss the appeal with costs.

The 29th June 1870.

Present:

The Hon'ble G. Loch, and Sir Charles Hobhouse, *Bart., Judges.*

Limitation—Cause of action—Profits—Interest.

Case No. 662 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Dinagepore, dated the 25th February 1870, modifying a decision of the Moonsiff of Shibgunge, dated the 27th September 1869.

Bibee Heerun and another (two of the Defendants), *Appellants,*

versus

Bibee Mariun (Plaintiff), *Respondent.*

Baboo Bykuntnath Paul and *Moulvie Murhumut Hossein* for Appellants.

Baboo Rajendronath Bose for Respondent.

Plaintiff having received from her brothers a sum as an equivalent for her share in her father's estate, made over the money to one of the brothers (*E*) to be invested in the common stock for the purposes of trade; it being agreed that she was to receive her proportion of the profits. A few years after this *E* died, and then a disagreement occurring in the family, resort was had to arbitration. The arbitrators found that certain sums were due to plaintiff and her sisters by the three brothers, but they were unable to settle how much. Plaintiff being unable to recover her due, brought this suit for principal and profits.

HELD that plaintiff's cause of action arose when she made her demand for the money after the arbitration award, and that limitation would run from no earlier date.

HELD that in the absence of the accounts (which were in the hands of the defendants) or of other evidence to show the profits of the business, the Judge was obliged to award interest at 12 per cent. per annum.

Loch, J.—IN special appeal, the following grounds have been taken against the judgment of the Court below:—

First.—That the suit is barred by limitation.

Secondly.—That the arbitration award upon which the Judge has gone is inadmissible in evidence.

Thirdly.—That if the arbitration-award is admissible in evidence, the Judge has misread it as regards the accounts being in custody of the special appellant.

Fourthly.—That the Judge should not have awarded interest or profits upon the principal sum.

And *fifthly.*—That the Judge has failed to come to any decision upon the allegation put forward by the special appellants, that there was a conspiracy between their co-defendant Hemayetoollah and the plaintiff.

On reference to the judgment of the Court below, we find that the plea of limitation was taken, and the Judge found against the special appellants, and towards the end of his judgment the Judge writes thus:—

"The plea in bar on the ground of limit-"ation is also untenable, as the plaintiff's "claim is not in the nature of a loan but a "deposit, to which Clause 9, Section 1, Act "XIV. of 1859, would not apply."

And it is urged by the pleader for the special appellants, that this is a case which comes either under that Clause, *i. e.*, Clause 9, or else under Section 4 of Act XIV. of 1859.

To dispose of this question, we may state what are the circumstances of this case. The plaintiff as the daughter of one Oojan Mundle was entitled to a share of her father's estate. She agreed to take from her brothers a sum of 450 rupees, as an equivalent for her share in the estate. She received the money, but on the proposal of her brother Enayetoollah, now represented by the special appellants and other co-defendants, she made over this sum to him to be invested in the common stock for the purposes of the trade and it was agreed that she was to receive her proportion of the profits. This occurred so far back as 1266. In 1273 Enayetoollah died; and another brother, Deanut, appears to have left the country. In 1274, there appears to have been a disagreement in the family, and steps were taken for a separation; and certain members of the family, not including the plaintiff, appointed certain parties to arbitrate regarding their shares of the paternal property, and these arbitrators drew up an award on the 25th Falgoon 1274; and in disposing of the questions that were put before them by the members of the family, they found that, on looking over the books of the family, there were certain sums of money due to the plaintiff as well as to her other sisters; and they held that the three brothers were liable to make good the sums, but they were unable to settle what the amounts of those sums were. The plaintiff, on the allegation that she has been unable to realize this sum, has brought the present suit claiming to recover the principal 450 rupees with a further sum equal in all to 1,000 rupees, as representing the principal with profits.

The defendants, special appellants, before us plead that the suit is barred by limitation; they deny the fact of the deposit-money and they allege that the action is brought by the plaintiff and their co-defendant in collusion with a view to injure them.

In support of the plea of limitation, it has been urged that this money was a loan payable on demand, and that it was of the nature of a simple contract; and that such being the case, the period of limitation would run from the date on which the money was paid over to Enayetoollah, and consequently the plaintiff is out of Court.

In support of this allegation, certain cases from English books with regard to promissory notes or receipts bearing interest have

been quoted. But we think that in disposing of this case, it is necessary to look to the surrounding circumstances; and we find that it was, in fact, money given into the common stock for the purposes of trade. It was agreed, so the plaintiff's statement sets forth, that a separate account should be opened for each of the sisters of the family, showing what was the share of the profits to which each was entitled; and she adds that it was agreed when she asked for the money, the principal should be returned to her with any profits that might be due. So long as her brother Enayetoollah was alive, she was satisfied that the money was in safe custody and never asked for it. But after his death when some dispute arose in the family, and after the arbitration-award was made, she did apparently make a demand for the money, and not obtaining it, she has brought this suit. Now, we think, that the demand made so late as the year 1274, or somewhere about that time, was the cause of action, and that it did not arise at the time when she made over the money to her brother in 1266, and the law of limitation will run only from 1274, and not from an earlier date. This being the case, we think that the plea of limitation must fall to the ground.

With regard to the arbitration-award, it may be observed that was admitted in the first Court without any objection being raised against it; nor do we find that any objection was taken in the Lower Appellate Court to its being used as evidence, and we think that it is now too late to raise the objection.

As to the allegation that the Judge has mis-read the award when he says that the award makes the defendants the custodians of the account papers, it is to be observed that the Judge apparently refers to a statement in the award, to the effect that the accounts were with Enayetoollah, and that he was to make them over to the ladies, defendants in this suit. On examination before the Court, the co-defendant alleged that the accounts were with the ladies defendants—they on their part denied that the papers were with them. Even if the Judge's reading be not quite correct, we do not think that this is a ground for admitting a special appeal.

On the question of collusion between the co-defendant and the plaintiff, we find that the first Court has decided this point against the special appellants; that they made this one of their grounds of appeal, but they have been unable to show that they pressed the question before the Lower Appellate Court, or asked the Judge to make an issue upon this point; and therefore any omission on the part of the Judge to come to a decision upon this point arose from their own neglect, and cannot be any ground of special appeal.

With regard to the sum which has been awarded, it appears that the Judge has awarded the principal with interest at 12 per cent. per annum. Had the defendants produced any evidence to show what were the profits of the business, the Judge would have been able to determine what the plaintiff was entitled to. But in the absence of the accounts, which were in the hands of the defendants, either of the special appellants or of the co-defendants—it matters not so far as the plaintiff is concerned—the Judge in awarding this sum was obliged to do it arbitrarily as a Jury would do in assessing damages; and we think that the judgment upon this point also must stand.

In this view of the case, I think that the special appeal must be dismissed with costs.

Hobhouse, J.—I will only add a few words on the question of limitation. The Section on which the special appellants rely is Clause 9, Section 1 of the Limitation Act, and that prescribes the following period of limitation, namely—"The period of three years from the time when the debt became due, or when the breach of contract in respect of which the suit is brought first took place" * * *. Admitting, therefore, for the sake of the argument, that, under the circumstances of this case, the law applicable is that to be found in Clause 9, we must either consider the money as money lent, and the cause of action, therefore, to have accrued when that money became due; or we must consider that there was a contract, and that the cause of action arose when there was a breach of that contract. The contention is that the contract in this instance is of the nature of a simple contract, such as a promissory note or receipt for money payable on demand with interest. I think it is quite impossible to say that the contract before us is of that nature. In a contract for a sum of money payable on demand with interest, there is not only a specific sum of principal named, but there is also a specific sum of interest named, and the sum is known at the

very moment when the demand is made. But here the facts are entirely different. The money was lent to be laid out in trade, and the sum to be re-paid was the principal, if any principal were left, plus the profits, if any profits there were, of the trade. Therefore it was quite impossible when there was an immediate demand made of the money with the profits, that there could have been any specific sum known at once to be due or not. It would be necessary to go into accounts, and to see upon those accounts what had become of the principal, and whether there was any interest, and what interest; it might be that there was no principal left; it might be that there was only some principal left; it might be that there was no interest; it might be that there was a great deal or very little interest; and according to the terms of the contract and a reasonable interpretation of those terms (there being an absolute and complete choice left to the person who took the money to invest it as he liked), if after such investment, even the whole or a part of the principal had been lost, or a part or a very little interest or no interest had accrued; still the person who lent the money could only recover what was left of the principal or interest—it might be none or it might be a great deal. It seems to me, therefore, that in such a case there is a very great and obvious distinction between such a contract and a contract upon a promise payable on demand with sum certain and interest certain.

If, then, we take it that the period of limitation did not begin to run until there was a breach of contract, there is obviously upon the agreement between the parties no breach until the person who had lent the money demanded it, and the person who had received it, and the person who advanced it had refused to re-pay, or had, as in this case, disavowed the transaction altogether.

If, again, we take it to be money lent, and the period of limitation is three years from the time when the debt became due, it is impossible, I think, to say that the debt could have become due until, under the terms of the contract, it was demanded, because the person who had to receive the money had full power, under the terms of the contract, to use it in any way he liked until it was demanded of him, and even then he would not have been bound to deliver up that exact sum, and indeed any sum at all, until the accounts had been delivered and had been agreed to or otherwise determined between both parties.

I think, therefore, that taking the period of limitation to be that prescribed by the Section upon which the special appellants rely, that even in that case the suit is not barred by the application of the statute of limitation.

On the other points I entirely concur with Mr. Justice Loch.

The 1st July 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Adding defendants to the record—Jurisdiction—Appeal—Sections 73, 350, and 363, Act VIII., 1859.

Case No. 218 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 18th December 1869, reversing a decision of the Subordinate Judge of that District, dated the 19th September 1867.

Ridhnath Sahoy (one of the Defendants), *Appellant,*

versus

Gopee Sahoo and others (Plaintiffs), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Kishen Succa Mookerjee* for Appellant.

Baboos Unnoda Pershad Banerjee and *Anund Chunder Ghossal* for Respondents.

The action of the Court under Section 73, Act VIII. of 1859, is a matter of discretion, and, upon a true construction of Sections 363 and 350, not a matter of appeal; but an appeal will lie after decree against interlocutory orders if they affect the decision on the merits or the jurisdiction of the Court.

Markby, J.—THERE is only one question raised in this special appeal, the suit being a suit by the plaintiff to recover possession of certain mouzahs which are said to be covered by a mokurruree pottah, dated the 15th Aughran 1246, which the plaintiffs allege was executed by the ancestor of the present zemindar in favor of the original defendants or their ancestors, and which

mokurruree interest the plaintiffs say they purchased from the mokurrureedars on the 13th Assin 1268.

The vendors, who were the original defendants, admit in their defence that they sold this mokurruree right to the plaintiffs, but object to giving up possession on the ground that the purchase-money has not been paid.

After this suit had been instituted, the zemindar put in a petition, requesting that he might be made a party to the suit, and he was made a defendant on the 24th April 1867. He filed his written statement in which he denied that any mokurruree had been granted of this property, and that the defendants had ever been in possession.

Issues were framed raising as well the defence set up by the original defendants as also the defence set up by the zemindar.

The first Court found that the zemindar was in possession, and that there had been no mokurruree granted, and dismissed the plaintiff's suit.

The second Court, thinking that the zemindar ought not to have been made a party, and thinking that the defence set up by the vendor-defendants had failed, gave the plaintiff a decree; but as we understand the judgment, the Judge intends to restrict that decree to a decree as against the vendor-defendants only. The Judge seems to doubt about his power to strike off the zemindar-defendant, but there can be no doubt that that is what he really does, and the question which we have to consider is whether or no the Judge was legally right in so doing.

Now, that makes it necessary to consider in this case what has been considered in many other cases, what is the power of the Court under Section 73, Act VIII. of 1859. I think it is not necessary now to discuss this matter at very great length, because I have already said all that I have to say on the point in the decision to be found in Volume XI., Weekly Reporter. It appeared to me then, and it does appear to me still, that the object of the Legislature was to leave some discretion to the first Court to decide whether or not the persons who asserted that they would be affected by the result of a litigation to which they were not made parties were likely to be so affected, and so deciding, to bring parties likely to be affected as parties on the record. I said in that case, and say so still, that I had no intention whatever, neither had my learned colleague who joined me in that decision, any intention to dissent from the opinion expressed by the Chief Justice and Mr. Justice Louis Jackson in the case reported in Volume VII., Weekly Reporter, *viz.*, that if a person comes in as a total stranger both to the plaintiff and the defendant claiming under a title wholly adverse to both those parties, that he ought not to be admitted; but on the best consideration which I can give to the decision of the Chief Justice in that case, and in that I had the assistance of Mr. Justice L. S. Jackson who was himself a party to that decision, it seemed to me that the Chief Justice did not intend the remarks in that case to apply to cases where there might be either a community of interest or such interest as exists between the landlord and tenant, or other similar cases. Here the person who comes in is admitted by both the plaintiff and the original defendants to be the zemindar-proprietor of the land in dispute; and although I fully adhere to what I said in the former case that the first Court ought to be exceedingly careful in bringing intervening defendants on the record, I still think that there are cases conceivable in which the Courts would come to the conclusion that the zemindar is likely to be affected by the result of a suit where the person who, he denied to have any title in the land, was likely almost by admission to gain a decree for possession which would be executed against his ryot.

I have been reminded by Mr. Justice Bayley of the practice that obtained prior to the Civil Procedure Code. As appears from a decision reported in the Sudder Dewanny Adawlut Reports of 1857, page 876, and other cases therein cited, it would have been a ground of non-suit if in a case similar to this the zemindar was not made a party. That state of the law, no doubt, no longer exists, but it is reasonable to suppose that the Legislature while abolishing that system meant to leave to the first Court some discretion to bring the zemindar on the record if it thought that his interests required that to be done. Therefore, the whole matter comes to this—that the action of the Court under Section 73 is a matter of discretion; and, if it is so, then upon a true construction of Sections 363 and 350, I think this is not a matter of appeal. This is one of the orders from which no appeal lies when the order is made, but under Section

363 an appeal will lie after decree against interlocutory orders, but only under certain restrictions; that is to say, only if such orders affect the decision on the merits or the jurisdiction of the Court. The order in this case did not, to my mind, affect the jurisdiction of the Court or the merits of the case, as I understand the words in that Section. What it does affect is the procedure in the case; it affects the question whether these matters shall be tried in two suits or in one. I consider that the merits of the case are not affected by putting the zemindar on the record.

A case is referred to which is not reported, but which was heard before Mr. Justice L. S. Jackson and myself, in which we, sitting as a Court of appeal, struck off from the record the zemindar who was made a defendant. It is very true that in that case we did strike off the zemindar from the record, but under circumstances which quite distinguish that case from the present. I have a very clear recollection that there was a considerable discussion as to whether the zemindars were properly put on the record as defendants or not, and without deciding whether or not they were properly put there, we held that the order of the Lower Court was made under a mistake, and therefore we ought to treat that order as if it was not made at all. That distinguishes the case from the present.

Upon the whole, we think that the first Court did not exceed the discretion given by the law in bringing the zemindar on the record, and that the order of the second Court striking him off was wrong, and that he must be restored. The suit, so far as the vendors and the plaintiff are concerned, is concluded; still it has to be tried between the zemindar and the plaintiff whether or no the mokurruree exists, and any other issues open on the record between these parties must also be disposed of.

The costs of this appeal will abide the result.

The 1st July 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Possession—Mesne-profits—Section 10, Act VIII., 1859—Partition—Form of decree.

Case No. 20 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 8th November 1869.

Chowdhry Imdad Ali and another (Plaintiffs), *Appellants,*

versus

Boonyad Ali and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Debendro Nath Bose* for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

A party holding a decree for possession has a right under Section 10, Act VIII. of 1859, to bring a separate suit for wassilat which accrued prior to his decree.

Where a suit for possession, by partition of *kamut* (nij-jote) lands and for wassilat is decreed, it is the duty of the Judge, in drawing up the final decree after the Ameen's report, to state the boundaries of the shares of the parties, the extent of each share, and the exact amount due as wassilat.

Markby, J.—THE claim of the plaintiff as stated in the plaint is not very clear, but as stated by the Subordinate Judge, which statement is not objected to, it appears to be that the plaintiff sues for possession by partition of 40 beegahs out of 135 beegahs in *kamut*, a term admitted to be equivalent to nij-jote land, in Puttee Pahlam, and for mesne-profits on account of 1 anna and 15 gundahs share of Pahlam Puttee, &c., from Sawun 1270 to 1273 on a kobalah dated 2nd August 1863, and a decree of the High Court dated the 2nd July 1866, and for mesne-profits on account of 29 beegahs and 10 cottahs out of the aforesaid 40 beegahs from 1271 to 1276, and on account of 10 beegahs and 10 cottahs out of the same 40 beegahs from 1273 to 1276.

The plaintiff has got a decree for partition of the *kamut* lands according to the respec-

e shares of the parties, and an order that should get wassilat, to be ascertained in ecution from 1274 to 1276. It is also dered that the Ameen, who is to be depu- for partition of the *kamut* lands, do as- tain the actual area which is allotted to plaintiff, and also what ryottee share is be deducted from the wassilat.

It appears from the judgment that the ubordinate Judge considered that the plaint- 's title to the 1 anna and 15 gundahs share of hlam Puttee, &c., did not accrue until the te of the final decree of this Court of the d July 1866, corresponding with the 4th ssar 1273, awarding him possession, and at, as no collections were made subsequent that month in the mofussil, the plaintiff uld obtain no such mesne-profits as he imed, *viz.*, from 1270 to 1273.

As to the claim in respect of wassilat of e 1 anna and 15 gundahs share (*i. e.*, 29 egahs and 10 cottahs) of the *kamut* lands om 1271 to 1279, the Lower Court held, on grounds already stated, that the plaintiff uld claim nothing up to, and including the ar 1273, but gave him wassilat for the ars 1274 to 1276.

As to the 11 gundahs 2 cowries 5 krants dhan and 2 purus share (that is, 10 bee- ahs and 10 cottahs) of the *kamut* lands, the ubordinate Judge also gave the plaintiff e wassilat of those lands from 1274 to 276.

The plaintiff has appealed. The defend- nt has taken no objection to the decision o far as it goes against him.

So much of the decision of the Subordi- nate Judge as holds that the plaintiff was ot entitled to wassilat in respect of the estate Pahlam Puttee, &c., and the *kamut* and, *prior* to the decree for possession of the High Court in Assar 1273, appears to us to be wrong. The decree that the plaint- iff then obtained was for possession only; and under Section 10, Act VIII. of 1859, the plaintiff had clearly a right to bring a separate suit for wassilat which accrued prior to his decree. The decision of the Lower Court must, therefore, be amended by directing that the plaintiff get wassilat of the 1 anna and 15 gundahs share of the 8 annas of 16 annas of Pahlam Puttee, &c., from 1270 to 1273.

The plaintiff will also be entitled to wassilat in respect of the 1 anna and 15 gun- dahs share of the *kamut* lands, not only in respect of the years 1274 to 1276 as decided by the Lower Court, but, for the reasons already stated, from 1271 to 1273 also.

As to the 11 gundahs 2 cowries 5 krants 1 dhan and 2 purus share of the *kamut* lands, which the plaintiff claimed from 1273 to 1276, but which the Lower Court has only given him from 1274 to 1276, we think that his claim in respect of the year 1273 was rightly dismissed. It appears from his own statement that he got possession of this share in the *kamut* lands; but it is not stated nor is he now able to show when he got possession. We infer that he got possession prior to the year 1273. The plaintiff's claim, therefore, for wassilat, which is in the nature of compensation for being wrongfully kept out of possession, must here fail.

A distinction has been attempted to be drawn by the Counsel for the appellant between the term "proceeds" (*paidawar*) and the term "wassilat;" but we have no doubt whatever upon the reading of the plaint that it was substantially wassilat, and nothing else which the plaintiff intended to claim. As to this share, therefore, the plaintiff's claim must be restricted to the wassilat from the years 1274 to 1276.

A further objection has been taken by the appellant, that the Lower Court was wrong in leaving to be decided in execution the actual area of the *kamut* lands, and the question whether the ryottee share was to be deducted which the plaintiff wholly denies. This objection appears to us to be well founded, but to be rather one of form than of substance. The so-called decree as drawn up is not a final decree. When the Ameen has made his report, it will be the duty of the Judge to draw up a final decree, stating the boundaries of the shares of the respective parties in the land to be divided, the extent of the shares, and the exact amount of money which is due from the defendant to the plaintiff for wassilat during the periods above-mentioned, leaving nothing further to be ascertained in execution either as to the amount of wassilat or as to the shares of the parties.

The 1st July 1870.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Privy Council appeals—Security.

In the Matter of
Ameeroonissa Khatoon, *Petitioner.*

Baboo Nuleet Chunder Sein, for Petitioner.

Judges should not transmit to the High Court documents used before them to make out the title of parties offering immoveable property as security in Privy Council cases; but should, in reporting upon the securities, state particulars of the documents upon which the title of the surety appears to be made out.

Jackson, J.—THE documents alluded to in the written petition may be returned to the petitioner. As a general rule, Judges should not transmit to this Court documents which have been used before them for the purpose of making out the title of parties who offer immoveable property as security in Privy Council cases. Judges are directed to enquire into the sufficiency of the security, by requiring the surety to present *primâ-facie* proof of possession, such as the title-deeds, papers, and documents relating to the property. Those documents are only to be submitted to the Judge for the purpose of informing his mind, and it is not necessary that they should be forwarded to this Court; but the Judges are, in reporting upon the securities, to state particulars of the documents which have been produced and proved before them, and upon which the title of the surety appears to be made out.

The 2nd July 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Pleaders' fees—High Court's Rules—Costs—Pro-forma defendants.

Case No. 162 of 1870.

Special Appeal from a decision passed by the Judge of Patna, dated the 25th August 1869, affirming a decision of the Subordinate Judge of that District, dated the 25th July 1868.

Ramputty Kooer and others (some of the Defendants), *Appellants,*

versus

Kalee Churn Singh (Plaintiff) and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee, Nil Madhub Sein and *Khetturnath Bose* for Appellants.

Mr. C. Gregory and *Baboo Sreenath Doss* for Respondents.

The rules relating to pleaders' fees passed by the Court on 13th June 1866 do not provide for the case of defendants who have separate interests, and who consent to a decree; the amount of costs to be allowed in such a case being in the discretion of the Court.

Where co-sharers were made consenting defendants only in order to plaintiff's obtaining a complete decree for partition, it was held that plaintiff ought to pay the co-sharers' costs which, however, should be a small sum sufficient to cover the costs of their appearing.

Bayley, J.—THIS is a case in which the plaintiff sued for ⅓rd share of certain ancestral property, alleging that the family had been joint, and had only separated in 1273.

The defendant's case was that the separation had taken place in 1258, and that there were also certain deeds by which the property was acknowledged to be divided into six shares, of which the plaintiff was entitled to 1-6th only—not ⅓rd.

Both the Lower Courts decided in the plaintiff's favor.

The points taken in special appeal before us by Baboo Onookool are that certain deeds are conclusive evidence that the plaintiff is entitled only to 1-6th; that the Lower Court should not have allowed the plaintiff's claim for money without entering fully into the plea of separate acquisition raised by the special appellant on this point; and, lastly, that the special appellant has been wrongly charged with the costs of the other defendant—a co-sharer who did not oppose.

Now, on reading the judgment of the Lower Appellate Court as a whole, we are of opinion that the Judge has properly held that the deeds of 2nd January 1855 and 10th October 1840 were not conclusive evidence. The passage on which the special appellant's pleader chiefly relies is in substance this—that in equal shares for a sum of Rupees 2,000 of which Rupees 1,000 is the half, certain heirs of Kanhya Singh, being six persons, each of whom is mentioned by name, had purchased the property referred to. There is nothing specified precisely that each had purchased 1-6th and 1-6th only or any definite share, but merely certain names are given as representing members of the family and as being purchasers of the property in equal shares. Equal shares may be held by three members as by six;

for any one share may be held by three or four members of a family, and another share by two, and a third share by one only.

With these deeds before them, the Lower Courts have come to a clear finding of fact on the whole evidence that the title and possession of the ⅓rd share which the plaintiff claims is proved. With this finding of fact we cannot interfere in special appeal, holding, as we do, that the deeds are neither conclusive, nor estoppels, nor erroneously construed in law.

In regard to the money-claim, there is nothing shown that this money was separate from the general estate. The Lower Courts have found upon the evidence that the plaintiff is entitled to ⅓rd of the whole estate including the money.

On the third ground, it appears that the plaintiff made certain co-sharers who supported the plaintiff's claim defendants in the case, but merely because they being co-sharers had a certain joint interest in the property. The question arises whether the plaintiff who brought in this party, or the opposing defendant is to pay those defendants their costs. Those costs appear to amount to Rupees 239 in the first Court, and Rupees 267 in the second Court—the vakeel's fees being the largest portion of the amount in each Court.

We are of opinion that when the co-parceners—so made defendants—supported the plaintiffs' case, and were only made parties in order to enable the plaintiff to get a complete decree for partition, it was the plaintiff, and not the defendants who opposed the partition, who ought to pay the costs of these defendants in the first Court. But we also think that it would be highly improper to saddle any person, plaintiff or defendant, with such enormous costs in respect of defendants who were after all little more than formal parties to the record. What we think these consenting defendants are entitled to in the first Court, is a small sum sufficient to cover their costs of appearance—and that these should be paid by the plaintiff. In the second Court, the defendants who appealed made these consenting parties respondents, and they ought, in justice, to pay the similar costs in that Court.

But this which is the fair mode of dealing with the costs, is said to be prohibited by the rules relating to pleaders' fees passed by this Court on 13th June 1866.* But upon the whole we do not think so. We think the case of defendants who have a separate interest and who consent to a decree is not provided for in those rules; and that the amount of costs to be allowed in such a case is in the discretion of the Court. In this case, the Courts below evidently thought that they had no discretion as to the amount.

We, therefore, direct that the plaintiff pay to the consenting defendants Rupees 16 costs in the first Court; and that the defendants, appellants, pay to the same defendants Rupees 25 costs in the Lower Appellate Court, and Rupees 25 in this Court. This appeal is in other respects dismissed. The appellants will pay to the plaintiff, respondent, the ordinary costs in this Court.

The 2nd July 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Confirmation of title—Onus probandi—Documents—Sections 39 and 128, Act VIII., 1859—Summary suit—Evidence.

Case No. 4 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 30th September 1869.

Lekhraj Roy (Plaintiff), *Appellant,*

versus

Mutty Madhub Sen and another (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Grish Chunder Ghose* for Appellant.

Messrs. G. C. Paul, J. T. Woodroffe, and *R. E. Twidale,* and *Baboos Unnoda Pershad Banerjee, Khettur Mohun Mookerjee* and *Kishen Dyal Roy* for Respondents.

Where a party who asserts that he is in possession without adducing any evidence in support of his title, sues for confirmation of title as against a *bonâ-fide* purchaser for valuable consideration without notice from the party in whose name the property stood, who exercised acts of ownership, and gave himself out to the world as the real proprietor, plaintiff cannot put the defendant to proof of his title till he has proved his own.

* 5 W. R., *Rules,* p. 15.

When a plaintiff sues upon title-deeds as evidence of his claim, he is bound to file them with his plaint, or else have them ready to produce at the time of the first hearing; otherwise he is bound to show good cause for not having done so.

In a suit to set aside a summary award under Section 246, Civil Procedure Code, a Judge is bound to find facts upon the evidence tendered and taken in the case, and not upon any evidence taken in the summary cause.

Hobhouse, J.—THIS was a claim for confirmation of possession and determination of title in respect of certain villages; and the plaintiff's statements of his claim are shortly these. He says that the villages in question belonged to Rajah Beejoy Gobind; that he, the plaintiff, had had these villages mortgaged to him by the said Rajah; that subsequently, upon the mortgaged bond, he, the plaintiff, had obtained a money-decree; that in execution of this decree, he had attached and sold the said villages as the property of the said Rajah, and had himself become the purchaser of the Rajah's rights and interests in them; that the said Rajah had been in possession of the properties in question up to his death; and that those properties still belonged to the Rajah's representatives. The plaint then went on to say that the defendant, one Mutty Madhub Sen, had obtained a mortgage of the said property from one Ranee Benode Butty, one of the widows of the said Rajah, and had subsequently obtained a decree upon the mortgage-bond, and having so obtained a decree had attached and sold the properties in question, and had purchased the rights and interests of the said Benode Butty in those properties; that the properties were never, in fact, the property of the said Ranee Benode Butty; that, consequently, her conveyance of them to Mutty Madhub Sen, and Mutty Madhub Sen's subsequent purchase of the Ranee's rights and interests were altogether infructuous; but that inasmuch as in a certain execution-proceeding of date the 22nd May 1869 his, the plaintiff's, objections to attachment and sale and purchase of the properties by Mutty Madhub had been overruled, so the plaintiff sued to have his title established and possession confirmed as above stated.

Mutty Madhub Sen was originally the sole defendant in the cause, but one Ranee Chundessurree appeared before the Judge whilst the suit was pending, and she and Mutty Madhub Sen joined in a written statement to the effect that whatever rights Mutty Madhub Sen had in the villages in question had been conveyed to her, Ranee Chundessurree, and that so she was entitled to be heard as a party to the suit. Accordingly the Judge made her a party to the suit, and in her presence gave judgment on the 30th September 1869 to the effect that the plaintiff could not maintain a suit against Mutty Madhub Sen and Chundessurree deriving through him; and that so the suit must be dismissed.

The first objection taken to the judgment of the Court below may be said to be a preliminary objection with the object of obtaining a remand in order to a trial of the suit *de novo*, and upon issues other than the one laid down and determined by the Court below. Mr. Allan for the appellant contends that no proper issues were laid, and no evidence taken on behalf of his client; and that the question to be determined was simply whether the property was the property of Rajah Beejoy Gobind Singh or whether it was the property of Ranee Benode Butty, and that he is entitled to a remand in order that evidence may be taken and a determination arrived at on that question.

On the other hand, it is contended by Mr. Woodroffe and Mr. Paul, learned Counsels for the respondents, that the suit as laid should at once be dismissed by reason that the plaintiff having had the opportunity has failed to give in evidence of that title and possession which he seeks to have established and confirmed.

If it were necessary that we should determine the case upon this objection taken by the learned Counsel for the defendant, we think we should be obliged to say the plaintiff's suit must be dismissed on that ground. We find that the plaintiff instituted his suit on the 4th September 1869; that, then, on the 27th September the sole issue which the Court heard and determined in the suit was fixed with the consent of the pleaders on both sides—a consent expressed by the signatures of those pleaders; that up to this time the plaintiff had filed no title-deeds whatever, and that although on the 30th September, the day fixed for the hearing of the suit, the plaintiff filed a petition praying for time, yet even that petition was not sufficient to entitle the plaintiff to receive such time.

It is to be remarked that the plaintiff's title-deeds were a mortgage-bond, alleged to have been given by the Rajah Beejoy Gobind Singh; secondly, a decree alleged to have been obtained against the said Rajah

the strength of the said bond; and lastly ale-certificate said to have been given to plaintiff, conveying to him whatever ts and interests the said Rajah had in property in dispute. Now, the defendants e both of them entire strangers to these uments, so-called title-deeds; they de- d every one of them, and it was, there- , certainly incumbent on the plaintiff to e filed these deeds at some time or r. Then by Section 39, Act VIII. of 9, when the plaintiff sued upon these -deeds, they being written documents being evidence of his claim, he was nd to produce the same in Court when plaint was presented; or if any such ument was not produced in Court by him n the plaint was presented, then it could be received in evidence on his behalf hout the sanction of the Court. Then in Section 128: by this Section the ties are required to bring with them, and e in readiness at the first hearing of the , to be produced when called upon by Court, all their documentary evidence very description which may not already e been filed in Court. And the Section s on to say: "No documentary evidence any kind, which the parties or any of em may desire to produce shall be ceived by the Court at any subsequent tage of the proceedings, unless good cause e shown to its satisfaction for the non- roduction thereof at the first hearing." that, to apply these Sections, the plaintiff s bound in this case either to file the cuments with his plaint, or else have em ready to produce at the time of the st hearing, or if he did not do that, then was bound to show good cause for his t having done so. But what was his tition of the 30th September? He does t produce any document, nor does he al- de to any; but simply he says that he s not had time to prepare a list of the cuments, and he prays that time may be ven for that purpose. He does not say why had not time to prepare the list of docu- ents before, much less why he did not efore file the documents, the list of which e wanted time to prepare. And it is evi- ent that certain of the documents were of a kind such as would naturally have been in his custody, or at least would have been easily accessible; and it is impossible to say, for any thing that is shown to the contrary, that between the 4th and the 30th September, the plaintiff had not time even to file a list of documents. So that it seems to me that whereas the plaintiff is a claimant to have his right established to certain villages, and whereas that right is based upon certain title-deeds, not one of those title-deeds is produced in Court, nor is their absence in any way accounted for; and when the title in question is disputed by the defendants, it is quite clear that the plaintiff comes before us in a position in which it would, under any circumstance, be impossible to give him a decree, unless, after good reasons had been shown for granting time, we allowed the case to be remanded to the Court below for a re-hearing.

But, as I have said before, we do not desire to determine this case upon the preliminary point, because we think that we can decide it upon such documents as are already on record in a manner which is conclusive, and is rightly conclusive, between the parties. I have said that the cause of action in this suit was a summary decision given under the provisions of Section 246, Act VIII. of 1859, between the parties or their representatives on the 22nd May 1869. That decision is, in reality, the decision of the Court below in this case, and that this is so is evident from what the Judge says in his very concise judgment to be found at page 8 of the printed paper-book. He says: "The pleader for the prosecution has "urged nothing to rebut the legal grounds "on which the summary order of this "Court was passed against his client." * * * * "In fact," he goes on to say, "it ap- "pears that this suit has been laid only to ob- "tain an appellate ruling against the order "passed, the same not having been appealable "summarily. Adhering, therefore, to that "order, and to the reasons on which it was "grounded, I dismiss," the Judge says, "this suit, and charge the defendant's costs," &c.

So that, in reality, the Judge's decision in this case is to be found in the summary order of the 22nd May 1869 in original suit No. 32 of 1869, to be found in the appendix in the printed paper-book.

Moreover, Mr. Allan for the plaintiff himself states that that summary order is the thing on which his client, the plaintiff, relies now, and relied in the Court below, and is, in fact, all that there is upon the record upon which the plaintiff's case can stand or fall. The facts found in that order may be said to be these. The villages in question are found to have been purchased by Rajah Beejoy Go-

bind Singh in the name of his wife Ranee Binode Butty; the Rajah is found to have been in possession and enjoyment of the property up to his death, which occurred in the year 1263, corresponding with the year 1856 A. D.; the Ranee is found to have been in possession of the property after the Rajah's death, not as his heir, but as guardian of his minor son, heir-at-law. But then further it is found that the Rajah purchased the property fictitiously in the name of his wife in fraud of creditors; the Ranee is then found to have fraudulently deceived the opposite party, the defendants in this case, into the belief that the property was hers, and this she is found to have done at a time when she was in possession of the property and when it stood *benamee* in her name. It is also found that when she mortgaged the property to the defendants, she was the declared and ostensible owner of the properties, entitled to them by the deed which covered them; that the defendants dealt innocently and in good faith with the Ranee and paid valuable consideration for the mortgage, and so it is found that the mortgage was a good mortgage creating a valid lien on the property, and that the defendant's title as the purchaser in execution of a decree founded upon that mortgage, was a good title against the plaintiff, standing simply in the place and as representative of Rajah Beejoy Gobind Singh.

If every one of these facts could be held to be facts binding on both parties to this suit, and they are certainly binding on the plaintiff, for he stands by them, we should still come to the same decision as that to which we are now coming on the contention between them. But we must here state that the learned Counsel for the defendants contend, as we think very justly contend, that the decision of the Subordinate Judge of the 22nd May 1869, which is the sole document upon which the plaintiff relies, is in reality no evidence in the cause at all. It is impossible not to hold that this is so. Because it is this very document that the plaintiff himself seeks to set aside, and it is the facts found in this document and other facts which are the facts which it was the plaintiff's duty to establish in evidence before he could use them in any way to the disfavor of the defendants; and to show that this is so, that is to say, that this judgment of the Subordinate Judge of the 22nd May 1869 is no evidence against them, the defendants point to the facts that there is no evidence on record in support of these facts, and that in their written statement of the 27th September 1869 they distinctly denied and put in issue certain of the facts which are found in this decision, facts without which and without evidence as to which it was impossible that the plaintiff (even if with these facts he could succeed) could succeed.

The judgment finds that, up to the time of his death, Rajah Beejoy Gobind was in possession of the properties in dispute. The defendant maintains in his written statement that the Ranee Binode Butty was the actual owner and holder of the properties, and that the facts of possession have already been decided in the presence of the plaintiff.

The judgment finds that, after the Rajah's death, Ranee Binode Butty held the properties, not in her own right, but as guardian of a minor son of the Rajah. In the written statement defendants distinctly aver that Ranee Binode Butty was the owner and the possessor in her own right of the disputed properties. So that it is impossible to treat the facts found in the summary judgment of the Judge of the 22nd May 1869 as any facts which are to bind the defendants in our decision of this case. The Judge might have had evidence before him sufficient to bind those facts in the summary case, which he decided under Section 246 of the Act; but when he had to find those facts or other facts upon the allegations this way or that way, for the plaintiff or the defendants respectively in this case, he was bound to do so upon evidence tendered and taken in this case, and not upon any evidence taken in the summary cause, which it was the object of this suit to render null and void.

It is, however, contended by the learned Counsel for the defendant that, taking the facts set forth by the plaintiff himself in this case, they are sufficient to show that the defendants have a good title, which is at once fatal to the plaintiff's suit. Now, looking to the statements made by the plaintiff himself in this suit, either made by Mr. Allan in his pleadings before us or made in the written statement on oath by the plaintiff himself, they are these: The plaintiff says that when this property was originally purchased by Rajah Beejoy Gobind Singh, it was purchased in the name of Ranee Binode Butty, and the title-deeds were made to run in her name. He says that after the Rajah's death, which he admits was in the year 1856, the property went to

the minor son of the Rajah—a son not of his wife Binode Butty, but of his wife Brijo Butty; and that these two ladies were acting as guardians of the said son. It is then said that these two ladies, with a view to defraud the plaintiff, and acting in concert and in collusion with one another, declared possession to be in the name of Ranee Binode Butty; that Ranee Binode Butty thereafter alleged the property to be hers in her own right; that further, after the death of the Rajah, she held ostensibly in her own right though really as guardian of her step son; that she, while she was thus holding this property, that is, in the year 1861 it is verbally admitted, mortgaged the property to the defendants; that she did so after contracting a personal debt from the defendants; and that the defendants, as is not denied in the argument, had no notice of the fraud or of the real state of things. The written statements, therefore, of the plaintiff, coupled with the verbal admissions made in the course of the argument, set forth these facts: that the title-deeds of the property ran in the name of Ranee Binode Butty; that from the year 1856 she was the person who was in actual possession of the properties, alleging them to be her own, and treating them as if they were her own that she was declared proprietor of those properties; that she and another person concealed the fact that the properties, in reality, belonged to some one else; and that whilst this was the state of things existing, she mortgaged the property to the defendants, who were first of all mortgagees and afterwards purchasers *bonâ fide* on a valuable consideration and without notice. In this state of things, the learned Counsel for the defendants, respondents, point out that by various decisions of the Courts of this country and of the Courts at home, the defendants are, upon the very averments of the plaintiff himself, purchasers, whose title is good against all the world, and specially against the person claiming, as the plaintiff claims, through the so-called owner of the property, Rajah Beejoy Gobind Singh. The cases cited are to be found at page 293 and page 569 of Marshall's Reports, at page 67, 8 Weekly Reporter, and English cases in Volume II. of Tudor's Leading Cases, page 5 of the new edition.

The cases to be found at page 67 of the 8 Weekly Reporter, and page 569 of Marshall's Reports, are, we think, directly in point, and bear out the contention of the learned Counsel for the defendants.

On the other hand, Mr. Allan for the plaintiff points to a case to be found at page 338 of the 9 Weekly Reporter, and page 92, 3 Weekly Reporter. We are of opinion that neither of these cases is in point. The first has simply to do with a presumption of law, which, even if it arises, does not govern the case, and the second is not even so much in point as the first.

We are of opinion, therefore, that upon the plaintiff's own statement of his case, the defendants are in the position of *bonâ-fide* purchasers for valuable consideration without notice, whose claims are good against all the world, and especially against the plaintiff deriving through Rajah Beejoy Gobind Singh.

In this view of the case, we uphold the judgment of the Court below, and dismiss this appeal with costs.

Loch, J.—In this case, the plaintiff comes into Court, asking the Court to give him a decree declaring his title to the property in question. He asserts that he is in possession, but he has put in no evidence of title. If, therefore, he were able to prove present possession, he would not be entitled to ask for a confirmation of title in the absence of evidence to support that title as against the defendant, who is a *bonâ-fide* purchaser for valuable consideration without notice from the party in whose name the property stood; who exercised acts of ownership therein, and gave himself out to the world as the real proprietor of the estate. Plaintiff cannot put the defendant to proof of his title till he has made out his own. I concur in the order dismissing this appeal.

The 4th July 1870.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Established usage—Section 20, Act X., 1859—Summoning plaintiff.

Case No. 738 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 31st January 1870, modifying a decision of the Deputy Collector of Pubna, dated the 26th October 1869.

Chytunno Chunder Roy (Plaintiff), *Appellant,*

versus

Kedarnath Roy (Defendant), *Respondent.*

Baboo Anund Chunder Ghossal for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Section 20, Act X. of 1859, refers to the established usage in the pergunnah, and not to the established usage between the parties.

A Court is justified in declining to summon a plaintiff when defendant has failed to give any kind of proof.

Loch, J.—We think the interpretation put by the Judge on the words *shun ba shun* সন বসন, in the pottah filed by thed efendant, is incorrect. They merely mean that the amount of rent should be paid every year. But the use of these words do not show that the rent was to be paid according to instalments, if such instalments are payable by established usage. In this case, the plaintiff has given the evidence of men in the same position as the defendant, and holding tenures of a similar kind, to prove that the established usage in the pergunnah is that rents should be paid in certain months of the year, and the defendant has given no evidence whatever to rebut that evidence on the part of the plaintiff.

It has been contended before us that the words *established usage* in Section 20, Act X. of 1859, mean established usage in each particular case; and therefore when the document in this case did not specify the instalments on which the rent was to be paid, what the Court had to do was to enquire, not what was the established usage in the pergunnah, but what the established usage between the parties had been. We think this is altogether an erroneous view of the law, and cannot be sustained.

Another objection on the part of the respondent is that as he relied on the evidence of the plaintiff, the Court should have remanded the case to enable him to have the plaintiff examined. The first Court declined to summon the plaintiff; and as the defendant has altogether failed to give any kind of proof, we think that the first Court was quite justified in refusing to comply with the defendant's request, as it appears to us on the face of it that such an application was merely intended to harass the plaintiff; for there is no doubt that the defendant could have found plenty of other means to prove his allegation without calling the plaintiff to the Court.

We think that the judgment of the Lower Appellate Court must be reversed, and that of the first Court restored and affirmed. The plaintiff will get his costs of this Court and of the Lower Appellate Court.

The 4th July 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Act X. of 1859—Enhancement of rent.

Case No. 265 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Tipperah, dated the 22nd November 1869, affirming a decision of the Deputy Collector of that District, dated the 30th July 1869.

Chunder Coomar Banerjee (Plaintiff), *Appellant,*

versus

Azeemooddeen and another (Defendants), *Respondents.*

Baboo Kashee Kant Sein for Appellant.

Baboo Okhil Chunder Sein for Respondents.

The provisions of Act X. of 1859 for enhancement of rent are applicable only where the occupant of the land has such a right to be there that the owner cannot turn him out.

Phear, J.—This suit has been brought in complete misapprehension of the rights given by Act X. It is only where the occupant of the land has such a right to be there that the owner cannot turn him out, that the provisions of the Act for enhancement of rent are applicable. If the occupant has no right to remain in possession as against the owner, then, if the parties cannot come to terms with regard to the amount of rent to be paid, the owner can turn the occupant out of possession.

In this case the notice of enhancement which the plaintiff has served on the defendants, and which, under Section 13 of the Act, is the very basis of this suit, designates the defendant as a person who has no right to possession; one with whom no settlement had been made; and so, of course, a person who could be turned out if he did not choose to pay the rent which the owner asked.

It is quite clear that the suit could not rest on a foundation of this kind, and the suit has been rightly dismissed by the Lower Courts, and the appeal must also be dismissed with costs.

The 4th July 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Dewutter land—Mortgage.

Case No. 274 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 16th September 1869.

Rumonee Debia and another (Plaintiffs), *Appellants,*

versus

Baluck Doss Mohunt (Defendant), *Respondent.*

Mr. W. A. Montriou and *Baboos Sreenath Dass, Romesh Chunder Mitter,* and *Rajendronath Bose* for Appellants.

Baboos Onôokool Chunder Mookerjee and *Okhil Chunder Sein* for Respondent.

A mortgage of dewutter property by a Sebait is *ultra vires.*

Phear, J.—AFTER the best consideration which we can give to this case, we are unable to resist the conclusion that the property which is the subject of suit is in truth *dewutter* property dedicated to the idol. It is even proved, we may say, to be so from the evidence on which the plaintiff himself relies.

This being the case, whatever remedies the plaintiff may have against the Sebait for fraud or misrepresentation, we think that he cannot claim the land itself under the mortgage-deed of the defendant which was altogether *ultra vires.*

We are, therefore, of opinion that the decision of the Lower Court upon this point was right, but we think that the defendant is bound to pay the plaintiff the costs which he has incurred both in this Court and in the Court below.

The plaintiff's suit is dismissed, but the defendant must pay the plaintiff's costs in both Courts.

The 4th July 1870.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Attachment—Section 237, Act VIII., 1859.

Case No. 6 of 1870.

Regular Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 2nd October 1869.

Luchmeeput Singh Doogur (Plaintiff), *Appellant,*

versus

Mr. P. A. Humphrey, Magistrate and Collector of Pubna, and the Collector of Rajshahye on behalf of Government (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Sreenath Doss* and *Rash Beharee Ghose* for Appellant.

Mr. J. S. Rochfort and *Baboo Onookool Chunder Mookerjee* for Respondents.

*** Where an attachment of money in the hands of a Deputy Collector was made by a Civil Court, without any such direction as is enjoined by Section 237, Civil Procedure Code, that the money should be held subject to the further order of the Court, it was held that the attachment ceased to be binding when once the suit was dismissed.**

Loch, J.—THIS suit is brought against the Deputy Collector, Mr. Humphrey, and the Government for the purpose of recovering from them a sum of money which had been attached by an order of the Civil Court, and which Mr. Humphrey had paid away without the permission of that Court.

It appears that on the 23rd April 1866, the plaintiff Luchmeeput Singh Doogur

brought a suit against one Mymunissa Bibee and others, and at the same time applied to the Court of the Subordinate Judge of Rajshahye to attach certain moneys then in the treasury of the Collector of Rajshahye; that the attachment was made as prescribed by Section 287 of the Civil Procedure Code; that on the 7th May, Mr. Humphrey, the Deputy Collector in charge, reported to the Civil Court that he had attached a sum of 6,000 and odd rupees; that on the 12th December 1866 the plaintiff's suit was dismissed; and on the 1st February 1867, on the application of the defendants, Mr. Humphrey, considering that the attachment was no longer existing, paid over the money to Mymunissa Bibee and Moonsad Bibee. Subsequently, the plaintiff having appealed to the High Court obtained a decree, bearing date the 21st September 1867, which declared that he was to receive a sum of 14,000 rupees from the defendants whose money had been attached; and on the 20th March 1868, the Subordinate Judge called for that money, and he was told by Mr. Humphrey that he was unable to produce the money, it having been already paid away by him to the defendant, he having considered that the attachment had ceased, the Lower Court having dismissed the suit.

It is urged before us in appeal that the attachment made by the Civil Court did not come to an end with the disposal of the suit by the first Court; secondly, that the Civil Court alone had jurisdiction to deal with the subject-matter of this attachment; and that as Mr. Humphrey, the Deputy Collector, had, on his own responsibility, taken upon himself to pay away the money, and thereby exhibited gross carelessness in so doing, he was personally responsible to the plaintiff.

Looking at the proceeding of the Civil Court, dated the 27th April 1866, we find the order to this effect: "That a copy of "this *roobokaree* be sent to the Collector "of Rajshahye with a request that he would, "by attaching the said money, Rupees 14,000, "inform this Court of the fact." Section 237 requires that when an attachment of money in the hands of any officer of Government is made by a Court, it should be made with a request to the officer that the money should be held subject to the further order of the Court by which the notice may have been issued. Now, there is no such direction as this in the proceeding of the Civil Court of the 23rd April 1866, so that even admitting that the attachment was a legal attachment, and a binding attachment so long as the suit before the Subordinate Judge was pending, it appears to me that it ceased to be a binding attachment when once the suit before that officer had been dismissed; and that when the defendant in that case presented a petition to Mr. Humphrey with a copy of the judgment of the Court dismissing the suit, Mr. Humphrey did not act illegally, nor did he show gross negligence by ordering the payment of the money to the defendant, though he perhaps might have shown a better discretion had he applied to the Court which ordered the attachment.

In this view of the case, Mr. Humphrey cannot be made liable for this money, and the plaintiff's suit must be dismissed with costs. Each of the defendants will have a separate set of costs.

Jackson, J.—I entirely concur in this judgment. I do not see how Mr. Humphrey is in any way liable for this money for ordering it to be paid over to the defendant, when the suit was dismissed, and the attachment had virtually ceased.

The 5th July 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Right of privacy.

Case No. 177 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 30th September 1869, reversing a decision of the Moonsiff of Behar, dated the 20th January 1869.

Mahomed Abdoor Ruhim and others (Defendants), *Appellants,*

versus

Birjoo Sahoo and others (Plaintiffs), *Respondents.*

Mr. Piffard and *Baboo Boodh Sein Singh* for Appellants.

Moonshee Mahomed Yusuf for Respondents.

The right of privacy is not an inherent right of property, nor can it exist independently of prescription or grant or express local usage.

Markby, J.—In this case, the plaintiffs and defendants were owners of two houses separated by a narrow lane, but whether public or private does not appear. The defendant's house consisted originally of one storey, and he built a second storey with three windows looking towards plaintiff's house into the lane. The defendants also built a verandah, one end of which looked in the same direction. The object of the plaintiffs in bringing the suit was to compel the defendants to close these windows, to pull down the verandah, and also to close two doors in the lower-storey.

The Moonsiff held that the suit could not be maintained; that the mere fact that the females of the plaintiff's house could be seen from the defendant's house, did not give the plaintiffs a right of suit; and that, if the plaintiffs were annoyed thereby, they had the remedy in their own hands by raising their walls or erecting a screen.

The Subordinate Judge thought otherwise. He considered that "if the privacy of any "house occupied by purdah-nisheen women "were intruded on by the erection of another "house, the party thus injured could cer-"tainly lay claim to its demolition."

The only question brought before us on this special appeal is whether or no the suit can be maintained.

The appellants, arguing against the maintenance of the suit, rely on a decision of Steer and L. S. Jackson, JJ., of the 18th June 1862. In that case the Moonsiff held the suit would lie, but the Judge of Patna held that it would not. The Sudder Court upheld the decision of the Judge, saying: "We are not aware that where two owners of "houses live contiguous but separated by an "intervening space, the custom of the coun-"try requires that neither party shall make "any improvement on his property, if such "improvement has the effect of depriving "the other of a certain degree of privacy. "We should rather say that where the one "opens a window which overlooks the other, "it is the custom of the country that the "other raises a screen or adopts some other "contrivance to counteract the effect of the "opening made in his neighbour's house."

The appellants also rely on a decision of Phear and Hobhouse, JJ., dated 2nd September 1868. There both the Lower Courts in Patna held that the suit could not be maintained. The Principal Sudder Ameen said: "It appears that the plaintiff com-"plains of be-purda-zee, that is, his females "are seen from the windows in question. "If that be the case, the remedy is in his "own hands. He can build a wall or put "up screens of mat or any other materials "in order to prevent the inmates of the "house being seen by men from the windows. "It is evident, therefore, that by the acts of "the defendant, the plaintiff's right to the "enjoyment of light and air has not been "invaded, nor has the defendant done any "act by which an actionable wrong has been "created."

This Court said: "We think that there "is no legal right shown in this case of the "infringement of which the plaintiff is en-"titled to complain."

The appellants also refer to two cases in the Bombay Court (5 Bombay, page 42, and 6 Bombay, page 143), in which the suit was maintained but on the express ground of a local usage in Guzerat.

The respondents, on the other hand, rely on a case reported in 5 Weekly Reporter, page 208, where the Court (Bayley and Sumbhoonath Pundit, JJ.,) say: "We "further notice that the plaintiff is said to

"have built an upper-storey to his house "overlooking the inner apartments of the "defendants. Defendants on this built the "wall, which, it is said, deprived plaintiff "of light and air. Even if it were shown "that light and air had long been enjoyed "by the plaintiff and have now been cut off "by defendant's wall, still as plaintiffs had "no right to build an upper-storey, with "reference to the circumstances of domestic "life in India, so as to intrude on the pri-"vacy of the females of the defendant's "family, the plaintiff would have no relief "in this respect as he was the first and "greater wrong-doer."

They also rely on a decision of Kemp and Seton-Karr, JJ., of the 10th August 1865, which is in these words: "We see no rea-"son whatever to interfere in this case. "Both the Judges of the Lower Courts have "visited the spot, and have satisfied them-"selves that the opening of the windows "complained of is a violation of the privacy "to which the plaintiff has a right. There "is nothing contrary to law in this finding; "and it is certainly in conformity to the "usage of the country."

There is also said to be a decision in the Agra High Court Reports of 1867 that the suit can be maintained, but the pleaders have not been able to show us the case in the reports.

In a case reported in 3 Madras Reports, page 146, the Madras High Court held that there was no "right of privacy," but the question, for reasons which do not appear upon the face of the judgment was discussed with reference to European and not with reference to Hindoo or Mahomedan Law.

It is remarkable that in the cases in which the right is upheld, nothing is said of gaining by prescription a right to prevent your neighbour from building his house so as to overlook your premises; but the "right of privacy" is spoken of as if it were an inherent right of property, and the invasion of privacy is spoken of as something like a trespass. And in the present case, the Subordinate Judge considers that intrusion on the privacy of female apartments is an "injury" which the law will prevent.

It seems to me impossible to support this view. That privacy is of the utmost importance I can well understand; and that the law should lay down rules to prevent that privacy being wantonly and unnecessarily invaded would be also intelligible. But to hold that privacy is a *right*, and the invasion of it an *injury* would lead, as it appears to me, to the most alarming consequences to the owners of house-property in towns. By erecting female apartments, a man would prevent his neighbours building as they wished on property situate at a very great distance, and the erection of such apartments by two or three different persons might render all the surrounding land useless for habitation. But though this is the ground of the Subordinate Judge's decision, it is not necessary to go so far in order to maintain this suit. For instance, a right exists by express enactment in France that a window should not be opened within a distance of 6 feet from a neighbour's property —such a right might exist by usage in this country. But it does not appear that it is so; that there is anything analogous to it. The only right which I find anywhere set up here is this supposed "right of privacy," and that is a right which, in my opinion, cannot exist at any rate independently of prescription or grant or express local usage.

With regard to the case reported in 5 Weekly Reporter, I wish to guard myself carefully from saying that I should dissent from the proposition there laid down. I think that the opening of new windows affecting a neighbour's privacy may very possibly give him a right, according to the usage of the country, of protecting his privacy by any erection which he chooses to put upon his own land; and that the person who has opened these new windows cannot complain that such erection interferes with his light and air. That is a very different question from the present, and does not arise here.

I agree with the Moonsiff that it is much more reasonable that the plaintiffs should protect themselves, than that they should prevent the defendants improving their house. I think he was right in holding that the suit could not be maintained, and in dismissing the suit, I think the decision of the Subordinate Judge ought to be reversed and the suit dismissed, the plaintiffs paying one set of costs in all the Courts.

Bayley, J.—I concur.

The 6th July 1870.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Costs—Joint liability—Contribution.

Case No. 881 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Dinagepore, dated the 11th February 1870, affirming a decision of the Subordinate Judge of that District, dated the 25th August 1869.

Shaikh Ahmudoollah (Defendant), *Appellant,*

versus

Meah Khan and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellant.

No one for Respondents.

Notwithstanding an order of the Privy Council that a certain sum should be paid to a judgment-creditor out of money deposited by the judgment-debtor in their treasury, the former took out execution against the property of the latter, who having deceased in the meantime was represented by plaintiffs and defendants. Certain property belonging to the deceased having been attached and advertised for sale, plaintiffs paid the costs due under the Privy Council decree, and now sue for contribution.

HELD that defendants were liable for the sum paid in excess of plaintiffs' share.

Loch, J.—IT appears that under the Privy Council order, £218-8-4 were to be paid as costs to the respondent Radha Benode Misser out of £300 which had been deposited by order of the Privy Council in their treasury, and the balance of £81-11-8 was to be refunded to the appellant Ameena Bibee. Radha Benode Misser, instead of applying through his agent to the Privy Council to obtain this money out of the sum deposited in the treasury of the Privy Council, took out execution against the property of Ameena Bibee (who had deceased in the meantime, and was represented by the plaintiffs and defendants in this case), and certain property belonging to her was attached and advertised for sale, on which the plaintiffs came forward, and paid the amount of costs due to Radha Benode Misser under the Privy Council decree; and they now bring the present suit for contribution against the other representatives of Ameena Bibee, who were liable jointly with the plaintiffs to pay the costs.

Both the Lower Courts have found in favor of the plaintiffs. In special appeal it is urged that this was a voluntary payment on the part of the plaintiff. We cannot look at it in that light. No doubt the proper course for Radha Benode was to have applied through his agent to have his costs paid to him from the treasury of the Privy Council; but because he did not do so, that was no fault of the plaintiffs in this case. Radha Benode by attaching and advertising their property to recover the costs by its sale, put that property in jeopardy, and they came forward and paid the debt for which they and the defendants in this suit were jointly liable. It is clear, therefore, that the Lower Courts are right in finding that the defendants are liable to the plaintiff for the sum paid by them in excess of their share.

We dismiss this appeal, but without costs, as the respondents did not appear.

The 6th July 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Review—Right of re-hearing.

Case No. 42 of 1870.

*Application for Review of judgment passed by the Hon'ble Justices H. V. Bayley and W. Markby on the 10th February 1870, in Regular Appeal No. 108 of 1869.**

Rajendro Protab Sahee (Plaintiff), *Petitioner,*

versus

Bhowabul Singh (one of the Defendants), *Opposite Party.*

Messrs. G. C. Paul and *R. T. Allan* for Petitioner.

Mr. J. T. Woodroffe for Opposite Party.

Under Sections 378, 379, and 380, Act VIII. of 1859, before an applicant for review is entitled to re-open the case, he must show some good and sufficient reason why he should be re-heard.

A re-hearing cannot be allowed upon the possibility of an alteration of opinion on new points being put and new arguments urged by a pleader not present at the first hearing.

* 13 W. R., p. 157.

Markby, J.—THE question raised for our decision on this application is one on which I believe nearly all the Judges of the Court have expressed their opinion. It is whether an unsuccessful party can come up in review, and claim as of *right* to be heard to argue that the conclusions arrived at by the Court at the hearing are erroneous? I consider it to be a settled rule of practice in this Court that no such right can be claimed.

We heard the case to which this application relates argued at very considerable length, and we took time to consider our judgment. The result was that the plaintiff's suit was dismissed. The plaintiff now claims, as a matter *of right*, to be heard to argue that the grounds of our decision were wrong.

It was contended on behalf of the plaintiff that this was contemplated by the Act VIII. of 1859. The contrary appears to me to be the case. The Sections which relate to proceedings in review provide, *first*, by Section 376 for the application for a review; *secondly*, by Section 378 for a notice to the opposite party and a hearing in order to discuss whether the application for a review ought to be granted; and, *thirdly*, under Section 380 for a re-hearing if the review is granted.

Now, it is clear that the proceedings under Section 376 and Section 378 and under Section 380 are perfectly distinct; the *first* is in order to consider whether the case should or should not be re-heard; the *second* is the re-hearing.

But the right which the plaintiff now claims would wholly expunge the first of these proceedings. What the plaintiff's Counsel really now claims is at once to have the case re-heard. He wishes at once to produce his arguments to show that our decision was wrong. He has not stated in his application or suggested a single reason of any sort or description why the hearing which has already taken place was not full and complete and final, but simply states the several grounds on which he wishes to contest our decision. In my opinion, to permit this would be to give an unsuccessful party the privilege of a re-hearing without the preliminary requirement being satisfied, namely, that he should show some good and sufficient reason why he should be re-heard.

This view of the law, which seems to me to follow from the plain language of the Act, has possibly been lost sight of, from the three stages of the proceedings above-mentioned very often taking place at one sitting of the Court. We have found it more convenient when an application for review is filed, that notice should at once be given to the vakeel of the opposite party under Section 378 so as to bring both parties before the Court when the review is first applied for. And when both parties are before the Court, if the Court thinks that the application for review should be granted, it is very often found convenient at once to re-hear the case. But it was never intended thereby to make the re-hearing of a case a matter of right.

I think the plaintiff, before he can be heard to argue that our decision was wrong, must satisfy us that there is some good and sufficient cause why we should grant him that privilege. Until he has done so, I think we are bound to treat our former judgment as final.

Bayley, J.—I think the plea of plaintiff untenable, and that this application for review should not be granted. The provisions of the law as to the application for review is one distinct matter. To re-hear after the success of that application is another matter.

But the plaintiff's Counsel argues that he is entitled to a re-hearing of his case on any good and sufficient ground, even if such ground were never urged in any Court below or even here—that is, the Court is asked to say it is in error in its adjudication when it never had before it in the first instance the new points on which it is asked subsequently to adjudicate.

I adhere then to the almost concurrent decisions of this Court, which construe the Sections 376 to 378 not to allow of a re-hearing upon the possibility of an alteration of opinion upon new points being put and new arguments urged, after the decision by another pleader not present at the first hearing.

The 8th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Sir Charles Hobhouse, *Bart., Judge.*

Istemraree pottah—Hereditary tenures—Section 2, Regulation XIV. of 1812—Construction.

Case No. 3027 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 20th September 1869, reversing a decision of the Deputy Collector of Tajpore, dated the 20th July 1869.

Kuroonakur Mahotee (one of the (Defendants), *Appellant,*

versus

Neeladhro Chowdhry (Plaintiff), *Respondent.*

Baboo Mohendro Lall Mitter for Appellant.

Baboo Tarucknath Sein for Respondent.

The use of the word "istemraree" in describing a pottah shows an intention that the lease shall be perpetual, and implies its hereditary character.

The proper construction of Section 2, Regulation XIV. of 1812, is that the lease therein referred to is to be null and void as against the Government, but not against the lessor.

Couch, C. J.—In this case in the pottah itself the parties to it describe it as an istemraree pottah, and its terms are "in future you shall cultivate the lands and a mokurruree rent of Rupees 8 every year you shall pay;" followed by a provision for a remission in case of drought or flood. If the intention of the parties that the pottah should be perpetual is not sufficiently shown by the use of the word "istemraree," the pottah may be explained by what has been done under it; and the fact that the land has been allowed to descend from defendant's grandfather to his father, and from him to the defendant, shows that it was intended to be hereditary although it contains no words to that effect, and the Judge was wrong in laying any stress upon that omission. The principle that the absence of words importing the hereditary character of the tenure may be supplied by evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son was laid down by the Privy Council in Gopal Lall Tagore *versus* Teluck Chunder* (10 Moore's Indian Appeals, 191), and in Rajah Sutto Shurrun Ghossal *versus* Mohesh Chunder Mitter (11 Weekly Reporter, Privy Council, 10). In both those cases, the enjoyment had been much longer than in the present; but the word "istemraree" had not been used as it is here. That word shows an intention that the lease should be perpetual, and if it were so the hereditary character would follow from it. In Mussamut Luckhee Kooer *versus* Roy Hurree Krishna Singh† (3 Bengal Law Reports, A. C., 226,) it was held that the words "mokurruree istemraree" in a pottah must be taken in themselves to convey an hereditary right in perpetuity.

The objection that the rent is not fixed, because there is a provision for a remission is of no weight; nor can the plaintiff, because there has been a new settlement, say that he is not bound by the pottah. The new settlement has been made with him as representing the holder under the former settlement, and he cannot take the benefit of that representation without taking the burden also. He must, like any other heir, be bound by the acts of the ancestor from whom he derives the estate.

But it was also objected that this pottah was rendered null and void by Regulation XIV. of 1812, Section 3, and upon this point we took time to consider our judgment. By that Regulation, it is provided (Section 2) that "no zemindar or other "proprietor of land in the ceded and con-"quered provinces shall grant leases or fix "the rent of any land-tenure for a term "exceeding ten years; or if the term of his "own engagement with Government be less "than ten years, extending beyond such "less term;" (Section 3) "Any evasion of "this prohibition, by entering into separate "engagements or leases to take effect succes-"sively, or by dating an engagement or lease "on a day other than that on which it was "actually executed, or by any other device, "shall be considered as an infringement of "it; and every lease or engagement fixing "the rent, which has been or shall be con-"cluded or granted in opposition to this "prohibition, is declared to be null and "void."

Now, it is a rule that the preamble of a statute may be resorted to in restraint of

* 3 W. R., Privy Council, p. 1.
† 12 W. R., p. 3.

the generality of the enacting clause when it would be inconvenient if not restrained. The allowing the grantor of a pottah at any time, no matter how long after it was granted, to avail himself of this Regulation to nullify his deliberate act is, we think, an inconvenience which justifies our resorting to the preamble of the Regulation. That says: "Whereas it is enacted by "Section 2, Regulation V., 1812, that pro-"prietors of lands shall be competent to "grant leases for any period which they may "deem most convenient to themselves and "tenants, and most conducive to the improve-"ment of their estates; and whereas Regu-"lations IX. and X., 1812, contain rules "under which the settlement which had been "made in perpetuity in the ceded and con-"quered provinces, with the reserve of the "approval of the Hon'ble the Court of "Directors, is subject to considerable modi-"fications and restrictions; and whereas "these rules consequently create a necessity "for limiting the power granted by Section "2, Regulation V., 1812, as above noticed, "the following rules have been enacted to "be immediately in force in the ceded and "conquered provinces, including the terri-"tory ceded by His Highness the Peishwa "in Bundlecund, the district of Cuttack, and "the pergunnahs formerly dependent on that "district, but now annexed to the zillah of "Midnapore."

The reason for making the Regulation is the necessity created by the rules in Regulations IX. and X. of 1812; and the term of ten years is fixed upon as the settlement then in force was for ten years. When the period of the settlement had been extended, we find Regulation XIV. of 1812 modified accordingly by Act XVI. of 1842. The proper construction of the Regulation seems to be that the lease was to be null and void as against the Government, but not as against the lessor. The decision of the Privy Council in Ranee Surno Moyee *versus* Maharajah Suttesh Chunder Roy* (10 Moore's Indian Appeals, 123) was upon this principle, and the case of the Statute of 1st Eliz. C. XIX., Section 3, referred to in the judgment, is closely applicable to the case now before us. The words of that Statute are "shall be "utterly void and of none effect to all intents, "constructions, and purposes whatsoever;" and it was held that the lease or grant is not void or voidable by the bishop himself who made it, but remains good against him during such time as he continues bishop, and the reason given is because such leases or grants were good at the common law, "and the "Statutes were made only for the benefit "of the successors that they should not be "bound by those acts of their predecessors "which might turn to their prejudice and "disadvantage; but not to give the bishop "himself power to avoid or derogate from "his own acts, which would be against all "rules both of law and equity, and therefore "was not within the meaning of the said "Statute; for then he would be empower-"ed by Act of Parliament to do wrong to "other persons, which it cannot be presum-"ed the Parliament intended to allow" (Bac. Ab., Leases and Terms for years, H).

We are of opinion that the Judge was wrong in reversing the decision of the Deputy Collector who had held the pottah to be valid, and that the Judge's decision must be reversed, and the respondent must pay the costs of this appeal and of the appeal in the Lower Appellate Court.

* 2 W. R., Privy Council, p. 13.

The 8th July 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Mál and lakherajlands—Possession—Title—Evidence.

Case No. 482 of 1870.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 16th December 1869, affirming a decision of the Subordinate Judge of that District, dated the 26th February 1868.

Radha Gobind Dass (one of the Defendants), *Appellant,*

versus

Prokash Chunder Dass and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Appellant.

Baboos Ashootosh Dhur and *Rajendronath Bose* for Respondents.

In mál cases of title the question of possession is dependent on the question of title; whereas, in lakheraj cases, the title may fail, and yet if possession as lakherajdars, that is to say, possession without paying rent, is proved, it may be sufficient to give a lakheraj title.

Possession as lakherajdars for a long series of years may be proved by oral evidence, notwithstanding the failure of documentary proof.

Bayley, J.—I THINK the judgment of the Lower Appellate Court in this case must be reversed, and the case remanded to that Court for re-trial.

It is not necessary to go behind the order of remand which is contained in these terms: "We remand the case to the "Lower Appellate Court in order that the "Judge may find upon the evidence on the "record whether or not the lands in dis-"pute are part of any lakheraj *khanabaree* "lands of the plaintiff. Of course we need "hardly say that if the Judge finds as a "matter of fact that the plaintiff is not in "possession of the lands in question, he "must at once dismiss the suit."

The Judge, upon this order of remand records his finding in these terms: "I "come to the conclusion that plaintiff fails "to prove that the land is part of any "lakheraj *khanabaree* of plaintiff. I need "not go through each document. The "chitta and sooruthal of 1845 are rebutted "by the Commissioner's roobokaree unin-"telligible, and the plaintiff's Counsel could "not explain it. The Regulation VII. de-"cision is of very little use in proving the "point at issue, and had concern with only "one koollea of land in other documents—"incidental mention of lakheraj land is "insufficient. As to the second point, I hold "it proved by the evidence of plaintiff's "witnesses and Roop Ram, Gour Mohun, "and Domai for defendants, that plaintiff "is in possession as alleged by him.

"As plaintiff sues for confirmation of his "title and of his possession and only proves "the latter, he is only entitled to a declara-"tory order as to possession; his suit as "regards title must be and is hereby dis-"missed with costs, &c., and his suit as "regards possession is decreed, but I de-"cline to award costs on this part to plaint-"iff. Plaintiff will pay all his own costs "and all defendant's."

The defendant comes up in special appeal against so much of the Lower Appellate Court's decision as decrees possession to the plaintiff, and contends that when the suit is for confirmation of possession, and the title is not proved, the title failing the right to possession also fails; and the case of Gunga Pershad Kubiraj, special appeal 1277 of 1868, decided on the 20th November 1868,* is cited as strongly proving this proposition.

On the other hand the plaintiff files a cross-appeal, stating that the Lower Appellate Court has erred in law in adjudicating his title independently of possession, and that the questions are not two but one.

I think that the case cited by the special appellants is distinguishable as are all *mál* cases of title from *lakheraj* cases of title; because in *mál* cases the question of possession is dependent on the question of title; whereas in lakheraj cases the title may fail, and yet if possession as lakheraj, that is to say, possession without paying any rent, is proved, that possession may be sufficient to give a lakheraj title. In this case, however, it is quite clear that the Judge has separated, whereas he ought to have united, the adjudication of the two points.

I would remand the case to consider, even if the documents referred to by the Judge are insufficient to prove lakheraj by grant, whether the evidence of the witnesses which he finds proves the plaintiff's possession is of such a character as would entitle the plaintiff to a declaration of his lakheraj title; that is, whether it proves that the

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* The 20th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Case No. 1277 of 1868.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 31st January 1868, reversing a decision of the Moonsiff of Naraingunge, dated the 19th June 1867.

Ram Coomar Shome (one of the Defendants), *Appellant,*

versus

Gunga Pershad Sein and others (Plaintiffs), *Respondents.*

Mr. J. S. Rochfort for Appellant.

Baboos Onookool Chunder Mookerjee, Chunder Madhub Ghose, and *Motee Lall Mookerjee* for Respondents.

Peacock, C. J.—THE Judge says that the plaintiffs have not been able to prove their title to the disputed land, but that they have proved their possession of the land for a period of 19 years. That will not justify us in declaring that the plaintiffs have the particular title set up in their plaint and in confirming them in possession.

The decision of the Judge is reversed and the decision of the first Court dismissing the suit of the plaintiffs upheld, with costs of this appeal and of the Lower Appellate Court.

plaintiff held the lakheraj khanabaree lands without paying any rent for such a length of time as would justify the Court to declare him entitled to retain possession on that ground. It is true that the plaint is for declaration of title and confirmation of possession, but I understand all that the plaintiff says is this. He says: "I sue for declaration of a title to these lands, and to retain possession of them on the ground that I have a title to them, by reason of my having held them as lakheraj without the payment of any rent, and by that means being entitled to hold them as such lakheraj."

I would remand the case to be re-tried with reference to the above remarks.

Mitter, J.—I am of the same opinion. I do not think that it was ever intended by the order of remand passed by this Court, that the plaintiffs in this case should be compelled to prove such a lakheraj title against the defendant, as would have enabled them to resist a claim for resumption by the zemindar under the provisions of Section 30, Regulation II. of 1819. If the plaintiffs can show that they have been in possession of the lands in question as lakheraj from generation to generation; and if it is further shown that the lands which the defendant purchased in execution of a decree against them are distinct from those that are now in dispute, they would be clearly entitled to obtain the declaration which they have asked for against the defendant. The Judge seems to have excluded the oral evidence produced by the plaintiffs in trying the first question which he had to try, *viz.*, the question of title; but if that oral evidence is believed, as it was believed by the Court of first instance, and if the effect of that oral evidence be to prove that the plaintiffs have been in possession of the disputed lands as lakherajdars for a long series of years, it would be quite sufficient to enable them to maintain this action, notwithstanding the failure of documentary proof on their side.

Much stress has been laid on the resumption-proceedings of the Commissioner of 1840; but there is nothing whatever to show that the order passed by the Commissioner for the resumption of the lands in question has ever been acted upon. On the contrary, there is evidence on the record to show that the zemindar, within whose zemindary the lands in dispute are geographically situated, brought a suit, under Regulation VII. of 1799, in respect of a portion of those lands; and in that suit it was declared that the plaintiffs in this case, who were defendants in that case, were holding those lands as rent-free, and the zemindar's claim was dismissed. This would be strong evidence in this case to show that the plaintiffs have been holding the lands in suit as lakherajdars.

I would wish to add that, whether the plaintiffs were holding the lands in question as *mâl* or lakheraj, the issue still remains as to whether those lands were included in the sale upon which the title of the defendant is based. If they were included in that sale, it is perfectly immaterial whether they were mâl or lakheraj, and the plaintiffs would not be entitled to maintain this action against the defendant.

In conclusion, I have only to say that cases of this kind can never be satisfactorily disposed of, without taking into consideration all the evidences, oral and documentary, produced by the parties. If a party suing for declaration of title or for recovery of possession, is in every case to be restricted to the production of documentary evidence directly bearing on the question of title, all that I can say is that in 99 cases out of 100 no one in this country would ever be able to prove his case. That possession is evidence of title has been held over and over again; and if that possession has been held undisturbed for a long period of time, it would be the strongest evidence of title which a party can produce.

For these reasons, we remand the case to the Lower Appellate Court for the decision of these two questions, namely, *1st*—whether the plaintiffs have been holding the lands in dispute as lakheraj, that is to say, without paying rent to the zemindar for such a length of time as would constitute a valid title under the rulings of this Court; and *2ndly*—whether those lands were included in the sale upon which the title of the defendant is based.

The costs of this appeal will abide the result.

The 8th July 1870.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Suit by purchaser—Benamee sale—Section 260, Code of Civil Procedure.

Case No. 86 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 22nd September 1869, modifying a decision of the Moonsiff of Amdohara, dated the 29th May 1869.

Tara Soonduree Debee (one of the Defendants), *Appellant,*

versus

Oojul Monee Dossee (Plaintiff), *Respondent.*

Baboo Doorga Dass Dutt for Appellant.

No one for Respondent.

In a suit for possession of a tank on the allegation that plaintiff purchased it in execution of a decree against one S. D., and that, after being put in possession, she was subsequently ousted; defendant's plea being possession after prior purchase at an execution-sale under a decree against the same S. D., the Lower Court found that the defendant's purchase was a fictitious transaction, being, in reality, for the benefit of S. D., who was in actual possession and enjoyment of the property at the time of the plaintiff's purchase.

HELD that the case did not come under the purview of Section 260, Act VIII. of 1859.

Loch, J.—THE plaintiff in this case sues to recover possession of a tank on the allegation that she purchased this tank in execution of a decree against Shib Dyal Bhuttacharjee; that she was put in possession; and that she has been subsequently ousted by the said Shib Dyal and other persons.

One of the defendants, Tara Soonduree Debee, alleges that, previous to the purchase by the plaintiff, her husband, in execution of a decree against Shib Dyal, purchased the same property; that she was in possession, and Shib Dyal had no right whatever to the property; and that, therefore, the plaintiff's claim should be rejected.

On the part of the plaintiff, it was urged further that this purchase by Tara Soonduree's husband was a mere sham; that, in fact, Shib Dyal purchased the property in the name of Tara Soonduree's husband, and was himself in possession at the time when the property was put up for sale and purchased by her.

The Lower Appellate Court found the facts to be that the defendant Shib Dyal was in actual possession of the tank in question when it was sold in execution of the decree and purchased by the plaintiff, and that the purchase in the name of Tara Soonduree's husband was merely a fictitious transaction, for the benefit of and in reality for Shib Dyal who was the judgment-debtor.

It is urged in special appeal that, under the provisions of Section 260, Act VIII. of 1859, this being a suit to oust the certified purchaser at an auction-sale on the ground that the purchase was made on behalf of another person and not the certified purchaser, the suit cannot lie. We think that this case does not come under the purview of that Section. It is clear from what has been found by the Lower Court that, even supposing that Tara Soonduree's husband had purchased the property, yet he had given up his possession to the real owner; and, as found on the evidence, at the time of the plaintiff's purchase the said Shib Dyal was in actual possession and enjoyment of the property, and the rights and interests of Shib Dyal were sold in execution of the decree under which the plaintiff purchased.

The Full Bench decision reported at page 16, XI. Weekly Reporter, Full Bench Rulings, has been quoted to us as a precedent in this case. The ruling laid down in that case was that, where a certified purchaser claimed to recover possession from a party in possession, the party in possession could not plead that the certified purchase was merely a fictitious purchase for him. But the decision went on to say that, "if a *benameedar* should acknowledge the purchase to have been made *benamee*, and waive the right conferred upon him by Sections 259 and 260, and give up possession to the real purchaser as the rightful owner, such act would probably amount to a transfer of the title, as well as of the possession to the real purchaser." Now, what is ruled in that case is not applicable in this case.

It is also said that the Judge in the Lower Appellate Court has made out a new case for the appellant. We think this allegation is not correct; for the question that was tried by the Lower Appellate Court was

one that rose on the pleadings of the parties, and was, in fact, the question which had to be tried.

The appeal is dismissed, but without costs, as no one appeared for the respondent.

The 8th July 1870.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Execution—Limitation—Onus probandi—Bona fides.

Case No. 141 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judicial Commissioner of Chota Nagpore, dated the 1st February 1870, affirming an order of the Officiating Deputy Commissioner of Maunbhoom, dated the 27th September 1862.

Raj Coomar Baboo and others (Judgment-debtors), *Appellants,*

versus

Judoo Bungshee (Decree-holder), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

The mere payment of tullubanah by a decree-holder is not sufficient evidence of a *bonâ-fide* intention on his part to execute his decree.

Kemp, J.—THE judgment-debtors are the special appellants in this case. It appears that the decree was passed on the 30th September 1862. The present application to execute is dated the 25th of March 1868. It appears, however, that on the 20th September 1866 the case was struck off. The question, therefore, is whether any proceedings were taken within a period of three years prior to the last application in March 1868. The first Court held that a *bonâ-fide* application is sufficient to keep alive a decree, and further that there was nothing to show that the decree-holder's proceedings were otherwise than *bonâ fide*. He found that the decree was not barred, and ordered execution to proceed. On appeal by the judgment-debtors, the Judicial Commissioner of Chota Nagpore observes that, as it is quite clear that the decree-holder caused a notice, as required by Section 216 of Act VIII. of 1859, to be issued by paying tullubanah, he had done all that was necessary to show that he had a *bonâ-fide* intention of executing his decree; the appeal was, therefore, dismissed with costs.

The judgment-debtors appeal specially. We think that, looking to the decision of the Full Bench published in Volume VI. of the Weekly Reporter, page 101, and to the instances laid down in that decision, that the decision of the Judicial Commissioner is not sufficient in law. The judgment-debtors had distinctly stated in the grounds of appeal that no service of notice had been made upon them —and upon this point there has been no enquiry whatever. If this is the case, it would be a matter of evidence as to whether the application of the decree-holder was *bonâ-fide* or not. The Full Bench, in their decision quoted above, observe that, if a party, who makes an application to the Court for execution, should neglect to lodge the necessary tullubanah, his neglect would be evidence from which the Court, on a subsequent application for execution, would have to decide whether the former application was a *bonâ-fide* one or merely colourable for the purpose of keeping the decree alive. This is only one instance given. Another instance may be given, namely, that, when a party makes an application to the Court for execution, and lodges the necessary tullubanah, but neglects to serve the notice, such neglect would be evidence from which the Court, upon a subsequent application for execution, would have to decide whether the former application was a *bonâ-fide* one, or, as observed by the Full Bench, "merely colourable for the purpose of keeping the decree alive." Again, the Full Bench lay down that in all cases the Courts must decide whether the former application which is relied on was *bonâ fide* or not. The Judicial Commissioner appears to us to have decided this case simply upon the fact that the tullubanah was paid, without deciding whether the application, looking to all the circumstances of the case and to the objection of the judgment-debtors as to the non-service of notice, was a *bonâ-fide* one or not. The case must, therefore, go back for a fresh decision on this point.

Jackson, J.—I quite concur with Mr. Justice Kemp. I think that neither the decision of the first Court nor that of the

Appellate Court are right in law. The question was whether a certain decree was barred execution on the ground of limitation or not. The judgment-debtors urged that it was barred by limitation, and it was for the decree-holder to show that he had applied within the time allowed by the law of limitation. It has been held by this Court that he must show that, within three years next before his application for execution, he had taken *bonâ-fide* proceedings to enforce his decree or to keep it in force. The first Court here held, that as the judgment-debtor had not been able to show that the application on the former occasion was not in good faith, therefore it must be held to be in good faith. That is, in short, what the decision of the first Court amounts to. The decision of the Appellate Court is that as the decree-holder paid tullubanah for the service of a summons on the former application, therefore it must be held that his application to serve such summons was *bonâ-fide*, and that it was not necessary to ascertain whether the summons was served or not. It seems to me that the mere fact that the decree-holder paid a certain amount of money into Court in order to serve a summons, is not sufficient evidence that he was *bonâ-fide* attempting to execute his decree; for, if so, it might be said that the mere making of an application would be sufficient, for then also there would be a payment of money in purchasing the stamps upon which the application is made. It seems to me that under the decisions of this Court, the question is not as to what formal proceeding the party took, but whether he can show that, on the former occasion, he was really taking steps to enforce the judgment, and whether these steps were *bonâ-fide* steps to carry out his decree, or whether they were merely nominal without any intention of carrying out his decree. Of course, a person may make an application, and may afterwards show that certain circumstances happened which rendered it unnecessary for him to proceed further to serve his judgment-debtor with notice; or even after paying tullubanah he may show that certain circumstances happened which furnished good reasons for not actually serving the notice, and even after serving the notice he may show that he had some good and sufficient reasons for not carrying the execution further; but it seems to me that his proceedings are not shown to be *bonâ-fide* proceedings to carry out his decree, unless he shows some good reason why they were not carried on to the point of execution.

It is altogether wrong in law, as was argued for the respondent in this case, to say that it was the business of the judgment-debtor to show that the proceedings were not in good faith. It is for the decree-holder to show that he is within the law of limitation, and to do so he must show that his proceedings were in good faith to carry out his decree.

Neither of the Lower Courts have gone upon this view of the law; and I, therefore, concur with Mr. Justice Kemp in remanding the case for further trial.

The 11th July 1870.

Present:

The Hon'ble F. A. Glover and Sir Charles Hobhouse, *Bart.*, *Judges.*

Minor's education—Collector's powers—Jurisdiction — Section 12, Act XL. of 1858.

Case No. 92 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 18th February 1870.

Ramendro Bhuttacharjee and another (Petitioners), *Appellants*,

versus

The Collector of Rajshahye (Opposite Party), *Respondent.*

Baboos Unnoda Pershad Banerjee and *Issur Chunder Chuckerbutty* for Appellants.

Baboos Onookool Chunder Mookerjee and *Juggadanund Mookerjee* for Respondent.

A Collector appointed guardian under Section 12, Act XL. of 1858, has power to make arrangements for a minor's education, and is not so far amenable to the jurisdiction of the Civil Courts.

Glover, J.—We cannot, I think, interfere with the Judge's order in this case.

It appears that the Collector applied under Section 4, Act XL. of 1858, for the appointment of a fit person to take charge of the property and person of the minor on the ground of a will executed by the Rajah, Chunder Seekhuressur Roy, and the Civil Court on the 26th of September 1866 made an order under Section 12 of the Act appointing the Collector to that charge.

It may be that, under the circumstances of the case, the Judge ought to have acted under Section 7; but it is clear from the record that the appointment was made under Section 12; and that being so, the Collector was competent to make arrangements for the management of the estate and the guardianship of the minor, "as if the property and person of the minor were subject to the jurisdiction of the Court of Wards," and the present applicants never appealed against that order.

Now, it has been ruled in the case of the Collector of Beerbhoom, appellant, *versus* Mundakinee Debee, decided on the 8th July 1864, that with regard to such a minor's education, the Collector acting as a Court of Wards has power to make arrangements, and is not so far amenable to the jurisdiction of the Civil Courts.

I agree, therefore, with the Judge of the Court below in thinking that, so long as the certificate granted to the Collector under Section 12 of Act XL. of 1858 is not recalled, the petitioners cannot interfere with his discretion as to the best way of educating the minor. It is for them to make out, if they can, a case under Section 21 of the Act.

The appeal should, I think, be dismissed with costs.

Hobhouse, J.—The Collector in this case is said to be conducting the education of the minor otherwise than in accordance with the will of the minor's father, and it is urged that inasmuch as the Collector was appointed guardian of the minor's person under the terms of the will, so we have jurisdiction to direct the Collector to conduct that guardianship in accordance with the terms of the will.

We sent for the record appointing the Collector guardian, and we find that the Judge on the 26th September 1866 appointed the Collector guardian, not under the will, nor under Section 7 of the Act, but under Section 12 of the Act.

This being so, it is clear that the Collector *quâ* guardian in the conduct of the education of the minor is subject to the jurisdiction of the Court of Wards, and not of the Civil Court.

In this view, I agree in dismissing the appeal with costs.

The 11th July 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Seizure and attachment of the property of rebels — Procedure — Act XXV. of 1857—Act IX. of 1859.

Case No. 223 of 1870.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 31st December 1869, affirming a decision of the Subordinate Judge of that District, dated the 29th April 1869.

Byjnath Singh and others (some of the Defendants), *Appellants,*

versus

Messrs. E. R. Solano and others (Plaintiffs), *Respondents.*

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Appellants.

Messrs. J. T. Woodroffe and *G. Gregory* and *Baboos Onookool Chunder Mookerjee* and *Umernath Bose* for Respondents.

The procedure in regard to the seizure and attachment of property under Act XXV. of 1857, and the adjudication of claims to such property under Act IX. of 1859, pointed out.

HELD that it is not incumbent on a party aggrieved by acts done under these laws to bring a suit at all; but if he brings a suit, it must be brought within a year of the attachment or seizure complained of.

A seizure within the meaning of Section 20, Act IX. of 1859, is such a taking possession of the property forfeited as is referred to in Section 7, Act XXV. of 1857—not merely formal but actual.

Markby, J.—IN this case the plaint and written statements have not been translated; but the Lower Appellate Court states the suit was one "for possession of certain "villages, which were sold by Government "to plaintiffs through their agents as the "property of certain rebels on the 30th "May 1859, under the provisions of Act "XXV. of 1857 and Act IX. of 1859."

The plaintiffs (as we are told by the Lower Appellate Court) alleged that the defendants opposed their possession in Assin 1267, and that some of the defendants retained possession and appropriated the produce; the plaintiffs, therefore, sued for possession and mesne-profits.

Amongst other issues, which are not now material, the Court of first instance raised an issue: "Whether Phulwan Singh and defendants Nos. 3 to 8 (that is, the alleged rebels) or the defendants Nos. 9, 10, and 11 (that is, the appellants before us) and their ancestors were in possession of the mouzahs for a period of 12 years up to the date of the sale to plaintiffs—the 19th April 1859; and by what means, *i. e.*, which party had the right of *malik* (proprietor) up to the said date; and is plaintiff's claim just and adjudgeable."

This issue, though not very clearly expressed, seems to me to raise the question who was the owner of this property at the date named—the rebels or the present appellants and their ancestors.

The Subordinate Judge considered that the *defendants* (by which he, no doubt, means the defendants 9, 10, and 11, the appellants before us) wholly failed to prove their possession prior to 1266, *i. e.*, prior to plaintiff's purchase; and he also expresses an opinion (though the District Judge thinks that he did not decide the case on that ground) that the property really belonged to the rebels. The Subordinate Judge expresses an opinion (and the District Judge thinks this is the ground of his decision) that the defendants are barred by Section 20 of Act IX. of 1859 from setting up any claim to this property. From some further observations bearing on the question of wassilat, I gather that the Subordinate Judge also considered the defendants 9, 10, and 11 to have been in receipt of the rents and profits of the property from the 30th May 1859 up to the present time, though he considered that possession to be illegal and to be held, not in their own behalf, but on behalf of the rebels.

The Lower Appellate Court finds the facts on this part of the case as follows: "Not only was there regular attachment of the property on the 14th July 1858, but after the plaintiff's purchase formal possession was given of the property under the amul dustuck, dated 30th May 1859, corresponding with Jeyt 1266. Hence, in this case, it can hardly be said, even if the said defendants had, prior to the said attachment, been in possession, that they have had undisturbed possession for the 12 years preceding the institution of the suit. In fact, from the time the property was attached by Government, it must be held to have been in the legal possession of the Collector, until the purchaser at the Government sale was put in possession." And relying on a decision of this Court, the District Judge holds that the defendants, appellants, "should have preferred their claims and brought a suit to set aside the attachment and sale within one year from the date of the attachment of the property;" and that "no claim, however just, can be listened to if not brought within the year."

I take the facts as found by both Courts to be that there was an attachment of this property on the 14th July 1858; that the defendants were then in possession, and have remained in possession by receiving the rents and profits since that date until now. It is not found that there was any adjudication of forfeiture after or simultaneously with the attachment; nor is it found that the Government took possession or attempted to take possession otherwise than by attachment; nor is it found that the purchaser was put in possession otherwise than "*formally*" by the amul dustuck, which I take to be a written order by the Collector authorizing the purchaser to take possession.

It appears to me that the judgment of the District Judge has proceeded on a misconception of the law in more than one particular. As I understand the law, at first forfeiture only took place on a conviction; but by Act XXV. of 1867, Section 2, power is given to the Court having authority to try the offender, upon the application of the proper officer, to hold an inquiry, and upon proof that a person who has committed mutiny, treason, and other like offences, is dead or has escaped, or after diligent search cannot be found, to adjudge his property liable to be forfeited to Government. There are, therefore, two species of forfeiture: one on a conviction, and the other on an adjudication. Sections 3 to 6 provide in detail what shall be the effect of forfeiture on conviction and adjudication respectively; and Section 7 provides that, *after* the conviction or adjudication, the Collector may *seize* and take possession of the forfeited property, and may require the assistance of the Civil Court of the district for that purpose; which Court is to hear and determine in a summary manner upon petition any matter in dispute in relation to such property. The party against whom the order is made may bring a suit to establish his right at

Baboos Sham Lall Mitter and *Mohendro Lall Seal* for Appellant.

Baboos Onookool Chunder Mookerjee, Romesh Chunder Mitter, Unnoda Pershad Banerjee, Hem Chunder Banerjee, and *Mohesh Chunder Chowdhry* for Respondents.

Section 5, Chapter 2 of the Mitakshara, was not intended to be an exhaustive enumeration of the gotrajas (gentiles), but only a statement of the order in which they would inherit, and does not, therefore, limit the inheritance to the grandsons of the paternal grandfather and paternal great-grandfather.

Couch, C. J.—THIS is an appeal from the decision of the Deputy Commissioner of Lohardugga dismissing the plaintiff's suit with costs. The suit was brought to obtain possession of the Ramghur estate as heir to Triloke Nath Singh, deceased. The plaintiff is the son of the sister of Triloke Nath's father, and the defendant Brum Narain is the great-grandson of the great-grandfather of the grandfather of Triloke Nath; and the main question which has been raised in this appeal is whether the plaintiff is, under the law contained in the Mitakshara, the heir to the deceased Triloke Nath in preference to Brum Narain, it being assumed that, by the custom of the family, the defendant Maharanee Heera Nath Koomaree, the mother of the deceased, is incapable of inheriting. The argument for the plaintiff has been rested upon the interpretation which, it is contended, should be put on the 5th Section of the 2nd Chapter of the Mitakshara; and it is said that in that Section the author refers to the text in Section 1, Verse 2, and enumerates the heirs; and that only those are gentiles (gotrajas) who came within the scheme of Section 5, by which it is said the collateral succession is limited to the grandson of the common ancestor, the degrees being reckoned in the direct line, and on failure of these the cognates succeed. Thus Brum Narain, who is a great-grandson of the common ancestor, would be excluded, and the plaintiff, who is the nearest cognate, entitled to the inheritance.

Before noticing the decided cases upon the point, we think we had better consider the text of the Mitakshara.

In Chapter 2, Section 1, Verse 2, the rule of Yajnavalkya is given: "The wife, and "the daughters also, both parents, brothers "likewise, and their sons, gentiles, cognates, "a pupil, and fellow-student; on failure of "the first among these, the next in order is "indeed heir to the estate of one who de-"parted for heaven leaving no male issue. "This rule extends to all persons and "classes."

In Section 5, the author, having in the previous Sections commented on the right of the wife, the daughter, and the daughter's sons, the parents, and the brothers, proceeds to comment on the succession of the gotrajas or gentiles. In the first place, the paternal grandmother takes the inheritance, and, on failure of her, the paternal grandfather, the uncles, and their sons—Section 4.

"On failure of the paternal grandfather's "line, the paternal great-grandmother, the "great-grandfather, his sons and their issue, "inherit"—Section 5.

It is urged that the author thus limits the inheritance to the grandsons of the paternal grandfather and paternal great-grandfather, and that the words which follow—"In this "manner up to the seventh degree must be "understood the succession of kindred be-"longing to the same general family"—apply the same rule to the descendants of remoter ancestors. If this be the interpretation, the author of the Mitakshara does not expound the text of Yajnavalkya by stating the order in which the gotrajas or gentiles are to succeed; but he makes a different rule of succession by which some of them are altogether excluded from the inheritance, the text of Yajnavalkya being that, on failure of the gentiles, the cognates (the next in order) are to succeed. It is reasonable to suppose the author intended to state the order of succession among gotrajas rather than to introduce a different rule. And it has been suggested in the argument for the respondent that the making the enumeration in the collateral line cease at the grandsons is explained by the offering of funeral oblations. It is argued for the respondent that, as the sapindas are of two grades, the nearer who offer and partake of pinda (the rice ball) entire, and the remoter who offer and partake of merely the wipings of the hands, the author keeping in mind the text he had before cited in Section 3, Verse 3, and Section 4, Verse 5, "To the nearest sapinda the "inheritance next belongs," enumerates the sapindas in the order of propinquity, omitting the great-grandsons of the father, of the paternal grandfather, and of the paternal great-grandfather, because they are remoter than the kindred he mentions.

And the passage in Subadhini translated in the note at page 141, West and Bühler, is consistent with this. It is "on failure of "the father's line, the line of the father "(must be understood to) end with the "brothers and their sons," which may mean for the purpose of determining who are the nearest sapindas. It cannot be supposed that it was intended entirely to exclude the father's great-grandson, and that the inheritance should go to another family.

That the 5th Section was not intended to be an exhaustive enumeration of the gotrajas, but only a statement of the order in which they would take, seems to be the interpretation which is consistent with the text which was being expounded, and with the ruling principle of the Hindoo Law of inheritance, and ought to be preferred. But the question is really settled by decisions. In Rutcheputty Dutt Jha *versus* Rajender Narain Roy, 2 Moore's Indian Appeals, 132, it was held that, by the Hindoo Law in force in Mithila, the party in possession being descended in the sixth degree in the paternal line was to be preferred to the maternal line. At the close of the judgment, it is said that the Mithila law was against the claim of any relation on the mother's side, till those on the father's side to the seventh degree have been exhausted. Some of the authorities quoted in that case—the Vivada Chintamani and Vivada Chandra for instance—do not belong to the Benares School, by the law of which the case before us is governed; but this is not a point upon which there appears to have been a difference between the Mithila and Benares Schools. In Mussamut Dig Daye *versus* Bhuttun Lall, 11 Weekly Reporter 500, it was held by Mr. Justice L. S. Jackson and Mr. Justice Mitter that gentiles must be exhausted before the cognates can succeed. There are several decisions in the North-Western Provinces upon the law according to the Benares School. In Duroo Singh *versus* Rai Singh, S. D. A. Reports, 1864, page 521, it was held that though the great-grandsons of the paternal great-grandfather of the last male owners are not expressly enumerated by Sir W. Macnaghten as heirs according to the law as current in Benares, yet they are entitled to inherit.

In Agur Singh *versus* Ram Singh, S. D. A. Reports, N.-W. P., July 1865, page 4, it was also held that, in the tracts governed by the Benares Law, a great-grandson is included among near heirs, and several previous decisions to the same effect are quoted at page 11. In that case both the claimants and the deceased appear to have been in the fifth degree from the common ancestor. There is another decision in the same Court, Shoodhyan *versus* Mohun Pandey, II. Sudder Dewany Adawlut Reports, N.-W. P., 1863, page 134.

In the Bombay Presidency the same construction has been put on the Mitakshara; and the series has been considered by the Shastris as not exhaustive, nor intended to exclude others than those named, but only as an exemplification of the general doctrine—Digest of Hindoo Law by West and Bühler, Book I., page 139. It was also recognized as the law of the Mitakshara in Ranee Sreemutty Debia *versus* Ranee Koond Luta, 4 Moore's Indian Appeals, page 292.*

We are, therefore, clearly of opinion that the appellant is not entitled to the inheritance in preference to the respondent Brum Narain, and that the decision of the Lower Court on this point is right. As regards that part of the case which is described in the plaint and is called in the grounds of appeal the constitution of an heir by appointment, we need only say that, taking the evidence of Maharanee Prem Koomaree to be entirely true, there was no adoption nor any thing which would by Hindoo Law alter the status of the plaintiff, and give him any other right of succession than he had as the father's sister's son. The question between the Maharanee and the defendant Brum Narain is the subject of another suit. As between the plaintiff and Brum Narain, the decision of the Lower Court is right; and the appeal must be dismissed with costs as against the second and third respondent, but without costs as against the first respondent, the Court of Wards.

* 1 W. R., P. C., p. 44.

The 12th July 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Sale of moveable property not the judgment-debtor's—Decree-holder's liability.

Case No. 526 of 1870.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 18th December 1869, modifying a decision of the Subordinate Judge of that District, dated the 4th December 1868.

Kanaye Pershad Bose and another (Plaintiffs), *Appellants,*

versus

Hur Chand Manoo (one of the Defendants), *Respondent.*

Baboo Grish Chunder Ghose for Appellants.

Baboos Onookool Chunder Mookerjee and *Ram Churn Mitter* for Respondent.

A decree-holder who has caused the sale of moveable property not belonging to his judgment-debtor, though he has done so in perfect good faith, is liable to make good the value of that property to its rightful owner.

Mitter, J.—THE only question raised in this special appeal is whether a decree-holder who has caused the sale of a moveable property not belonging to his debtor, is liable to make good the value of that property to its rightful owner, supposing that he, the decree-holder, had acted in perfect good faith.

I am of opinion that this question ought to be answered in the affirmative. Whether the decree-holder had acted in good faith or not, does not seem to me to be of much importance one way or the other. It is beyond all question that a decree-holder has no right to seize a property which does not belong to his debtor, and he is, therefore, bound to satisfy himself beyond the possibility of a mistake that the property against which he intends to execute his decree is really the property of his debtor. No mistake on this point, however innocently committed, can relieve him from the consequences of his own act, which is certainly an act of trespass so far as the rightful owner is concerned; and I see no reason in justice or equity why the latter should suffer in consequence of such a mistake. It has been said that the rightful owner may follow the property in the hands of the purchaser who purchased it at his own risk and peril. But there is no law, that I am aware of, which says that this is the only remedy of the rightful owner. Suppose, for instance, that the purchaser is an insolvent, or that he is beyond the reach of the Court's process, or that the rightful owner is unable to find him out. Is the rightful owner to pocket the loss because the decree-holder had acted under a mistake? I see no reason whatever for acceding to such a contention.

Much stress has been laid by the pleader for the respondent upon two decisions of this Court—the one reported in page 119 of the 9th Weekly Reporter; the other in page 528 of the 11th Weekly Reporter. But neither of these two cases appears to me to have any bearing upon the point now under our consideration. All that was decided in the first case was that the owner of a moveable property sold in execution of a decree is at liberty to follow that property in the hands of the purchaser; but no question relating to the liability of the decree-holder seems to have been raised or discussed before the learned Judges by whom that decision was passed. In the second case it was found as a fact that the judgment-debtor had a moiety share in the property seized by the decree-holder; so that if anybody was to blame, it was the auction-purchaser who had taken possession of the entire property notwithstanding that he was entitled to one-half of it only as the purchaser of the right, title, and interest of the judgment-debtor. There is a case, however, in page 329 of the 12th Weekly Reporter which directly supports my view.

For the above reasons, I would reverse the decision of the Judge and restore that of the Court of first instance. The costs of this Court and of the Lower Appellate Court ought to be borne by the decree-holder, respondent.

Loch, J.—I concur.

b

The 13th July 1870.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Suit for measurement—Jurisdiction—Section 9, Act VI. (B. C.) of 1862—Appeal—Section 337, Act VIII. of 1859.

Case No. 291 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 22nd January 1870, reversing a decision of the Deputy Collector of that District, dated the 6th October 1869.

Doorga Chunder Doss (Plaintiff), *Appellant,*

versus

Mahomed Abbas Bhooyan (Defendant), *Respondent.*

Baboos Romesh Chunder Mitter and *Anund Chunder Ghossal* for Appellant.

Baboos Nuleet Chunder Sein, Karoona Doss Bose, and *Kalee Mohun Doss* for Respondent.

In a suit under Section 9, Act VI. (B. C.) of 1862, for aid to measure his ryot's land, plaintiff claimed the proprietorship as purchaser from the owner, while defendants denied the proprietary right of either plaintiff or his vendor. The Deputy Collector, finding that plaintiff's vendor had been proprietor, and had received rent up to the date of sale, gave plaintiff a decree which was reversed by the Judge in appeal as made without jurisdiction.

HELD (Mitter, *J.*, *dissentiente*) that the Judge was right, and that it was not enough for plaintiff to be able to prove his title, he having been bound to show that he was a proprietor in possession in some way or other.

HELD (Mitter, *J.*, *dubitante*) that, as the Deputy Collector's decision proceeded on a ground common to all the defendants, the Judge had jurisdiction under Section 337 of the Code of Civil Procedure to reverse the decree on the appeal of only one of the defendants.

Glover, J.—THE plaintiff in this case sued under Section 9, Act VI. of 1862, B. C., for assistance to measure his ryot's, the defendant's, land. He claimed the proprietorship of the estate—the half of a small talook—as purchaser from the owner, one Akbur Ali.

Abbas and the other defendants denied plaintiff's right as proprietor, and averred that Akbur Ali, plaintiff's vendor, was not owner of any portion of the talook. Abbas appears to be a co-sharer in the estate as well as a cultivating ryot.

The Deputy Collector made what he calls a summary enquiry into the right of proprietorship, and found that Akbur Ali was a part-owner, and had received the rent of the land up to the year 1275, B. S., the date of sale to the plaintiff. He, therefore, gave plaintiff a decree, reserving all question of title.

The Judge on appeal reversed this decision, thinking that the Revenue Courts had no jurisdiction where the party claiming the right to measure was admittedly out of possession, and where his title to the land was disputed by third parties.

In special appeal, it is contended—

(1) That the Judge ought to have decided whether plaintiff's vendor, Akbur Ali, was in possession and in receipt of rent up to the date of sale; and

(2) That the decision of the Deputy Collector ought not to have been reversed in its entirety merely on the appeal of Abbas alone.

On the first point, I think that the Judge was right; and that Section 9, Act VI. of 1862, B. C., cannot be employed to give title by a side wind, or to virtually decide questions of proprietary right under cover of a right to measure. A plaintiff coming into Court under this Section as proprietor must show that he is a proprietor in possession; it is not enough that he may be able to prove his title. He must be in possession before he can claim the right to measure, and the only question the Revenue Court has to try under Section 9 is "who is in possession." The case of Kalee Dass Nundee *versus* Ram Gutty Sein, VI. Weekly Reporter, page 10, lays down the same ruling; and Pureejan Khatoon *versus* Bykunt Chunder Chuckerbutty, VII. Weekly Reporter, page 96, is exactly in point. In that case, as in the present, the defendants, who were ryots in the estate, pleaded that the lands did not belong to the plaintiff, but to another party; and it was held that the act contemplated possession by the receipt of rents for those lands of which measurement was required, and that, where such possession was not proved, the suit should be dismissed.

This possession is explained (and I think properly) to mean possession, not only by receipt of rent, but any sort of *bonâ-fide* undoubted possession (in the case of Raj

Chunder Roy, IV. Weekly Reporter 16). But the result of all the cases is that a party seeking to measure under Act VI. of 1862, B. C., must be in possession of the estate in some way or other.

Now, the plaintiff in this suit is admittedly out of possession. He has neither got manual possession of the estate, nor has he ever received any rent from it; and it seems to me immaterial whether his vendor Akbur Ali had possession, and received rent or not so far as a suit of this kind is concerned. It is clear that that possession was never transferred to the plaintiff; and until he acquires it, he cannot, in my opinion, sue for measurement.

The second objection is not taken in the petition of special appeal; but if we were to allow it, I do not think that it mends the plaintiff's case. Section 337 of Act VIII. of 1859 says that, where there are two or more defendants in a suit, and the decision of a Lower Court proceeds on *any* ground common to all, any one of the defendants may appeal against the whole decree, and the Appellate Court may reverse or modify the decree.

Now, the defence of Abbas and his co-defendants, who were all treated as ryots, was, amongst other things, that the plaintiff had no title; and the Deputy Collector decided that point adversely to all the defendants, so that, when Abbas appealed on the same question, he was appealing against a judgment which was adverse to all the defendants on a ground common to all of them; and on his appeal alone, therefore, it seems to me that the Judge had jurisdiction to reverse the Deputy Collector's decree as against all the defendants.

I would reject this special appeal with costs.

Mitter, J.—This was a suit instituted by the plaintiff, now special appellant before us, under the provisions of Section 9, Act VI. of 1862 of the Bengal Council.

The material averments in the plaint were to the effect that the talook sought to be measured was the property of defendants 1 and 2; that the said defendants were in possession thereof, partly by holding certain lands as their *niz-jote*, and partly by receiving rents from the other defendants; that the share of the said talook belonging to the defendant No. 1 was sold by him to the plaintiff on the 6th of Cheyt 1275; that on the 15th Jeyt 1276, the plaintiff served a notice on all the defendants calling upon them to point out to him the lands respectively held or occupied by them, and that, on their failure to do so, the plaintiff has been obliged to bring this action for the declaration of his right to measure the said lands.

Defendant No. 1 admitted the claim of the plaintiff, but the other defendants repudiated it on the ground that neither he nor his vendor had any title to, or possession in, the talook in question.

The Deputy Collector, who tried the case in the first instance, gave a decree to the plaintiff, holding that it was satisfactorily proved by the evidence on the record that the vendor of the plaintiff was entitled to a certain share in the talook in question, and that he was in possession thereof up to the date of the plaintiff's purchase.

Against this decree defendant No. 2 alone appealed to the Judge, but that officer has dismissed the entire claim of the plaintiff upon two grounds, namely, 1st, that the rights and interests of the plaintiff's vendor being disputed by the defendants, the Revenue Courts have no jurisdiction to enquire into those rights; and, 2ndly, that the plaintiff himself has never been in possession since the date of his purchase.

I am of opinion that neither of these grounds is sufficient to meet the requirements of this case. It is true that the title and possession of the plaintiff's vendor have been repudiated by the defendants; but this circumstance cannot, in my opinion, effect the jurisdiction of the Collector to try whether that repudiation is true or false. Were it otherwise, the jurisdiction of the Collector would be absolutely dependent on the nature of the defence set up; and this conclusion would be certainly contrary to all the recognized principles by which questions of jurisdiction are determined. The law says "that the Collector shall proceed to enquire into the case in the manner provided for suits under Act X. of 1859;" and he is, therefore, bound to decide all questions necessary for the right decision of the case, whether they are questions of disputed title or of disputed possession. The Judge says: "It may be that the rights and interests of Akbur Ali are contested merely to oppose the plaintiff; but if such is the

case, he must seek his remedy in the Civil Courts, but he cannot obtain redress by suing for assistance to measure the lands." If this reasoning is correct, all that a tenant has to do is to deny the title of his landlord, and the Collector would be bound to hold his hands notwithstanding the gross fraud involved in the denial. Surely, the jurisdiction of a Court of justice cannot depend upon the honesty of the defendant; and I see no reason for making any distinction in this respect between the jurisdiction of the Revenue Courts and that of any other Court in this country.

The other ground upon which the Judge's decision is based requires a more careful consideration. I do not wish in this case to raise the question as to whether a proprietor who is *de facto* out of possession is competent to avail himself of the provisions of Section 9 of Act VI. of 1862. But assuming that this question ought to be answered in the negative, I do not see any reason why the plaintiff should not be permitted to maintain this suit, merely because he himself has not received any rents from the defendants since the date of his purchase. The first Court has distinctly found as a fact that his vendor Akbur Ali was in possession of the talook in question up to that date; and as this finding has not been reversed on appeal by the Judge, the plaintiff is fully entitled to assume it to be correct for the purposes of the present discussion. Suppose, then, that there had been no sale to the plaintiff and that this suit had been brought by Akbur Ali himself. Could it have been contended for one moment that the mere fact of Akbur Ali's not having received any rents from the defendants during the interval between Cheyt 1275, the date of the plaintiff's purchase, and Srabun 1276, the date of the institution of this suit, would have been a sufficient answer to his claim? And would the defendants have been permitted upon that ground alone to say that Akbur Ali was not *a proprietor in the receipt of rents* within the meaning of Section 9, Act VI. of 1862? If Akbur Ali was in the receipt of rents from them in Cheyt 1275, there can be no doubt whatever that he was in possession through them up to that date. How then could it have been contended that they were not his tenants in Srabun 1276, or that he was not in possession through them at that time, merely because he did not receive any rents from them during the interval in question, particularly when it is borne in mind that that interval would have scarcely sufficed to enable him to make his *poonia* for 1276? It is a notorious fact that rents are not collected from the ryots in this country every month in the year; and if the mere fact of the non-receipt of rents during a short interval like the one under our consideration, is sufficient to convert a proprietor in possession into a proprietor out of possession, no zemindar in this country would ever be able to maintain an action under Section 9, Act VI. of 1862. Suppose, again, that Akbur Ali had brought a suit against these very defendants for arrears of rent; and suppose also that the period for which those arrears were claimed was the very period intervening between Cheyt 1275 and Srabun 1276. Could it have been contended for one moment that Akbur Ali was not a proprietor in possession merely because he did not receive any rents from the defendants during the period in question? And would the defendants have been permitted upon that ground alone to say that they were not his tenants in Srabun 1276? Of course, it would have been quite open to the defendants in such a suit, as in a suit for measurement under Section 9, to prove that the relation which existed between them and Akbur Ali in Cheyt 1275 had been subsequently determined in due course of law, or even that they had been paying their rents *bonâ fide* to some one else since that date; but in the absence of such proof the Collector would have been bound, in my opinion, to decree the claim of Akbur Ali, whether that claim was a claim for arrears of rent or for measurement under the Section above referred to.

But if Akbur Ali could have maintained a suit for measurement under the circumstances stated above, I do not see any reason why the plaintiff should not be permitted to maintain this suit under the Section in question. That the plaintiff is the purchaser of the rights and interests of Akbur Ali is not disputed in this case, either by Akbur Ali himself or by the other defendants; and it is, therefore, clear that he is legally entitled to occupy the same position as his vendor. Why then, it may be asked, is the Collector to decline jurisdiction in the one case and not in the other? It has been said that the plaintiff himself has not received any rents from the defendants since the date of his purchase. But the argument cannot, in my opinion, affect the position of the plaintiff in the slightest degree; for that position is in

the eye of the law, precisely the same as that of his vendor, so far as the defendants in this case are concerned. Suppose, for instance, that a zemindar who is *de facto* in possession of his estate, dies and a suit for measurement under Section 9 is brought by his heir on the very next day. Would the tenants of the deceased proprietor be permitted to get rid of the suit merely by urging that the plaintiff himself has not received any rents from them, and that they were not the tenants of his ancestor. I see no reason whatever for putting such a narrow construction on the words of the Section in question; and I may add that to allow such a defence would be to countenance a gross fraud.

With reference to the decisions relied upon by the pleader for the respondent, I have only to observe that they do not seem to me to have any direct bearing upon the point now before us. There is nothing whatever in those decisions to show that a suit like the present cannot be maintained in the Revenue Courts; and it is, therefore, unnecessary for me to go into them in detail.

As to the second ground urged in this special appeal, I am not prepared to say that the provisions of Section 337, Act VIII. of 1859, are not applicable to this case.

For the above reasons, I would remand this case to the Lower Appellate Court to be tried on the merits.

The 13th July 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

User—Right of way—Presumption.

Case No. 458 of 1870.

Special Appeal from a decision passed by the Deputy Commissioner of Cachar, dated the 18th December 1869, reversing a decision of the Moonsiff of that District, dated the 7th December 1869.

Mahomed Ali and others (some of the Plaintiffs), *Appellants,*

versus

Joogul Ram Chunder (one of the Defendants), *Respondent.*

Baboo Kalee Prosunno Roy for Appellants.
Baboo Tarucknath Sein for Respondent.

Where a claim to a right of way is supported by evidence of user only, the Court must satisfy itself whether or not the user was founded on actual right; the guiding principle being that open user of another's land for the purposes of a road or pathway, if continued without interruption for a long time and not attributable to permission or sufferance, induces the presumption that the user was of right.

Phear, J.—We think that there is no error of law in the judgment of the Lower Appellate Court. That Court was called upon by the plaintiff to declare that he had a right of way over certain lands belonging to the defendant; and the plaintiff supported his claim of right by certain evidence of user.

The Court below has refused to infer from that evidence that the plaintiff has the right which he claims. It does not appear to us that the Judge made any error of law in refusing to draw that inference.

As far as we can see, the evidence of user was in its character very indefinite. There was very little, if any thing, to show that it was user as of right against the defendant and his predecessors in the possession of the land. Indeed, according to the case of both parties, such user, as had taken place, appears, for a considerable portion of the time at least, to have been an user by passing and re-passing over waste and jungle lands which no body had any interest in disputing.

There was also evidence which tended to rebut the presumption as to the right which might possibly be justifiable upon the user alone, and the Lower Appellate Court drew attention to that evidence, and argued from it that the plaintiff never had, in fact, the right which he claims.

We do not in dismissing this appeal say that had the Lower Appellate Court in its discretion and on a full view of the evidence on the record, come to the opposite finding to that at which it has come, that finding would necessarily have been bad in law.

Several cases have been cited to us in which this Court has declined to interfere with findings of fact which have been come to by Courts of regular appeal upon certain evidence of user. But this Court has never yet undertaken to say that user of a specified kind must necessarily in law lead to the inference that the party who has enjoyed that user had a right of way. In all cases where a right of way comes in question and the party claiming the right supports his claim by evidence of user only, the Court which is

the Judge of fact must satisfy itself as best it can upon that evidence, having regard to all the circumstances under which the user took place, whether or not the user was founded on actual right. The guiding principle to be observed is, that open user of another person's land for the purposes of a road or pathway, if continued without interruption for a long time, and not shown to be attributable to permission or sufferance on the part of the owner, properly induces the presumption that the user was of right. The only other alternative would be that each passing and re-passing was a trespass, and the law will rather presume that acts such as these constantly repeated for a considerable length of time before all the world are rightful than that they are wrongful.

The sooner it is understood that these questions are substantially questions of fact to be determined upon the evidence furnished by the litigants, the better it will be for the interests of the parties to these suits. We dismiss this appeal with costs.

The 13th July 1870.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mahomedan Law—Marriage—Zina or fornication—Illegitimacy—Nussub or consanguinity—Admissions.

Case No. 9 of 1870.

*Application for review of judgment passed by the Hon'ble Justices F. B. Kemp and F. A. Glover, on the 13th December 1869, in Regular Appeal No. 17 of 1869.**

Mirza Himmut Bahadoor, Plaintiff (Respondent), *Petitioner,*

versus

Mussamut Sahebzadee Begum, Defendant (Appellant), *Opposite Party.*

Mr. J. T. Woodroffe and *Baboos Romesh Chunder Mitter, Chunder Madhub Ghose,* and *Boodh Sein Singh* for Petitioner.

Messrs. J. Kennedy, R. E. Twidale and *C. Gregory* and *Baboo Onookool Chunder Mookerjee* for Opposite Party.

* 12 W. R., p. 512.

Under the Shiah, as well as the Soonee Law, any connection between the sexes which is not sanctioned by some relation founded upon contract or upon slavery is denounced as "zina" or fornication.

Both schools prohibit sexual intercourse between a Mooslnah, *i. e.*, a Mahomedan woman, and a man who is not of her religion.

According to the Shiah Law, marriage must in all cases be lawful, except when there is error on the part of both or either of the parents.

"Nussub" or consanguinity is established by a valid marriage or the semblance of it, and is not established by "zina" or illicit intercourse. A *walud-oo-zina* or child of fornication has no *nussub.*

The admission of *nussub* on the part of an illegitimate brother does not operate under Mahomedan Law, if made at a time when he has a known heir.

Kemp, J.—THIS is an application on the part of Himmut Bahadoor, plaintiff in the Court below and respondent in this Court, to review our judgment, dated the 13th December 1869.

For reasons given in our judgment, we found on the evidence, as also on the probabilities of the case, that there had been no legal marriage between the late Rajah Mode Narain and the late Buratee Begum, the latter being a Mahomedan woman and the kept mistress of the former, who was a Hindoo Rajah of rank, married to, and with issue by a Hindoo lady who is still living.

The plaintiff Himmut Bahadoor, one of the illegitimate sons of the late Rajah Mode Narain by his kept mistress, the late Buratee Begum, claims the estate of his late brother, Ekbal Bahadoor, also an illegitimate son of the Rajah by Buratee Begum. He is opposed by Sahebzadee Begum, the widow of Ekbal Bahadoor.

The plaintiff alleges that he belonged to the Shiah sect, and that the case must be governed by the Imameea Law. We observed, in our former decision, that as the plaintiff in his examination had admitted that he had not been circumcised, it was not easy to conceive how he could claim to be a Mahomedan of any sect, whether Shiah or Soonee, but as it is laid down in the Digest of the Imameea Law compiled by Baillie, page 255, from translations of the Shuraool-Islam, a work of the very highest authority on the Imameea doctrines, that "if one of the parents of an infant be a believer, the construction of the law is in favor of the Islam of the child," we gave the plaintiff the benefit of the construction, and permitted him to carry on his suit as the illegitimate son of Buratee Begum, who was admittedly a true believer, *i. e.*, a Mahomedan.

We found that there was no evidence that the late Rajah Mode Narain had embraced the Mahomedan faith, and apostatized from Hindooism.

We also found that as the plaintiff was a child of fornication or walud-oo-zina, he had no "nussub" or parentage, and consequently neither the "zanee" or he who has unlawfully begotten, nor she who bore him, nor any of their relations, can be his heir, nor has he any title to their succession. The inheritance, therefore, is only for his own children or his wife, and on failure of them, it goes to the Imam. See Baillie's Digest of the Imameea Law, part II., page 305; as also the Shura-ool-Islam from which Baillie derives his authority.

Further, that as the right of inheritance is founded on "nussub" or consanguinity, and there being no nussub between the plaintiff and his illegitimate brother Ekbal Bahadoor, the plaintiff would not succeed to the estate of the latter.

With reference to certain alleged admissions by Ekbal to the effect that Himmut was his brother, we found that even admitting these admissions to exist and to be binding upon the parties making them, they were invalid inasmuch as the acknowledger, Ekbal, had at the time of the alleged admission a known heir in the person of his wife, the defendant Sahebzadee Begum; we, therefore, dismissed the plaintiff's suit. The above is a brief analysis of our judgment.

Mr. Woodroffe has been heard at great length for the applicant for review. Mr. Kennedy and Mr. Gregory have been heard for the opposite party, and the case has been thoroughly argued.

On the former occasion the only books on Mahomedan Law referred to by the pleaders on both sides were these: Shura-ool-Islam, Baillie's Digest of the Imameea Law, part II., and the Hedaya.

The first authority is one which is admittedly more universally referred to than any other Shiah law book, and is the chief authority for the law of the Indian followers of Ali—*vide* Morley's Digest, Introduction, page 277. This great work was composed by Shaikh Muayyid, the most generally known of all the Shiah lawyers. The author died in 1277 A. D.

Mr. Woodroffe admits that, according to the Shura-ool-Islam, the plaintiff would not be entitled to inherit the estate of his deceased illegitimate brother. But he contends that there are other authorities on the Shiah law which were not brought to our notice when the case was first heard by us, and which take a different view of the status and rights of an illegitimate son to that taken by the author of the Shura-ool-Islam.

As the case was a novel one and of considerable importance, we served notice on the opposite party and permitted the case to be re-opened on the law-point as well as to effect of the alleged admission as operating to create a "nussub" between the plaintiff and his deceased illegitimate brother.

Mr. Woodroffe called our attention to the position of the defendant Sahebzadee Begum and contended that inasmuch as she was a childless widow, she would not be entitled to inherit any portion of the estate of her late husband Ekbal Bahadoor, and therefore she was not in a position to question either the title of the plaintiff or the effect to be given to the admissions of Ekbal in favor of nussub existing between him and the plaintiff. In reply to this argument, we would remark that the defendant is in possession, and the plaintiff, before he can displace that possession, must prove a better title. Further, it is not at all clear whether the law is as laid down by the learned Counsel, for we find on referring to Sir William Macnaghten's Mahomedan Law, page 39, that "when a husband dies leaving no other heir but his wife, she is only entitled to one-fourth of his property, and the rest escheats to the public treasury." In Baillie, part II., page 295, we find that "when a wife has had a child by the deceased, she inherits out of all that he has left; and if there was no child, she takes nothing out of the deceased's land, but her share of the household effects and buildings is to be given to her." It has been said, however, that she is to be excluded from nothing except the mansions and the dwellings; while a third opinion has been expressed by "Moortaza" that the land should be valued and her share of the value assigned to her. Baillie adds that the first opinion appears to be best founded on *traditional* authority.

It appears to us that the plaintiff must prove his own title. If the defendant has none, which appears to us to be anything but certain, it is for the Imam, the Government, to claim the estate of Ekbal which is in the possession of his widow, the defendant

in the suit. The plaintiff cannot be permitted to succeed on the supposed weakness of the defendant's title, but must establish his own as a better title.

Mr. Woodroffe then contends that, before the Court can say that the plaintiff is a wulud-oo-zina or child of fornication, there must be proof that fornication was committed by the Rajah Mode Narain and Buratee Begum. Mr. Woodroffe referred us to several passages from the Shura-ool-Islam. They are to the effect that, if either the adulterer or adulteress pleads ignorance, the plea will be accepted, and he or she will not be charged with adultery; that if either of them knows that the act is illegal, the punishment of adultery will be inflicted on the party who knows its illegality, and not on the party who is ignorant of it. He referred us to cases quoted from the above authority of a man having sexual intercourse with his mother, foster mother, daughter-in-law, in which there would be no punishment inflicted for the act, if done under ignorance of its illegality.

The learned Counsel also contended that under the Mahomedan Law four witnesses are required to prove the offence of adultery.

To these arguments, we would reply that, under the Shiah as well as the Soonee Law, any connection between the sexes which is not sanctioned by some relation founded upon contract or upon slavery is denounced as "zina" or fornication. (Page 15, Baillie, Part II., Introduction.)

Both schools, Shiah and Soonee, prohibit sexual intercourse between a Mooslnah, *i. e.*, a Mahomedan woman, and a man who is not of her religion; and according to the Shiah law, marriage must in all cases be lawful except when there is error on the part of both, or either of the parents. (Page 19, Baillie, Part II., Introduction.)

At page 373 of Baillie's Digest, Part II., in regard to error on the part of both or either of the parents, it is stated that, supposing a man should have carnal connection with a woman through error, supposing her to be his wife, which proves not to have been the case, the offspring of such connection is held in law to be the child of both its parents, if both were alike in error, or of that one alone who was influenced by the mistake.

Applying these passages to the case before us, can it be for a moment contended with any show of reason that a Hindoo Rajah, who was married to a Hindoo wife, and had issue by her, was ignorant that he was committing fornication, in having connection with his Mahomedan kept-mistress. Could there have been even a semblance of a marriage between the two? Is it possible that a Mahomedan woman, in having sexual intercourse with a man not of her own religion, a man of high rank, could for a moment have entertained any doubt on the subject? There can have been no error or ignorance on the side of either.

As to the four witnesses referred to by Mr. Woodroffe, we are not acting as a Mahomedan Cazee trying either the Rajah or his mistress for the offence of "zina."

We, therefore, can have no doubt whatever that there was no legal marriage, nor even the semblance of a marriage between the late Rajah and Buratee Begum; that she was his concubine; and that neither of them were under error or ignorance of the fact that they were living together in open adultery. The plaintiff, who is the offspring of this connection, is clearly a "wulud-oo-zina" or child of fornication.

We now come to the important question in the case for the plaintiff. Mr. Woodroffe contends that, even admitting that the plaintiff is a "wulud-oo-zina," this Court was wrong in law in holding that there was no nussub between the plaintiff and his illegitimate brother, the late Ekbal Bahadoor, whose estate the plaintiff claims.

We shall presently refer to the authorities which have been quoted by Mr. Woodroffe for the first time in this stage of the case.

But first as to how "nussub" is established. It is established by a valid marriage or the semblance of it, and it is not established by "zina" or "illicit intercourse."

This passage is translated from the Shura-ool-Islam. The right to inheritance is founded on "nussub" or consanguinity, and on "subub" or special connection. Under nussub are comprised three classes or series of persons—first, the parents and the children how low soever; second, the brethren and their children how low soever, and the grand-parents how high soever; and third, the maternal and paternal uncles and aunts. "Subub" is of two kinds—"zarjeent" or the relation between husband and wife; and "wulla" or dominion, of which there are

three kinds; the wulla of circumspection, the wulla of responsibility for offences, and the wulla of Imamut or headship of the Mussulman community." (Baillie, Part II., Book VII., page 261.)

It is therefore clear that the plaintiff comes under the second class of parties claiming under the right of nussub, *viz.*, the brethren. Is there, then, any "nussub" between the plaintiff and his deceased illegitimate brother, for, unless this be established, the plaintiff's suit must necessarily fail.

In support of his theory that there is nussub between the plaintiff and his deceased illegitimate brother, even though they are the children of fornication, Mr. Woodroffe refers to authorities of a more modern date than the "Shura-ool-Islam," and contends that, if the doctrine laid down in this, the greatest work on the Shiah law, is inconsistent with the general principles of Mahomedan law as laid down in other authorities on the subject, the Court is not bound to be guided by the Shura-ool-Islam alone.

We have already alluded to the remarks by Morley on the authority to be attributed to the Shura-ool-Islam. Baillie in his introduction to Part II. of his Digest of the Mahomedan Law, page 26, informs us that the second part contains the doctrines of the Shiah sect on the most important of the subjects to which the Mahomedan Law is applied by British Courts of Justice in India, is composed entirely of translation from the Shura-ool-Islam, a work of the *highest authority* which has entered largely into the Digest of the Shiah law, compiled under the superintendence of Sir William Jones. Sir William Macnaghten, an authority accepted by the Privy Council as one which can be relied upon, also tells us in his preliminary remarks to his work on Mahomedan Law, page 12, that the Shura-ool-Islam is a work of the highest authority amongst the Shiah sect.

Now, we find in the Shura-ool-Islam that "the wulud-oo-zina has no nussub."

Mr. Woodroffe admits that this authority is against his client's right. What then has he quoted to induce us to hold that the law is not correctly laid down in the Shura-ool-Islam, and which has been adopted by Mr. Baillie as correct?

The passage on which Mr. Woodroffe has mainly relied, and which was referred to by him, is to be found in a manuscript which the learned Counsel has procured from the library of the College of Fort William of a work or a portion of a work called the "Jamia-i-Abbásí." This work is described by Morley in his introduction, Volume I., page 278, as a treatise on Shiah law in twenty books; that it is *generally** considered to be the work of Bahaad-deen Mahomed Amili, who died in 1621, A. D., but that that lawyer only lived to complete the first five books, dedicating his work to the Emperor Shah Abbas II. The remaining books, as far as Mr. Morley was able to ascertain, were subsequently added by Nizam Ibu Hossein as Sawai.

* *Note.*—The work is therefore modern in comparison to the Shura-ool-Islam.

Mr. Woodroffe quotes from a manuscript. Mr. Kennedy quotes the same passage from a copy printed at Lucknow. The passage quoted by Mr. Woodroffe is to the effect "that the child of fornication does not inherit "from his father, nor does his father or his "relations inherit from him, but his son and "his wife, and the Imam inherit from him;" and in various (روایات) traditions, it has been handed down that his mother, his maternal *brethren*, and his maternal relations do inherit from him. The printed copy to which Mr. Kennedy referred has the negative, and the passage runs thus:—

"In various traditions it has been handed "down that the mother and maternal bre-"thren and the maternal relations do not "inherit from him."

Without attempting to reconcile the difference between the manuscript and the printed copy, we may observe that at page 630 of the manuscript referred to by Mr. Woodroffe, we find a passage which is altogether opposed to the passage on which he so strenuously relies. It is to this effect: "The estate of a wulud-oo-zina, or child of fornication, is inherited by his children and his wife, as also by his father and his mother, but not by any near relation of his, *nekise ke bu ayeshan nuzdeek bashud* (نه کس که با ایشان نزدیك باشد), but if he have no children or wife, the Imam succeeds." Here the brother is not mentioned as entitled to succeed. Looking, therefore, to the doubtful authority of this treatise, as also to the inconsistent passages on the same subject to be met with in it, we think we ought to be guided by the more reliable authority of the Shura-ool-Islam which has been adopted by both Baillie and Macnaghten.

The next passage referred to by Mr. Woodroffe is taken from the "Mufateh," page 468, lines 21 and 22, which is to this effect: "A wulud-oo-zina neither inherits to, nor is "inherited by, either of the parents and "their relatives in consequence of his not "being recognized by the Mahomedan Law "as their son, and in consequence of there "being a kind of Hadees on the subject. "None inherits to him or to her except his "or her children or husband or wife. Ac-"cording to Saduk and Iskafa (two ancient "*traditionists*), in consequence of there be-"ing two Hadeeses, the wulud-oo-zina is "certainly treated like the child of a woman "separated by 'lian' or imprecation."

The only part of this passage which can at all be made use of by Mr. Woodroffe in support of his argument is the last portion which, on some tradition or other, states that there is some analogy between a child of a woman separated by "lian" and a child of fornication. The rest of the passage is entirely opposed to Mr. Woodroffe's theory.

The Mufateh is described by Morley as a modern work on the Shiah Law by Mahomed Ben Murtaza surnamed Muhson. It is not considered by Morley to be a work of any great authority. At all events, he does not, as in the case of the Shura-ool-Islam, say that it is so.

On turning to the Chapter of Lian, Chapter VI., Part II. of Baillie's Digest, we find that there must be the Moolain or imprecating husband, and the Moolainah or imprecating wife. A legal marriage or a marriage by permanent contract or the semblance of such is required. The whole Chapter treats of cases of a husband, or *vice versâ* a wife. The former charging his chaste wife with adultery: a child before it can be denied, it is necessary that delivery should take place at six months or more from the time of conjugal intercourse, and not beyond the extreme period of gestation. It is further requisite that the intercourse should have been under a permanent contract.

In the case of the wife, it is required of her that she be married by a permanent contract.

Now, it cannot be said that there was any marriage legal or by semblance between the Rajah and Buratee Begum; therefore, there can be no analogy whatever between the plaintiff who is clearly the child of fornication, and an imprecated child, or a child of a woman separated by "lian."

Mr. Woodroffe has referred us to a passage in the Shura-ool-Islam, page 499, Chapter IV., entitled on disputes respecting a child.

It is to this effect: we copy from the translation. "When two persons cohabit with "a woman in any way,"* it would establish nussub, "whether she be the wife "of one of them, and the "supposed wife of the other; or she be "the supposed wife of both; or each "of them tie himself with her by an illegal "contract, and then she brings forth a "child in six months or over and above that "period not exceeding the longest period "of gestation. In such a case, if none of "them have any proof, a lottery will be "held and the 'nussub' would be establish-"ed in him who draws the prize, no matter "whether the persons cohabiting with the "woman be both moslems or infidels, or "slaves or free men, or one of them be a "moslem and the other an infidel, or one a "free man and the other a slave, or one of "them be the father of the other, and the "other his son, and the nussub would be es-"tablished by reason of "the woman being under "the furash† or enjoy-"ment of a single person and by reason of the "claim being made by a single man. It "would also be established by reason of "her being under the common enjoyment "of and by reason of a joint claim being "made by more than one person, and then "the dispute would be settled by proof, and, "in absence thereof, by a lottery."

* *Note.*—The original ran thus: "In any way by which nussub would be established." The difference is material.

† *Note.* — Literally bed.

This passage, which is not very clear, contemplates an exceptional case where two men cohabit with the same woman, supposing her to be lawful to them. The nussub, as observed in the passage, is established by reason of the woman being under the "furash," which means "*wife*." (*See* page 155, Baillie, Part II.)

We fail to see how this passage, with the somewhat ridiculous ordeal of deciding the paternity of the child by lottery, can be applied to the case of the Rajah and Buratee. The latter was not the "furash" of the Rajah, but most probably a prostitute, but at all events the kept mistress of the Rajah.

No other passage from any works of known authority were quoted, and in some

of those referred to we have had to rely upon translations.

On the question, therefore, that a wulud-oo-zina has no nussub, and that, therefore, the plaintiff does not inherit the estate of his deceased illegitimate brother Ekbal, we adhere to our former opinion, which is supported by the authority of the Shura-ool-Islam—an authority which we can safely accept as our guide in the matter.

Lastly, it has been urged that the admissions of Ekbal, as also of the defendant herself, are sufficient to create a nussub between the plaintiff and Ekbal.

These admissions in the form of petitions, some through mookhtears, were considered by us when we first heard the case. We have, however, considered them again, and adhere to our opinion that they do not operate to create a "nussub" even if they were admissible as evidence, of which we entertain some doubt.

They certainly cannot bind the defendant as third party, who, except in the way of argument in the alternative as shown in our former judgment, has in no way admitted the existence of any "nussub" between the plaintiff and his brother Ekbal.

We also find that, at the time these alleged admissions were made, Ekbal had a known heir in the person of his wife, the defendant Sahebzadee Begum. We are not satisfied, for reasons stated above, that she is not the heir of any portion of her husband's estate as contended by Mr. Woodroffe; and we, therefore, hold that the admissions, even if admissible, do not operate under Mahomedan Law to create nussub between the plaintiff and Ekbal.

The application is rejected with costs, payable by the applicant.

Note.—We may mention that Mr. Woodroffe asked us to look at some Futwas which he had obtained from some Moulvies. These, if worth anything, ought to have been produced when the case was first heard, and we cannot receive them at this stage of the case; further, they do not appear to be by any well-known Moulvies.

The 13th July 1870.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Appellate Court—Section 337, Code of Civil Procedure.

Case No. 2985 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 13th August 1869, reversing a decision of the Moonsiff of Kytee, dated the 16th February 1868.

Protab Chunder Dutt (Plaintiff), *Appellant,*

versus

Koorbanissa Bibee and others (Defendants), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Section 337, Civil Procedure Code, does not empower an Appellate Court to exercise the power with which it invests such Court when it finds that the ground on which it proposes to base its own decision is common to all the defendants, but only when it finds that the decision of the Lower Court has proceeded on such common ground.

Mitter, J.—THE plaintiff in the Court below, now special appellant before us, brought this suit to recover possession of certain lands on the allegation that he had been forcibly ejected therefrom by the defendants 1 to 5. One Abedoonissa Bibee, the alleged vendor of the plaintiff, was made, what is usually called in the Mofussil Courts, a *pro-formâ* defendant. The defendants 1, 3, 4, and 5 put in a joint written statement, alleging that they had nothing whatever to do with the lands in question, and that they had never dispossessed the plaintiff of the same. The defendant No. 2 pleaded that he was entitled to the possession of the disputed lands under a lease granted to him by the plaintiff. The defence set up by Abedoonissa Bibee was to the effect that the bill of sale propounded by the plaintiff was a spurious instrument; that she had never sold the lands in question to him; and that she had been wrongfully ejected therefrom by him after he had fraudulently got possession of her title-deeds. In this state of the pleadings, the Moonsiff, who tried this case in the first instance, laid down the following issues, namely:—

1st.—Whether the plaintiff was ousted by the principal defendants from the land claimed, in the last year while he was in possession of the same, by setting tenants after purchasing it from defendant No. 6 on the 9th Jeyt 1265.

2nd.—Who, under what title, and for what length of time, is in enjoyment of the said land.

3rd.—Did the defendant No. 2 take the plot noted under No. 2 in jumma from the plaintiff in Assar 1272.

These issues, it will be seen, were not drawn up very artistically, but they resolve themselves substantially into the following points :—

1st.—Is the bill of sale propounded by the plaintiff a genuine instrument?

2nd.—Did the defendants 1 to 5 dispossess the plaintiff as alleged by him?

3rd.—Is the lease set up by defendant No. 2 true or false?

All these points, however, were found for the plaintiff by the Moonsiff, and a decree was accordingly passed in his favor by that officer.

Against this decree an appeal was preferred to the Subordinate Judge by the defendant Abedoonissa Bibee alone, and the Subordinate Judge has reversed it *in toto* in favor of all the defendants, upon the ground that the plaintiff has failed to prove his alleged purchase.

I am of opinion that the decision of the Subordinate Judge, so far as it reverses the decree of the Moonsiff in favor of the defendants 1 to 5, ought to be set aside as illegal. Those defendants did not prefer any appeal to the Subordinate Judge; and the Subordinate Judge had, therefore, no power to reverse the decree passed against them by the Moonsiff. Section 337 of the Code of Civil Procedure says, it is true, that an Appellate Court may, on the appeal of one defendant only, reverse the entire decree of the Lower Court in favor of all the defendants; but that very Section says that this power can be exercised only "*when the decision of the Lower Court has proceeded upon a ground common to all the defendants.*" In the present case, the decision of the Moonsiff did not and could not *proceed upon a ground common to all the defendants.* The defences set up by them were altogether different from one another; and whilst the plaintiff was bound to prove his bill of sale as against the defendant Abedoonissa, he was under no such obligation so far as the other defendants were concerned. The issue as to whether that bill of sale is a genuine instrument or not was laid down by the Moonsiff, it is true, but that issue had been raised by the defendant Abedoonissa alone, and she was the only party interested in its adjudication. Defendant No. 2 had nothing whatever to do with it, for his defence was that he was entitled to hold possession of the lands in question as a *tenant of the plaintiff.* The other defendants also did not dispute the title of the plaintiff, and the only point which the Moonsiff had to decide between them and the plaintiff was whether they had dispossessed the latter in the manner alleged in the plaint. On the other hand, the defendant Abedoonissa had nothing whatever to do with the remaining issues in the case, namely, those relating to the alleged dispossession of the plaintiff by the defendants 1 to 5, and the genuineness of the case set up by the defendant No. 2. Neither of these points constituted a real part of her defence, and it was all the same to her whichever way they were decided. How then can it be said that the decision of the Moonsiff "had proceeded upon a ground common to all the defendants?" And if it did not, how could the Subordinate Judge reverse the decree of the Moonsiff in favor of parties who were perfectly satisfied with that decree?

It has been said that the plaintiff's failure to prove his purchase, which constitutes the sole foundation of his title to the lands in question, is fatal to his claim against all the defendants. I am by no means prepared to accede to the correctness of this conclusion. In the first place, it is necessary to bear in mind that the plaintiff was under no legal obligation to prove his purchase as against the defendants 1 to 5. Those defendants did not, as I have already observed, dispute his title in any manner whatever; and one of them, namely, defendant No. 2, distinctly admitted it by setting up a tenancy under him. If the plaintiff had been wrongfully ejected by those defendants, as it was found by the Moonsiff, and this finding has not been interfered with by the Subordinate Judge on appeal, he was clearly entitled to the decree which the Moonsiff had passed against those defendants; for possession itself

is a sufficient title against a *mere wrong-doer*. If the defendant Khyroonissa Bibee had not been made a defendant in this case, no question regarding the genuineness or otherwise of the plaintiff's kobalah could have been raised or determined in it; and I am at a loss to perceive why the decree passed against the defendants 1 to 5 by the Moonsiff should be reversed as a matter of course, merely because the Subordinate Judge has found on the appeal of Abedoonissa that the plaintiff has failed to prove his alleged purchase from her.

In the next place, I have to observe that, even if it were true that the finding of the Subordinate Judge against the genuineness of the plaintiff's bill of sale is necessarily inconsistent with the decree passed in his favor by the Moonsiff against the defendants 1 to 5, it would by no means follow that the Subordinate Judge had the power to reverse that decree in favor of those defendants. Section 337 does not say that an Appellate Court may exercise the power vested in it by that Section, when it finds that the ground upon which it proposes to base its own decision is common to all the defendants. But it says that that power is to be exercised only when it finds that the *decision of the Lower Court, i. e.*, of the Court whose judgment is appealed against, has *proceeded upon a ground common to all the defendants*. In this particular case, I am sorry that the Subordinate Judge has reversed the finding of the Moonsiff on the genuineness of the plaintiff's bill of sale; and I am still more sorry that I cannot interfere with that reversal, as I am sitting here on special appeal. But I see no reason for holding that the Subordinate Judge had any power to reverse the entire decree of the Moonsiff in favor of all the defendants on the appeal of one of them only. The defendant Abedoonissa Bibee admitted in her written statement that she was not in possession of the lands in question at the time when this suit was brought. So that it is perfectly clear that there will be no difficulty in the plaintiff's executing his decree for possession against the defendants 1 to 5, if that decree is allowed to stand. Abedoonissa cannot recover possession in this suit, whichever way it may be decided by us; for the only course available to her is to bring a separate suit for that purpose on her own behalf. Why then should we dismiss the plaintiff's suit *in toto*, when we find that the only persons who will benefit by such a dismissal are the defendants 1 to 5, who, of all the parties to this litigation, are the least entitled to such a benefit? And why again should we allow those defendants to enjoy the profits of the lands in question, when it is beyond all dispute that the plaintiff will be liable to make good to Abedoonissa the whole of those profits in the shape of wassilat or damages.

For the above reasons, I would set aside the decision of the Lower Appellate Court so far as it reverses the decree passed by the Moonsiff against the defendants 1 to 5.

Glover, J.—I concur generally in this decision. The special appeal is allowed, and the decision of the Lower Appellate Court reversed as against the non-appealing defendants, with costs.

The 13th July 1870.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Suit for dissolution of marriage—Jurisdiction.

Case No. 547 of 1870.

Special Appeal from a decision passed by the first Subordinate Judge of the 24-Pergunnahs, dated the 28th December 1869, reversing a decision of the Moonsiff of Satkhirah, dated the 31st March 1869.

Anjona Dossee (Plaintiff), *Appellant,*

versus

Proladh Chunder Ghose and others (Defendants), *Respondents.*

Baboos Jadub Chunder Seal and *Ashootosh Chatterjee* for Appellant.

Baboos Bhuggobutty Churn Ghose and *Sreenath Doss* for Respondents.

Suit by a Hindoo mother, as the guardian of her infant daughter, to have an alleged marriage of that daughter with the defendant set aside as null and void.

HELD (*Mitter, J., dissenting*) that the Civil Courts have no power to declare a marriage null except as incidental to some right to property involved in the suit; and that plaintiff's remedy was to bring a suit as guardian to recover possession of her minor daughter, or for damages for loss of her daughter's services.

Glover, J.—I THINK that we should follow the ruling laid down in the case of Ram Narain Mitter *versus* Rakhal Doss and

others, 11 Weekly Reporter, page 412; and I am inclined to think with Mr. Justice Markby that the plaintiff's remedy was to bring a suit against the defendant to recover, as guardian, possession of her minor daughter; or a suit for damages sustained in consequence of the injury caused by the loss of her daughter's services.

I am not aware of any power in this Court to declare a marriage null, except as incidental to the decision of some right to property involved in the suit. To do so is the general way asked for in this suit would be virtually to give a judgment in remedy which I conceive we have no power to do.

I would dismiss the special appeal with costs.

Mitter, J.—I am extremely sorry to differ from my learned and honorable colleague in this case.

The plaintiff in the Court below, now special appellant before us, is a follower of the Hindoo religion; and this suit was brought by her as the guardian of her infant daughter Kirpa for the purpose of having an alleged marriage of the said Kirpa with the defendant No. 1, set aside as null and void under the Hindoo Law.

The Moonsiff, who tried the suit in the first instance, gave a decree to the plaintiff, but this decree has been reversed by the Subordinate Judge on appeal on the strength of a decision passed by the Division Bench of this Court reported in page 412 of the 11th Volume of the Weekly Reporter.

I am of opinion that the decision relied upon by the Lower Appellate Court is not sound. I see no reason for holding that the Civil Courts of this country are not competent to entertain a suit of this description, merely because no question of property is involved in it. That the suit is a suit of a "civil nature" is beyond all question; and it is equally clear that it is "not barred by any Act of Parliament, or by any Regulation of the Bengal Code, or by any Act of the Governor-General in Council." How then can we refuse to entertain such a suit when we are positively enjoined by the provisions of Section 1, Act VIII. of 1859, to take cognizance of *all suits of a civil nature* not barred by any express legislative enactment. That no question of property is involved in it does not appear to me to be of any importance whatever. Rights of property are not the *only* civil rights recognized by the law; and if there are other sorts of civil rights besides those of property, the Civil Courts are bound to protect them notwithstanding that no question of property is involved in the case. Thus, for instance, suits for the restitution of conjugal rights are frequently entertained by our Courts, although they do not involve any question of property; and we have got the authority of the Privy Council in the case of Buzloor Ruheem *versus* Shumsoonnissa, 8 Weekly Reporter, Privy Council, page 3, to show that such suits are clearly maintainable in the Civil Courts of this country.

Suppose, for instance, that the validity of the marriage set up by the plaintiff in such a suit is disputed by the defendant. Can the Court refuse to declare whether that marriage is legal or not, merely because no question of property, real or personal, is involved in the litigation? And if it cannot, how can it refuse to make a similar declaration in a suit like the present, when it is perfectly clear that the conjugal rights of parties are by no means of less importance to them than those of property?

Considerable light is thrown upon this question by the provisions of Section 8, Regulation III. of 1793. That Section ran as follows:—

"The Zillah and City Courts are empowered to take cognizance of all suits and complaints respecting the succession or right to real or personal property, land-rents, revenues, debts, accounts, contracts, partnerships, *marriage*, caste, claims to damages for injuries, and *generally of all suits and complaints of a civil nature*," &c., &c.

It is clear from the above that, so long as the provisions of this Section were in force, the Civil Courts of this country had full and ample jurisdiction to take cognizance of a suit like the present, inasmuch as it is a "suit or complaint respecting marriage;" and it is also clear that a "suit respecting marriage" was considered by the framers of this Section to be just as much *a suit of a civil nature* as a suit for the recovery of property, real or personal. Are we then to suppose that the power which the Civil Courts of this country had to deal with "suits respecting marriage" has been taken away from them, merely because the provisions of Section 8, Regulation III. of 1793, have

been repealed by Act X. of 1861? I am by no means prepared to adopt this conclusion. I have already shown that the provisions of Section 1, Act VIII. of 1859, are sufficiently large to include a suit like the present; and the only reason I can find for the repeal of Section 8, Regulation III. of 1793, is that that Section had become wholly superfluous after the Legislature had already defined the jurisdiction of the Civil Courts by Section 1, Act VIII. of 1859.

It has been said that the proper course for the plaintiff to adopt would be to sue for damages for the loss of her daughter's services. How far such a course would be congenial to the ideas and feelings of a native parent, or what amount of damages the plaintiff can recover for the supposed loss of the services of a girl of five or six years of age, I need not pause to enquire. But I feel no hesitation in saying that the remedy pointed out is by no means sufficient to meet the requirements of the case set up by the plaintiff. If the defendant is really guilty of the wrongful act for which this suit has been brought against him, there can be no doubt whatever that the question involved in this case is of the utmost importance to the future happiness of the infant concerned in it. So long as her so-called marriage with the defendant is not publicly set aside by a Court of competent jurisdiction, no man with a grain of common sense in him will venture to take her in marriage from the hands of the plaintiff—her lawful guardian—and thereby run the risk of being prosecuted by the defendant for the abetment of bigamy under the provisions of the Penal Code. But if the plaintiff, who is fully competent by the laws of her country to marry her daughter to a suitable bridegroom, cannot do so without the declaration she has asked for in this suit, it is perfectly clear that the interests of the infant are in serious danger. No amount of damages which the plaintiff can recover for the loss of her daughter's services can remove this danger; and I do not therefore see any reason why the plaintiff should not be permitted to maintain this suit, merely because she might have sued for damages if she liked.

It has been said that spiritual or ecclesiastical Courts like those in England are the proper tribunals for the determination of matrimonial causes; and as there are no such Courts in the mofussil, suits like the present cannot be maintained in the Civil Courts unless some questions of property are involved in them. I confess that I am utterly at a loss to understand the force of this argument. In the first place, I am unable to see why the Civil Courts should be deemed less competent to deal with such cases than the spiritual Courts referred to above, or why they should be deemed less competent to deal with them when they do not involve any questions of property, when it is beyond all dispute that they are fully competent to deal with them when such questions are involved. The additional element of property will only complicate the case; and if the Civil Courts are competent to deal with it when it is thus complicated, there seems to be no reason for supposing that they are not equally competent to deal with it without the complication. In the next place, if we have got no spiritual Courts in the mofussil for the determination of matrimonial causes, it is but just and proper that those causes should be decided by some Court or other; and I fail to perceive any reason why the Civil Courts should refuse to take cognizance of such causes if they find that they are *causes of a civil nature not barred by any express legislative enactment.* The institution of marriage among the Hindoos is not only a religious sacrament, but it is also a civil contract; and important civil rights arise from it quite independent of any right of property. I have already shown that suit for the restitution of conjugal rights will lie in the Civil Courts of this country, even though no question of property is involved in it; and it follows, therefore, that the absence of such a question is no sufficient ground by itself for refusing jurisdiction, if the suit is otherwise maintainable.

For the above reasons, I would refer this case to a Full Bench of this Court for the determination of the following point of law, namely: Whether the Civil Courts of this country are competent to take cognizance of a suit for the declaration of the invalidity of a Hindoo marriage, no question relating to property being involved in the case?

Glover, J.—By the rules of practice of this Court, the judgment of the Senior Judge must govern the appeal; and we have, I think, no power to refer the question to a Full Bench as my learned colleague proposes.

The 13th July 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Possession—Limitation—Onus probandi.

Case No. 190 of 1870.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 16th December 1869, reversing a decision of the Subordinate Judge of that District, dated the 17th December 1868.

Busseeroonissa Chowdhrain and others (Defendants), *Appellants,*

versus

Rajah Leelanund Singh and others (Plintaiffs), *Respondents.*

Messrs. C. Piffard and *C. Gregory* and *Baboo Boodh Sein Singh* for Appellants.

Messrs. G. C. Paul and *R. E. Twidale* for Respondents.

In a suit for possession, it is always for the plaintiff to remove the bar of limitation, whenever that bar is set up by the defendant in possession, although the latter's possession is not admitted to have existed for 11 years.

Mitter, J.—The plaintiff in this case sued for the possession of 125 beegahs of land, on the allegation that he had been dispossessed therefrom by the defendants on the 18th of Cheyt 1274 F. S. The defence set up was that the plaintiff's suit was barred by the statute of limitation, and that the lands in question belonged to the defendants, and not to the plaintiff.

The Subordinate Judge of Bhaugulpore, who tried this case in the first instance, dismissed the plaintiff's claim upon the ground that he had completely failed to prove that the lands in dispute were in his possession at any time within 12 years prior to the institution of the suit. But the Judge of that district has reversed this decision on appeal, and remanded the case to the Subordinate Judge with directions to re-try the question of limitation after taking evidence from the defendants. The special appeal is against this order of remand below.

A preliminary objection has been raised against the hearing of this special appeal, upon the ground that the order passed by the Judge, being an order of remand not involving any final adjudication on the question of limitation, must be treated as a mere interlocutory order; and that the special appellants have, therefore, no right to appeal against it to this Court. We are of opinion that this objection is of no force whatever. It is beyond all question that the Judge has reversed the decree, which was passed in favor of the special appellants by the Court of first instance; and if the Judge has committed any error in law in doing so, the special appellants are fully competent to prefer this appeal to us.

In respect to the case of the special appellants, we are of opinion that the Judge has committed two errors in law in dealing with the question of limitation; and we are further of opinion that these errors are likely to have produced an error in his decision upon that point. The Judge says: "There "can be no doubt plaintiff exhibits a very "strong *primâ-facie* title to these lands. "The former suits were between the ances-"tors of the present litigants regarding "these very lands. The Judge's decision "of the 9th August 1821, the Provincial "Court's judgment of the 12th February "1824, and the proceedings of Mr. Drum-"mond, Khas Mehal Deputy Collector of "Pergunnah Furkea, of the 26th January "1837; all show that these disputed lands "were clearly decreed in plaintiff's favor. "The mere survey-map is, in my opinion, "insufficient to set aside the above *strong* "*primâ-facie evidence of possession.* The "letter filed indicates that the survey of "21st August 1869, of Pergunnah Furkea, "is unreliable."

With reference to this passage, we have to remark that the Judge is wrong in supposing that the documents referred to by him afford "any strong *primâ-facie* proof of "possession." Those documents may be taken as good proof of title; but the only light which they throw on the question of possession is that the ancestor of the plaintiff was out of possession on the dates to which those documents refer. But be this as it may, the question which the Judge had to try was whether the plaintiff's cause of action had accrued within 12 years prior to the institution of this suit; and we are unable to see how any documents of 1821, or of 1824, or even of 1837, can decide that question.

The following remarks of their Lordships in the Privy Council in the case of Maharaj

Koonwar Nitressur Singh,* reported in 8 Moore, page 220, should, it appears to us, be our guide on this point. "The appellant is "seeking to disturb the possession, admitted "to have existed for 11 years, of defendants "who insist on a possession of much longer "duration, as a *statutory bar* to the suit. It "clearly lies on him to remove that bar by "the satisfactory proof that the cause of "action accrued to him (for that is the way "the Regulation puts it) on a dispossession "within 12 years next before the institution "of the suit, and therefore that he or some "person through whom he claims was in "possession during that period. *No proof "of anterior title, such as would be involved "in the decision of the boundary-question in "his favor, can relieve him from this "burden or shift it upon his adversaries "by compelling them to prove the time and "manner of dispossession. The lands in "question may have been part of Mouzah "Gopalpore, and as such may have been "enjoyed by his ancestor, and yet he may "have lost by lapse of time his right to "recover them.* Their Lordships, therefore, "propose to consider in the first place "*what evidence there is that the appellant, "or any person through whom he claims, "was in possession of the lands in question "at any time within 12 years next before the "commencement of the suit.*"

The only distinction between the case above referred to and the present is that here the possession of the defendants is not admitted to have existed for 11 years; but this will not alter the principle according to which the case is to be decided, for it is always for the plaintiff to remove the bar of limitation, whenever that bar is set up against his suit by the defendant in possession.

The next error which the Judge seems to have committed is that he has improperly rejected the survey-map produced by the special appellants. We have already shown that the documents relied upon by him do not afford any proof of possession on the part of the plaintiff's ancestor; and he was therefore wrong in saying that the survey-map "was insufficient to set aside the above strong *primâ-facie* proof of possession." He is also wrong in throwing discredit upon that survey-map on the strength of the letter of the 21st January 1869, which is not legally admissible in evidence in this case.

For the above reasons, we reverse the decision of the Judge, and remand this case to him with directions to re-try the question of limitation in accordance with the foregoing remarks.

* 1 W. R., P. C., p. 51.

The 13th July 1870.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Insolvency—Fraud on creditors—Official assignee's functions—Creditor's remedy.

Case No. 153 of 1870.

Special Appeal from a decision passed by the First Subordinate Judge of the 24-Pergunnahs, dated the 28th December 1869, modifying a decision of the Additional Moonsiff of Alipore, dated the 30th January 1869.

Mr. D. W. Manly (one of the Defendants), *Appellant,*

versus

Mrs. Sarah Manly (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondent.

A widow, as administratrix of her husband's estate, sued to recover certain articles of moveable property belonging to that estate, which had been wrongfully appropriated by her son. Defendant pleaded that, if the articles belonged to his father's estate, they had been fraudulently kept out of the father's schedule when the latter had passed through the Insolvent Court; and that the widow could not claim the property, as she would thereby be taking advantage of her husband's fraud. He also pleaded a set-off on account of a claim against his father.

HELD that, as the Official Assignee refused to make any claim to the property in dispute, no third party was competent to set up a claim. The creditors had their remedy against the Official Assignee. The right of ownership was still vested in the plaintiff notwithstanding the alleged fraud.

HELD, as regards the set-off, that defendant was rightly referred to a separate suit.

Glover, J.—THE plaintiff in this suit, the widow of the late Mr. R. D. Manly, sued to recover certain articles of moveable property belonging to the estate of her husband (to which estate she was administratrix) from the hands of her son, Mr. D. W.

Manly, who is alleged to have wrongfully appropriated them.

The son denied his mother's right to bring the suit, inasmuch as, if the articles did belong to his father's estate, they had been fraudulently kept out of his schedule to the injury of creditors, and that his widow could not, therefore, claim them, as by doing so, she would be taking advantage of her deceased husband's fraud.

On the merits, the son alleged that the articles were partly those excepted at the time of the insolvency, and afterwards given to him by his father, and partly things purchased by himself with his own money.

The son lastly claimed a set off against his father's estate in respect of food and lodging supplied to Mr. R. D. Manly between the time of his insolvency and his death.

Both Courts below found that part of the property had been given by the deceased R. D. Manly to the plaintiff, and that the other part was in his possession as of right at the time of his death, and that the defendant had failed to prove that any portion of it had been bought with his own money. On the question of set-off, the defendant was referred to a separate action.

The points taken in special appeal are—

(1.)—That the plaintiff cannot be allowed to profit by her husband's fraud.

(2.)—That, in any case, the property belongs to the Official Assignee, and that plaintiff cannot claim it.

(3.)—That the onus of proving that the property belonged to the father was on the plaintiff, whereas the Lower Appellate Court made the defendant prove his ownership.

And lastly.—That the question of set-off was wrongly decided.

The last point is not seriously contested before us, and may be at once disposed of adversely to the special appellant. He has his remedy as pointed out by the Court below.

The first two objections are, to my mind, disposed of by the fact that the Official Assignee himself, who by the way gave evidence in this case, refused to make any claim to the property now in dispute; and no third party is competent to set up a claim which the Assignee does not insist on. (Fyson *versus* Chambers, 9 Meeson and Welsby, Exchequer, 460.) The property has been held to have belonged to the plaintiff's husband, and to have been in his possession at the time of his death; and I do not think that the defendant, who is proved to have no right to the property, can come into Court and allege fraud on the part of his father, as a reason for preventing his mother from instituting the suit. If the Official Assignee has done wrong in not making a claim, the creditors of R. D. Manly have their remedy against him; but the defendant, as it seems to me, cannot evade a trial on the merits by pleading his father's fraudulent conduct. Besides, if his mother, in seeking to get back the property, is profiting by her husband's fraud, the defendant, who is seeking to retain it, is equally profiting by his father's fraud; for, if he succeeds in this objection, he will retain property proved to have been his father's, and to which property he has no shadow of a claim.

The objection regarding the onus appears to be founded on a mistake of fact. I do not find that the Subordinate Judge acted merely on presumption, but on the whole evidence adduced. There was evidence to show that the articles were the property of the father, and the finding of the Lower Appellate Court is, therefore, one of fact with which we are not competent to interfere in special appeal.

It is much to be regretted that the parties to this suit did not settle their differences out of Court; but as we have to decide the case, I think we must say that the judgment of the Court below was right, and that this special appeal must be dismissed with costs.

Mitter, J.—I am of the same opinion.

The plaintiff avers that the property in dispute belongs to the estate of her deceased husband; and she has accordingly brought this action, as his legal representative, to recover it from the hands of the special appellant who has, as she alleges, unjustly taken possession of it without any title whatever. If these averments are correct, it would follow, as a matter of course, that the special appellant has no right whatever to retain that property. That the husband of the plaintiff had committed a gross fraud, by excluding it from the schedule filed by him in the Insolvent Court, is perfectly clear. But that fraud did not divest him of the right of ownership, which was admittedly vested in him at the time; nor did it vest that right in the special appellant who had

nothing whatever to do with the proceedings in the Insolvent Court. There is no law that I am aware of which declares that parties guilty of such a fraud shall lose their rights in the property for the preservation of which the fraud was committed; and in the absence of such a law, it is impossible to contend that there has been any loss or forfeiture of right in the present case. Suppose, for instance, that the very parties against whom the fraud was committed were to bring an action against the special appellant for the recovery of this property. It is beyond all question that the fraud now relied upon by him would be no answer to such a suit, and the Court would be bound to decree it in spite of such a defence. But upon what ground would this decision stand? Surely upon the ground that *the property is still the property of the debtor*, and that it is, therefore, liable to be seized and sold by his creditors for the realization of their just dues. Suppose, again, that the property is sold at the instance of these creditors, and a large surplus left after their demands are satisfied in full. To whom would this surplus belong? Surely to the plaintiff as the representative of the debtor, and not to the special appellant who has not even a shadow of title to it. These arguments conclusively prove to my mind that the *right of ownership is still vested in the plaintiff*, notwithstanding that the person through whom that right is derived had committed a gross fraud in order to preserve it from the hands of his creditors.

But if it is once conceded that the plaintiff, and not the special appellant, is the lawful owner of the property in question, it is impossible to understand how this Court can refuse to make a decree in her favor, merely on the ground of the fraud under our consideration. This fraud, it is perfectly clear, was not committed against the special appellant; nor is he in a position to show that his own status has been affected by it in any manner whatever. The parties intended to be defrauded were the creditors of the plaintiff's husband, but the special appellant has nothing to do with those creditors, nor they with him. Why then are we to allow him to set up this fraud as a bar to the maintenance of the present suit? And what power have we to dismiss the suit when we find that, as between him and the plaintiff, the latter is the only person to whom the disputed property lawfully belongs?

It has been said that to allow the plaintiff to succeed in this suit would be to violate the maxim of law which says that no one ought to be permitted to take advantage of his own wrong. I confess that I am utterly unable to understand the force of this argument. That the plaintiff is *not* seeking to take any advantage of the fraud in question, so far as the special appellant is concerned, is a proposition beyond all dispute. Fraud or no fraud, the position of the special appellant will remain the same, namely, that of a person who has wrongfully taken possession of property which does not belong to him. Nor can it be said that the plaintiff is endeavouring in *this suit* to take any advantage against the creditors of her husband. Whatever injury has been done to them was done before this suit was instituted; and the question whether they are still to suffer that injury or not cannot arise in this case, for they are not represented before us—certainly not by the special appellant. On the other hand, there can be no doubt whatever that it would be considerably to their benefit if the plaintiff is allowed to recover the property in question from the hands of the special appellant, for they would then be able to avail themselves of it immediately without any further litigation. It is the special appellant, therefore, who is really trying to take advantage of the fraud committed by the husband of the plaintiff; and I do not see any reason in justice or equity why he should be allowed to do so, when it is perfectly clear that his interests have been in no way prejudiced by it.

It has been further urged that it would be contrary to public policy, if this Court, sitting here as a Court of equity and good conscience, were to decree a claim of this description. This argument also does not appear to me to be of any force whatever. That the husband of the plaintiff had committed a highly criminal act is beyond all dispute. But the Legislature has fixed certain definite penalties for such acts, and it is not for this Court to add to those penalties upon any notions of public policy, real or imaginary, of its own, for to do so would be to arrogate to itself the functions of the Legislature, which it has no right to do. The Penal Code contains ample provisions for the punishment of such frauds. But whether those provisions are sufficient or not, it is not for the Civil Court, whose duty it is to deal with the civil rights of parties,

to repudiate those rights merely because it seems to think that such a repudiation ought to be used as an additional instrument for the suppression of fraud. How often does it happen in this country that a really good case is attempted to be supported by perjury and forgery? But odious as both these offences are, there can be no doubt whatever that the Civil Courts have no power to reject such a case, merely on the ground that the party interested in it has been guilty of those offences. This point has been set at rest by the decision of the Privy Council in the case of Rajah Suttesh Chunder Roy *versus* Samasoondery Debia* reported in Sutherland's Privy Council judgments, page 553; and I do not see the slightest reason why the principle involved in that decision should not be applied to the present case. Undoubtedly, it is quite open to the Legislature to lay down expressly that parties guilty of such frauds shall forfeit their rights in the property for the preservation of which those frauds were committed, in addition to the penalties already prescribed by the Penal Code, or that the Civil Court shall refuse to entertain suits based upon rights tainted with such frauds, as, for instance, in the case of benamee purchases made at public sales. But so long as this has not been done, I am utterly at a loss to see how we can dismiss this suit, when we find that the plaintiff, and not the special appellant, is the lawful owner of the property in dispute. Whether such a law would be conducive to the public welfare or not, is a question upon which I do not wish to express any opinion. But it is beyond all dispute that no such law is to be found in our Statute Book; and I am, therefore, unable to see how the special appellant can resist the present claim. The special appellant himself has committed an improper act, by dispossessing the plaintiff of a property which did not belong to him. This act gave to the plaintiff, in my opinion, a good and valid cause of action as against the special appellant; and I see no reason whatever, either in justice or equity, why we should allow him to set off that act against the fraud committed by the plaintiff's husband—a fraud with which, as I have repeatedly observed, he had nothing whatever to do. If we dismiss this suit upon the ground of this fraud, it would be merely by way of a penalty; but what right have we to inflict such a penalty when it is nowhere prescribed by the law? If we are at all at liberty to go upon grounds of public policy, we must look to that policy as it has been established by the Legislature itself; and if we are really anxious for the interests of the only innocent persons who have suffered from the fraud in question, we should not overlook what has been already remarked by me, namely, that the success of the plaintiff in this case would be much more conducive to those interests than that of the special appellant.

The above view appears to me to be fully corroborated by the following remarks of Mr. Taylor. (See pages 105 and 106.)

"It seems now clearly settled that a party "is not estopped from avoiding his deed by "proving that it was executed for a fraudu-"lent, illegal, or immoral purpose. In one "case (Doe dem Roberts *versus* Roberts*) in-"deed, where a man in order to give his brother "a colorable qualification to kill game convey-"ed some lands to him, the Court held that "his widow could not avoid this conveyance "in an action of ejectment brought against "her by the brother; and in the subsequent "case of Prole *versus* Wiggins,† Sir Nicho-"las Tindal observed that this decision "rested on the fact that the defence set up "was inconsistent with the deed. The "case, however, can scarcely be supported "by this circumstance, for in an action of "ejectment by the grantee of an annuity to "recover premises on which it was secured, "the grantor was allowed to show that the "premises were of less value than the an-"nuity; and consequently that the deed re-"quired enrolment, although he had express-"ly covenanted in the deed that the pre-"mises were of greater value. So also "where a bond has been given or covenant "made for an illegal consideration, the ob-"ligor or covenantor is not debarred from "avoiding the instrument by pleading and "proving the illegality; and this too, though "a legal, but untrue, consideration, is stated "on the face of a deed. Indeed, the better "opinion seems to be that where both par-"ties to an indenture either know or have "the means of knowing that it was execut-"ed for an immoral purpose, or in contra-"vention of a statute or of public policy, "neither of them will be estopped from "proving those facts which render the in-"strument void *ab initio*. For, although a "party will thus in certain cases be enabled "to take advantage of his own wrong, yet

* 2 W. R., P. C., p. 48.

* 2 B and A, p. 367.
† 3 Bingham, N. S., p. 230.

"this evil is of a trifling nature in com-"parison with the flagrant evasion of the "law that would result from the adoption "of an opposite rule."

The cases referred to here are not directly in point, but the principle involved appears to me to be the same. It is true that the special appellant was not a *particeps criminis* in the fraud committed by the husband of the plaintiff, but there is no reason why he should be allowed to screen himself from the consequences of his own wrongful act by setting up that fraud as an estoppel in the present case. It may also be observed that the plaintiff is not seeking in this case to get rid of any instrument executed by her husband, but that the special appellant is endeavouring to use the schedule filed in the Insolvent Court as an estoppel, when he is competent to use it merely as a matter of evidence.

With reference to the second objection, I have but very little to say. I do not think that the special appellant has any right to take this objection, for it is one which, in my opinion, can come from the Official Assignee only. Whether the property is recovered by the plaintiff or by the Official Assignee, the creditors of her husband can equally avail themselves of it, and it is, therefore, for the benefit of those creditors that this suit should be allowed to proceed. But whether this is so or not, the disclaimer put in by the Official Assignee, who was made a party to this suit, appears to be conclusive on the point. The creditors of the plaintiff's husband may sue the Official Assignee for this disclaimer if they like, but a mere wrong-doer like the special appellant has no right to rest his defence upon such a ground.

The third objection is equally untenable. There is no reason for supposing that the Lower Courts have decided this case without going into all the evidence filed by the parties, and the question of onus does not therefore arise.

The special appeal ought, therefore, to be dismissed with costs.

The 13th July 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Sections 229 and 230, Act VIII. of 1859.

Case No. 1119 of 1869.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 25th February 1869, reversing a decision of the Subordinate Judge of that District, dated the 25th August 1868.

Meer Abdoos Sobhan (Defendant), *Appellant,*

versus

Brahma Deo Narain (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Baboos Chunder Madhub Ghose and *Bhowanee Churn Dutt* for Respondent.

HELD that the principle of the Full Bench ruling, that a suit under Section 230 of the Code of Civil Procedure must be treated as an ordinary suit for the recovery of property, and that the whole question of title between the parties ought to be gone into, is equally applicable to a case under Section 229.

Mitter, J.—WE are of opinion that this case has not been properly tried by either of the Courts below.

In the first place, we are at a loss to understand why the Lower Courts have treated this suit as a suit under Section 230 of the Code of Civil Procedure, and not as a suit under the 229th Section of that Code. The allegation with which the special respondent came into Court was, that the special appellant was about to dispossess him of the village in question in execution of a decree to which he was no party. If this allegation is correct, the special respondent is clearly entitled to occupy the position of a defendant under Section 229, and the Lower Courts have been, therefore, in error in treating him as a plaintiff under Section 230. It is of the utmost importance to the right

determination of a cause to assign to the parties litigant the precise positions which they are entitled to hold under the law; and every error on such a point is almost always likely to cause a serious error in the decision of the case upon the merits. The Lower Courts ought, therefore, to enquire whether the special respondent was or was not in possession at the time when he preferred his complaint, and then to treat him as a plaintiff or as a defendant, according as the case will fall under the one or the other of the two Sections above referred to.

In the next place, we find that the Lower Appellate Court has given a decree to the special respondent, simply upon the ground that the special appellant had failed to show that the village in question was included in the decree obtained against him by Meher Chand Roy. This finding is not sufficient, in our opinion, to meet the requirements of this case. The Court of first instance had distinctly found that Meher Chand had obtained possession of the village in question in execution of his decree; and if this finding was correct, the special respondent was clearly entitled to restitution, that decree having been set aside by a Court of competent jurisdiction. But be this as it may, a suit like the present cannot be disposed of upon such a narrow ground as that upon which the Judge's decision is based. It has been recently decided by a Full Bench* of this Court that a suit under Section 230 must be treated as an ordinary suit for recovery of property, and that the whole question of title between the parties ought to be gone into before it can be disposed of satisfactorily. The principle of this ruling is equally applicable to cases under Section 229, and the Lower Appellate Court was, therefore, wrong in reserving the question of title for a future litigation.

* 13 W. R., Full Bench, p. 80.

The case is, accordingly, remanded to the Lower Appellate Court for a fresh decision, with reference to the above remarks.

The 13th July 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Error—Section 350, Code of Civil Procedure.

Case No. 94 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 29th September 1869, affirming a decision of the Moonsiff of Gurbetta, dated the 11th August 1869.

Ram Chunder Chatterjee and another (two of the Defendants), *Appellants,*

versus

Ram Jeebun Dass (Plaintiff), *Respondent.*

Baboo Nubo Kishen Mookerjee for Appellants.

Baboo Bungshee Dhur Sein for Respondent.

In a suit for possession of a quantity of land, where the first Court gave plaintiff a decree on the ground that he had proved title by purchase, and the Lower Appellate Court, in confirming the decision on the substantial issue raised, went further and found that one of the defendants was plaintiff's ryot, contrary to the allegation set up by the plaintiff himself.

HELD, in special appeal that the error did not affect the merits of the case or the jurisdiction of the Lower Court, and the High Court could not, therefore, interfere under Section 350 of the Code of Civil Procedure.

Kemp, J.—THIS is a suit by Ram Jeebun Dass against several parties. It is necessary to enter into some detail as to the position of the parties. The grounds of special appeal refer only to the finding of the Lower Appellate Court that Khurgeshur Mytee was the tenant of the land in dispute; whereas the plaintiff had alleged in his plaint that Nobin Patro was his tenant, and that Khurgeshur was a trespasser; and it is said that

this Court ought to reverse the decision of the Lower Court, inasmuch as the Lower Court's decree is founded upon an allegation not to be found upon the plaint. We now turn to the plaint, and find that the first party made a defendant is Khurgeshur; the second party are the special appellants before us, Ram Chunder Chatterjee and others; the third Nobin Patro, the plaintiff's tenant; and the fourth Sreedhur, who is the under-tenant of Nobin Patro. The allegation in the plaint is that the plaintiff is entitled to the disputed 11 beegahs 4 cottahs of land under a purchase from Juggernath Ghose; that the defendant No. 1, Khurgeshur Mytee, plundered the crops of the plaintiff's ryot, the defendant No. 4; that the defendant No. 4 brought a suit for damages against Khurgeshur; that the plaintiff intervened in that suit, which being dismissed the plaintiff brings this suit for possession of these 11 beegahs 4 cottahs of land, alleging that his title has been prejudiced by the dismissal of that suit. We may mention that as between the plaintiff Ram Jeebun, and the special appellants before us, the only issue which was raised in the pleadings both of the plaintiff and of the special appellants was, whether the jote of 11 beegahs was purchased by the plaintiff, or whether it was purchased by the special appellants. The special appellants in their written statement in the Court below distinctly stated that the land was comprised within their purchase; that the plaintiff had given only one of the boundaries correctly; and that the three other boundaries of the disputed lands were given incorrectly.

The first Court laid down one issue, namely, whether the land in dispute had been purchased by the plaintiff or by the special appellants before us. On that issue, the first Court found distinctly that the plaintiff had proved his purchase, and that he was entitled to a decree. The decree of the first Court was to the effect that the plaintiff should get possession of the disputed land, and recover from the defendant No. 2, and the defendant No. 1, Khurgeshur Mytee, his costs with interest. The Subordinate Judge has confirmed this decision, but unfortunately, although he has, on the substantial issue between the plaintiff and the special appellants, found that the plaintiff is entitled to possession of the disputed land, inasmuch as he has distinctly proved that the land was purchased by him, he went further and found that Khurgeshur was the ryot of the plaintiff, contrary to the allegation set up by the plaintiff himself.

In special appeal, this mistake of the Subordinate Judge has been made much use of to induce this Court to shut its eyes to the real issue in this case; and it is because that mistake has been made, although Khurgeshur has not appealed, that this Court is asked to set aside the decision of the Subordinate Judge on the merits. A decision of their Lordships of the Privy Council in the case of Ishan Chunder Singh *versus* Shama Churn Bhutto, published in the Weekly Reporter, Volume VI., page 57, has been quoted in support of this contention. Now, there can be no doubt that the plaintiff in this case did not sue, alleging Khurgeshur Mytee to be his tenant. On the contrary, he sued on an averment that Khurgeshur Mytee was a trespasser and a wrong-doer, inasmuch as he had looted the crops of the plaintiff's ryot Nobin Patro. What their Lordships of the Privy Council disapproved of in the decision referred to was, that the decision of this Court had been come to upon a state of facts which had not been alleged or pleaded by the plaintiff; and what they insisted upon as a rule to be observed was, that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff shall not be departed from. Now, in the special appeal now before us, the allegations of the plaintiff were not substantially departed from by the Court of first instance. The substantial issues between the plaintiff and the special appellants as to whose was the land were tried, although the Subordinate Judge, as already observed, has, by surplusage, entered into the question of whether Khurgeshur Mytee was the tenant of the plaintiff, notwithstanding that the plaintiff himself did not allege this in his plaint, and found that he was so. Still, Khurgeshur has not appealed against this finding, and the substantial issue, as above specified between the plaintiff and the special appellants having been decided in favor of the plaintiff, we cannot interfere with the decision of the Lower Court under Section 350 of the Code of Civil Procedure, as this error of the Lower Court, if it is an error, does not affect the merits of the case or the jurisdiction of the Court. The merits of the case as between the parties really in conflict have been, as above shown, decided, and the conflict itself has been fully adjudicated upon by both Courts.

We, therefore, dismiss the special appeal with costs.

The 14th July 1870.

Present :

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Contribution—Joint-decree—Procedure.

Case No. 582 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 30th December 1869, affirming a decision of the Moonsiff of Ghosegaon, dated the 28th May 1869.

Kristo Monee Debia (one of the Defendants), *Appellant,*

versus

Buroda Dassia Chowdhrain (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

No one for Respondent.

In a suit against co-tenants to recover rent paid by plaintiff on their behalf, a joint-decree declaring the defendants collectively liable ought not to be passed. The Court should determine what portion of the whole rent ought to be re-paid by each one of the defendants, and whether each defendant is under any liability to pay the plaintiff at all.

Phear, J.—The judgment of the Lower Courts is manifestly founded upon a false view of the rights of the parties. The decree in the rent-suit merely had the effect of judicially declaring that all the defendants in that suit against whom it was passed were jointly bound to pay the rent which the plaintiff in that suit claimed of them.

In this suit the question is, not whether all the defendants together with the plaintiff were bound to pay the zemindar the whole amount of rent due to him, but what may be the portions, as between themselves, in which they are bound to pay it; and this is a matter depending entirely on their several interests in the property and their relations to one another with regard to it.

Perhaps, it would have been more regular if the plaintiff had brought a separate suit against each defendant. But whether this would be so or not, the Courts in this suit ought to determine what are the shares of the whole rent which the present defendants ought respectively to recoup the plaintiff.

The effect of the joint-decree which has been given by the Lower Courts will lie, that any one of the defendants who pays the amount of that decree will have a right of suit against the others collectively, and so on *ad infinitum* (at least so long as the defendants will last), if the principle on which the Lower Courts have gone is correct. We need hardly say that the law is not so unreasonable as to force the parties to such a gradual elimination as this.

This case has not yet been tried on its proper merits. The decrees of both the Lower Courts must, therefore, be reversed, and the case must be sent back for re-trial in the Court of first instance; and the Court must determine on such evidence as the parties may produce in support of their respective cases, what portion of the whole rent which has been paid by the plaintiff ought to be re-paid to her by each one of the defendants; and in considering this general question, the Court will, of course, have to determine, with regard to each defendant, whether he is under any liability to pay the plaintiff at all.

The costs of the suit will abide the event.

The 14th July 1870.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Execution—Costs—Fees.

Case No. 190 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Hooghly, dated the 28th March 1870.

Madhub Chunder Bera (Judgment-debtor), *Appellant,*

versus

Ram Lochun Bera (Decree-holder), *Respondent.*

Baboos Mohinee Mohun Roy and *Ashootosh Mookerjee* for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

Where a suit was decided after trial, and the decision being reversed by the High Court on appeal, the case was remanded with orders allowing the plaintiff to amend his plaint, but requiring him to pay all the costs of the first two hearings.

HELD that the stamp for the plaint was properly included in the costs of the second hearing in the Court below, and that, as the case was sent back for re-trial and not as a mere remand, the whole of the pleader's fees should be paid for the second trial.

Jackson, J.—THIS is an appeal in execution of a decree from the Subordinate Judge of Hooghly. In executing a decree of this Court, he found that the High Court had given to the plaintiff all the costs in the High Court, detailing distinctly their amount, and that it had also given the costs of the Lower Court, but had not distinctly detailed their amount. In executing this decree, the Subordinate Judge has ascertained what that amount was, and has allowed execution to proceed upon that amount. The contention before us is that it was for the High Court to have stated that amount; that it was not for the Subordinate Judge to ascertain what it was; and as it was not stated in the High Court's decree, it could not now be executed at all. In support of this view of the law, one case is quoted, in which it appears that there was some doubt as to what the High Court did intend to give as costs, and in which, accordingly, in consequence of that doubt, the Court afterwards declared that it could not be ascertained in execution. Other cases are quoted to the effect that only what is stated in the decree is to be awarded, and nothing beyond that.

We think that it is sufficiently stated in the decree what costs are given by the High Court; they are the costs of the High Court itself and the costs in the Lower Court, of the hearing from which the appeal was heard by the High Court.

There are two points on which it is contended that the Lower Court has been wrong in estimating these costs; first, in giving the amount of the stamp for the plaint; and secondly, in awarding more than half pleader's fees. It appears that this was an exceptional case in one way, that after the plaint was put in the parties went to trial, and a decision was passed upon the claim, and on appeal to the High Court the decision of the Lower Court was reversed, and the case remanded to the first Court with orders that the plaintiff might be allowed to amend his plaint, but at the same time the plaintiff was required to pay in all the costs of these first two hearings.

It is admitted now by the plaintiff that the defendant is entitled to all these costs. We think that the stamp for the plaint, which it is denied ought to have been put in amongst the costs of the second hearing in the Court below, has been properly included in these costs; and as the case was sent back for a re-trial, and not as a mere remand, the whole of the pleader's fees should be paid for the second trial. There being, therefore, no doubt, in our minds, as to what amount of money ought to be paid under the decree of the High Court on account of costs, we see no objection to the Lower Court drawing up an account of these costs, and making the defendants reimburse these costs to the plaintiff. We dismiss this appeal with costs.

The 14th July 1870.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Section 246, Act VIII. of 1859—Jurisdiction—Title.

In the Matter of
Khelat Chunder Ghose, *Petitioner,*

versus

Bhuggobutty Churn Mookerjee, *Opposite Party.*

Baboos Romesh Chunder Mitter and *Motee Lall Mookerjee* for Petitioner.

Baboo Oopendro Chunder Bose for Opposite Party.

A Judge has no jurisdiction to try the same objector's claim under Section 246, Act VIII. of 1859, a second time as against the same attachment, or to re-open a question finally decided on the former occasion.

The title of the objector, as compared with that of the debtor in possession, is not a point for adjudication under Section 246.

Jackson, J.—WE think that the orders of the Officiating Judge of Nuddea on the second enquiry as regards the objections of Bhuggobutty must be set aside. Those orders were passed under Section 246, Act VIII. of 1859. The law on the point is, that the enquiry into the objection must refer to the possession of the judgment-debtor or of the person claiming to remove the attachment, and that possession refers specially to the time when the property was attached. The Judge in the first instance, when the first enquiry was made, acted distinctly according to law; and finding that

the judgment-debtor was in possession at the time the attachment was made, rejected the claim of the objector. Mr. Brown, who has since become Judge of Nuddea, on a subsequent objection as regards the same attachment by the same objector, has set aside the attachment, and released the property without any enquiry at all on the point of possession.

We think that the Judge's order is wrong on two points; first, that he had no jurisdiction in law to try the same objector's claim a second time, as against the same attachment. The question of the possession of the objector at the time of the attachment had been finally decided by the Judge on the former occasion, and Mr. Brown could not re-open that question, the more especially as the objector had himself admitted in the course of the proceedings that he was not in possession. We think Mr. Brown's decision is also contrary to law, inasmuch as he does not decide that which under Section 246 of Act VIII. of 1859 he was bound to decide. He seems to have decided that the objector's title was a better title than the title of the debtor's. This is not a point upon which any adjudication should have been come to under the law, as laid down in Section 246 of Act VIII. of 1859.

The orders of Mr. Brown of the 10th of January 1870 are set aside; and the result of this order will be that that property still remains under attachment, and further proceedings in execution can be carried on.

The 15th July 1870.

Present:

The Hon'ble J. B. Phear and Sir Charles Hobhouse, *Bart., Judges.*

High Court—Jurisdiction—Section 362, Code of Civil Procedure.

Case No. 185 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 24th February 1870.

Kalee Doss Sandyal and others (Opposite Party), *Appellants,*

versus

Roy Luchmeeput Doogur (Petitioner), *Respondent.*

Moulvie Syud Murhumut Hossein for Appellants.

Baboos Romesh Chunder Miller, Sreenath Doss and *Rash Beharee Ghose* for Respondent.

The High Court has jurisdiction to direct a Lower Court in what manner its own (the High Court's) decree or order shall be carried into effect by that Court, and to see that the Lower Court does not pervert the order, or do that which was not intended to be done, even when such order constitutes a part of the order in execution of a decree which the Lower Court ought to have passed.

Phear, J.—We think that we clearly have jurisdiction to direct the Lower Court in what manner our own decree or order should be carried into effect by that Court. When the case came up to this Court on appeal under Section 257, the order made by this Court constituted, no doubt, part of the order in execution of the decree which ought to have been passed by the Lower Appellate Court; but it was an order made under and by virtue of the authority of this Court; the Lower Appellate Court is by Section 362 charged with the duty of carrying out this order. It is very possible that so far as the direction to pay interest affected the purchaser, who was not originally a party to the suit, it did not constitute matter upon which an appeal properly speaking would, under any circumstances, lie to this Court. But we have no sort of doubt that if this Court had authority, as it undoubtedly had, to make that order, and that it devolved upon a Court subordinate to this to carry that order into effect, it must be competent to us and within our power to take care that that subordinate Court does not pervert our order, or do that under it which the order did not intend should be done. On the whole, we feel convinced that we have jurisdiction to set the Lower Appellate Court right, if it has gone wrong in the interpretation of the order of this Court which it was charged with carrying into execution; and on considering the judgment which has been given by the Lower Appellate Court, we are of opinion that it has misconstrued the order that this Court made with regard to the payment of interest so far as regards the period of time for which interest was to be paid. We think it very clear that by the order it was intended that the judgment-debtor should pay the interest; and we also are of opinion that the interest so to be paid was not intended to go beyond the day at which the purchaser might with due diligence have obtained his

money from the Lower Court. Having regard to the facts of the case and the constitution of the Court which effected the sale, it seems to us that the purchaser might reasonably have taken his money out by the end of April 1868. The order, no doubt, was passed earlier in the month, but some days certainly were necessary to enable him to get that order carried into effect. Up to the end of April, then, we think that it was intended by the order of this Court that interest should be paid to the purchaser by the judgment-debtor.

The Lower Appellate Court has understood the order of this Court to give interest down to a date so late as September, and in this respect we think the mistake was made. We shall, therefore, direct the Judge that interest should run to the end of April and no further.

The question of costs has given us occasion for some consideration. We think the right order will be that each party should bear his own costs. Obviously, much cause for error in this matter was occasioned by reason of the purchaser not getting the order of this Court formally drawn up. On the other hand, the present appellant, or rather applicant, has asked for a great deal more than we have thought it right to give him. Under these circumstances, our order will be that each party will bear his own costs both in this Court and in the Lower Court.

The 18th July 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Decree—Compromise—Alienation—Hindoo widow—Reversioners.

Case No. 434 of 1870

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 20th January 1870, affirming a decision of the Moonsiff of that District, dated the 9th July 1869.

Mussamut Indro Kooer and others (Defendants), *Appellants,*

versus

Shaikh Abool Burkat and others (Plaintiffs), *Respondents.*

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Appellants.

Mr. C. Gregory and *Baboo Onookool Chunder Mookerjee* for Respondents.

It is not in the power of either of the parties to fall back upon a decree the effect of which has been nullified by mutual consent of those parties.

A compromise by which a Hindoo widow gives up all her rights in her husband's estate, reserving only a life-interest in a part of it, cannot but be regarded as an alienation, and is not binding against the reversioners.

Mitter, J.—I AM of opinion that the decree of the 24th July 1839, relied upon by the Lower Appellate Court, is no way binding against the special appellants in this case. It is admitted on all sides that a special appeal had been preferred against that decree to the late Sudder Dewanny Adawlut; and it is also admitted that the case was ultimately settled between the parties by a solehnamah which was duly notified to that Court. Under such circumstances, it is clear that the effect of that decree has been nullified by the mutual consent of the parties themselves, and it does not, therefore, lie in the power of either of them or of their legal representatives to fall back upon it in the present litigation.

It has been said that if the special appellants are not bound by the decree in question, they are at least bound by the compromise by which it was superseded. I am of opinion that this argument has no force whatever. A compromise like the present, by which a Hindoo widow gives up all her rights in the estate of her deceased husband, reserving only a life-interest for herself in some of the villages belonging to that estate, cannot but be regarded as an alienation; and I am aware of no provision in the Hindoo Law which would make such a compromise binding against the reversioner. It has been urged that a *bonâ-fide* decree obtained against the widow would be binding against the reversioner; but the decree of a competent Court of justice stands on a quite different footing from a compromise effected by the parties themselves.

For the above reasons, I would reverse the decision of the Lower Appellate Court, and remand this case to that Court for a fresh decision upon the merits. The costs of this appeal ought to abide the final result.

Loch, J.—I concur.

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The 19th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges*.

Religious endowment—Bond by manager—Legal necessity.

Case No. 64 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 7th February 1870.

Ram Churn Pooree (Defendant), *Appellant*,

versus

Nunhoo Mundual (Plaintiff), *Respondent*.

Mr. C. Gregory and *Baboo Mohesh Chunder Chowdhry* for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

A suit to recover on a bond given by the *de facto* manager of a muth as a charge on the muth having been decreed by the Subordinate Judge:

HELD that, as the obligor had turned the previous manager out of possession, and as his own right to possession was contested at the time he executed the bond, he was in no better position than a trespasser and wrong-doer.

HELD that, as the bond was given for antecedent claims against the muth of which a portion at least would, but for the fresh right of suit given by the bond, have been barred by limitation; and as no proceedings had been taken for sequestration or attachment of the property, there was no necessity for giving the bond, and the suit could not succeed.

Couch, C. J.—THIS suit is brought upon a bond which is dated the 14th July 1865; and unless the plaintiff can establish his right to recover on the bond, he must fail in the suit; because if he were to fall back upon the money-claims in respect of which the bond is alleged to have been given, the suit would be barred by limitation. The question then comes to this—whether Sheo Churn had authority to give the bond so as to charge the *muth*.

The Subordinate Judge has decided in the plaintiff's favor, on the ground that Sheo Churn was the *de facto* manager of the *muth*, and that the charge was one which he had power to make. He says, "that Sheo "Churn was in possession of the *muth* at "the time when the charge was created," *viz.*, at the time when he gave this bond "is admitted." It appears to me that the judgment of the Privy Council in the case of Hunooman Pershad Pandey, upon which the Subordinate Judge has based his decision, does not go to the extent of showing that Sheo Churn was a *de facto* manager having such power. In order to understand what their Lordships in the Judicial Committee meant to lay down in that case, it is necessary to see what the facts were. In the statement of facts, it is said that upon the death of the Rajah leaving an only son, his widow "assumed the proprietorship of "the estates of her late husband and the "guardianship of his infant son. Her name "was registered with that of her minor son "on the records until he attained his major-"ity, when a deed of gift having been exe-"cuted by the Ranee in his favor, her name "was removed from the Government regis-"ter of land-owners by a petition for muta-"tion in the ordinary way;" and that during her incumbency the Ranee dealt with the property in various ways, and acted as manager of the property. Then it is stated that one of the principal points submitted to the Court in the argument was "whether "it was competent by the Hindoo Law to the "Ranee, as the registered proprietor of the "family estate and curator of the infant's "property, to charge ancestral estates by "way of mortgage in consideration of the "advances made for the benefit of the "minor's estate to prevent a sequestration "and probable confiscation;" and in the judgment which was delivered by Lord Justice Knight Bruce, he states as the *third* point which was to be determined: "Did "the Lower Court consider the point whether "the rights of these parties could wholly "depend upon the question whether that "relation was duly or unduly constituted?" That is, whether the rights of the parties, derived under the deeds executed by the Ranee charging the estate for the purpose of raising money to prevent sequestration, could depend wholly upon the question as to whether the relation in which the Ranee assumed to stand with regard to her son's estate was duly constituted. It is with reference to this point that His Lordship says: "It is to be observed that under the Hin-"doo Law, the right of a *bonâ-fide* incum-"brancer who has taken from a *de facto* "manager a charge on lands created honest-"ly, for the purpose of saving the estate "or for the benefit of the estate, is "not (provided the circumstance would "support the charge had it emanated from a

"*de facto* and *de jure* manager) affected by "the want of union of the *de facto* with the "*de jure* title. Therefore, had the Ranee in- "truded into the estate wrongfully, and even "practised a deception upon the Court of "Wards, or the Collector exercising the pow- "ers of a Court of Wards, by putting forth "a case of joint proprietorship in order to "defeat the claim of a Court of Wards to "the Wardship, which is the case that Mr. "Wigram supposed, it would not follow that "those acts, however wrong, would defeat "the claim of the incumbrancer."

That case is very different from the present. The facts of this case are that Poorun Pooree having died, Ram Churn Pooree appears in the first instance to have obtained possession of the *muth*, and to have been in possession for some time. Then he appears to have been dispossessed by Sheo Churn; and according to evidence which there is no reason to disbelieve, and which is not in any way contradicted, 11 months after the death of Poorun Pooree. Sheo Churn, therefore, instead of being in the management of the property as the Ranee was, was a trespasser turning out another person who was in possession. His right to the possession was disputed, and proceedings were taken against him, if not immediately, without much delay. At the time when he executed this bond, his right to the possession was contested. He was, therefore, in no better position than a trespasser and a wrong-doer.

It may, however, be said it was possible that he had a right; but still the possession that he had was wrongfully taken, and during the time that he thus remained in possession, his right was very different from that with reference to which the judgment of the Privy Council was given; and I think there is nothing to support the position that Sheo Churn could be treated as a *de facto* manager of the estate, and able to create a charge upon it.

Another objection relates to the power which a *de facto* manager has of dealing with the estate, that is, a power of creating honestly, for the saving of the estate or for its benefit, a charge upon it.

In this case, however, the bond was not given as a mortgage for advances made at the time. It was given in respect of antecedent transactions, and there was no necessity for Sheo Churn giving such a bond. There was no danger to the estate which the money was advanced for the sake of averting. The plaintiff might have sought any remedy which he had against the *muth*; but it does not appear that any proceedings were taken for sequestration or attachment of the property; and there was not, therefore, any necessity for giving this bond, and thus really giving a fresh right of suit when, as regards at least a portion of the claim, a suit for it would have been barred by the law of limitation.

I think it also very doubtful on the evidence whether the transaction was an honest one, and that the plaintiff was not aware of the circumstances with regard to Sheo Churn's position; that he honestly believed that Sheo Churn was the *de facto* manager of the *muth* having power to charge it.

On these grounds I have come to the conclusion that the plaintiff cannot succeed in this case; and were it not that the Subordinate Judge has found that the bond was executed by Poorun Pooree, I should have been inclined to hold that it was not. It is true that the writer of the bond and other witnesses have been called to speak to the execution of it, but the absence of a regular account, which might naturally be expected to exist (and had the bond been really executed, the accounts would have shown consideration for it), is to my mind a suspicious circumstance. I cannot believe that there was no other account than that which has been produced. But I abstain from disposing of the case on this question of fact, because the Lower Court so decidedly finds that the bond had been executed by Poorun Pooree.

With regard to the expenses of the *shradh*, there is conflicting evidence as to by whom it was performed or to whom the goods were supplied by the plaintiff. It is probable that both the rival claimants performed the *shradh*, and it may be that Ram Churn got part of the goods and Sheo Churn the other part.

Possibly, if the plaintiff had brought a suit on that ground and brought it in proper time, he might have been able to show that he had some claim on the property of the *muth*, and then it would have been necessary for us to determine to what extent goods were supplied and to whom—questions on which we need not now pass any opinion.

The present suit is on the bond, and unless the plaintiff can establish that Sheo Churn had power, under the circumstances, to charge the *muth*, he is not entitled, to the decree which is appealed against.

I think, therefore, that that part of the decree of the Lower Court, which makes the property in the possession of Ram Churn liable, must be reversed, and the plaintiff's suit dismissed as against Ram Churn, with costs of this Court and of the Lower Court.

Bayley, J.—I am of the same opinion.

Milter, J.—I concur.

The 19th July 1870.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Rent-suit—Pleas—Issues.

Case No. 410 of 1870.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 19th January 1870, modifying a decision of the Moonsiff of that District, dated the 16th July 1868.

Purbooddeen Mullick and others (Defendants), *Appellants,*

versus

Molaem Bibee and another (Plaintiffs), *Respondents.*

Baboo Tarucknath Sein for Appellants.

Baboo Ubinash Chunder Banerjee for Respondents.

In a suit by putneedars for rent where the defendants plead a lakheraj title set up long before the plaintiffs acquired their putnee, the issue to be tried is not whether the lakheraj title is valid or not, but whether plaintiffs have at any time received rent for the lands in dispute.

Kemp, J.—In this case, I think it necessary to enter into some detail. The plaintiffs, special respondents, appear to have obtained a putnee in 1261. It is alleged in the plaint that after taking the putnee they received rent from the defendants, special appellants, up to 1262; that then a dispute arose between the plaintiff and his co-sharers which led to an attachment by the Civil Court, pending a decision of their dispute; that the Collector in 1263 appointed a Sezawal; that the Sezawal failed to receive any rents from the defendants, special appellants, who from that time or from 1262, set up a lakheraj title. In the plaint, it is clearly recited that the defendants, the special appellants, set up a lakheraj title for these very 81 beegahs odd cottahs which are now the subject of this appeal. It is further admitted in the plaint that the Collector on the report of the Sezawal enquired into the case; that is to say, the case of the non-payment of rent by the defendants, special appellants; and on the 15th August 1859, the Collector finding that he was unable to collect rent from these lands, because they were lakheraj, directed the Sezawal to withdraw the attachment with reference to these lands. All this is admitted in the plaint. The suit was brought in 1273, or nearly twelve years after the plaintiffs obtained the putnee; and therefore from 1261 to 1273 with the exception of the allegation of having received rent in 1262, it is clear that the plaintiffs have never received rent from these lands. When the case was before the first Court on the first occasion, the first Court dismissed the plaintiffs' suit holding that they had failed to set up even a *primâ-facie* case of receipt of rent, and that, therefore, it was unnecessary to go into the defendant's case. On appeal to the Judge, the same Judge who has now decided the case, Mr. Bright, without going into the defendant's case found on the kubooleut of 1258, which, it appears, was produced by the naib of the former zemindar, that the defendant had been paying rent, and therefore without looking into the defendant's case, he sent back the case to the first Court to try it on the merits. Both the Lower Courts, the first Court, and the Appellate Court have now found against the defendant.

It appears to me that this decision of the Judge is wrong in law. The case that he had to decide was whether the plaintiffs had proved that these were lands that had paid rent to them at any time. He had not to decide, as we pointed out to him in a similar case the other day, whether the lakheraj title set up by the defendant was valid or not; there will be time enough for him to decide that question when a suit for resumption is filed. All he had to decide was whether the lands had paid rent to the plaintiffs or not. Now, in the face of the admission on the plaint that between 1261, when the plaintiffs' title was created, and 1273, there has been admittedly no receipt of rent by the plaintiffs except for the year 1262; and that the Collector had failed, when the estate was under attachment, to collect rents from the defendant, who alleged before the Collector, and successfully

alleged, that the lands in dispute were lakheraj, and obtained from the Collector an order of release from the attachment. In the face of all this, it is difficult to understand how the Judge could have satisfied himself that the plaintiffs had at any time received rent for these lands. The lakheraj title of the defendant, be it a good title or a bad title, was set up long before the plaintiffs acquired their putnee. Under Section 11, Regulation III. of 1827, the defendant Bajaree Bibee applied to have her name mutated in the room of the lakherajdar, her father, whose name was on the Collectorate register; and this she obtained so far back as in 1849. Therefore, all along and before the creation of the plaintiffs' right in the putnee, this claim to hold these lands rent-free was set up by the defendants. They have also in this case filed a hibbanamah, the proceedings of the Collector in the mutation-case, the proceeding of the Collector releasing the lands from attachment, and also a list of documents including sunnuds and chars which were filed in a former case; and they explain the reason why they could not file the documents in the present case, by stating that they have been lost by their mookhtear; but the fact that they were filed is patent on the record from the copy of the list filed by them. In the face of all this, the Judge, instead of deciding the simple issue before him, whether the plaintiffs had received rent or not, goes into the question of the validity of the lakheraj title, which, I hold, he was not justified in doing in this case.

I am of opinion that there is sufficient evidence on the part of the defendants to show that these lands are lakheraj lands, and that the plaintiffs have never at any time received rent from these lands. I, therefore, dismiss the plaintiffs' case, reverse the Judge's decision, and decree this appeal with all costs. The plaintiffs, if so advised, may bring a suit for resumption against the defendants.

Jackson, J.—I concur in this judgment.

The 19th July 1870.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Arbitration—Difference of opinion.

Case No. 416 of 1870.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 20th December 1869, affirming a decision of the Moonsiff of Ghattal, dated the 28th August 1869.

Thakoor Dass Chuckerbutty (Plaintiff), *Appellant,*

versus

Ram Jeebun Chuckerbutty (Defendant), *Respondent.*

Baboos Ashootosh Dhur and *Luckhee Churn Bose* for Appellant.

Baboo Tarucknath Sein for Respondent.

A case having been referred to arbitration without provision being made for a difference of opinion, and the arbitrators having given in differing awards, the Court of first instance tried the case anew and dismissed the suit. This decision was confirmed on appeal. In special appeal the plaintiff asked that the case might be sent back to the arbitrators with a provision for difference of opinion, and that they might submit their award a second time : HELD that it was too late at this stage to allow such a course.

Jackson, J.—IN this case, while the trial was pending before the Court of the Moonsiff, a reference was made to arbitration. The reference was made to three arbitrators, who apparently differed in their judgments; two decreeing the case for the plaintiff, and

one giving in his award several days later, and decreeing the case in favor of the defendant. It turned out then that no provision had been made according to law for a difference of opinion amongst the arbitrators. The Moonsiff, thereupon, finding that the award was, in fact, no award, fixed issues in the case, called for evidence, and tried the suit anew. In the course of his judgment in the case, he alludes to the arbitrators' award, and states that there were grounds for doubting whether the arbitrators could give a fair and impartial judgment in the case, as they were mixed up in the dispute between the parties. He went on to decide the case himself, and dismissed the plaintiff's suit. An appeal was preferred from that judgment to the Judge, who also concurred with the Moonsiff in dismissing the plaintiff's suit on the ground of limitation. The plaintiff now appeals to this Court, and his vakeel has urged upon us that the Lower Appellate Court ought to have sent back the case to the Moonsiff, in order that the Moonsiff might send back the case to the arbitrators making a provision for a difference of opinion, and order them to submit their award a second time. The vakeel for the appellant has shown us that this was the course pursued by this Court in another case, but there are some differences between this case and that case. In that case, the arbitration-award being set aside, the Court acted on the evidence given before the arbitrators; while in this case the Court has not acted upon the evidence given before the arbitrators, but on evidence given before itself. I have no doubt that the Court would have the power to remand the case, with an order such as was passed in the case alluded to, but in this case, we think, it is not right to pass any such order. If the special appellant wished the case to be referred again to arbitrators, he should have asked the Lower Appellate Court to have pursued that course. He did not do so, and now at this late stage of the case, after both the Lower Courts have decided against the plaintiff, we think we ought not to allow him to adopt a course which he has not thought of till the last moment. Upon the merits between the parties, no ground of special appeal is preferred.

We think there ought to be an end of this litigation, and we, therefore, dismiss the special appeal with costs.

Kemp, J.—I am of the same opinion.

The 20th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, *Judge.*

Mesne-profits—Interest—Damages.

Case No. 48 of 1870.

Regular Appeal from a decision passed by the Deputy Commissioner of Gowalparah, dated the 23rd December 1869.

Protap Chunder Borooah (Plaintiff), *Appellant,*

versus

Ranee Surno Moyee (Defendant), *Respondent.*

Mr. R. T. Allan for Appellant.

Baboos Sreenath Doss and *Motee Lall Mookerjee* for Respondent.

Although interest as such strictly cannot be allowed upon mesne-profits previously to the institution of the suit, the Court, in estimating what loss has been sustained by the plaintiff in being kept out of possession, may take into consideration that, if he had received the rents year by year, he would have been able to make use of the same, and may thus calculate the interest in the damages to be awarded.

Couch, C. J.—The principle upon which the mesne-profits are to be awarded is, I think, very correctly stated by Mr. Justice Bayley in a case in the 11th Volume, Weekly Reporter, page 25, and there he says that "a party is entitled to receive what he could "have realized but for the wrongful act of "the opposite party; he has to receive da-"mages in such a shape and of such an ex-"tent as to cover his loss." Now to apply that, first, to the question of the allowance of interest. It is true that interest cannot ordinarily be allowed upon damages until the damages are ascertained. Act XXIII. of 1861, Section 10, authorizes the award of interest when the suit is for a sum of money due, but does not extend to the award of interest upon damages. But although interest cannot be allowed upon the mesne-profits previously to the institution of the suit as interest strictly, the Court, in estimating what loss the plaintiff has sustained by being kept out of possession of the property, may take into consideration that, if he had received the rents year by year, he would have been able to make use of the money so received, and that he is injured not to the

extent merely of the amount of the rents, but of the benefit that he could have received from using the money if he had got it in proper time. Therefore, although the interest could not be awarded from year to year as interest, it might very properly have been calculated in the amount of damages awarded to the plaintiff. That, we think, is the correct principle. In estimating the amount of loss so incurred, it is convenient for the Court to allow it in the shape of interest year by year upon the amount of mesne-profits for that year, but the result is the same; and on that ground we concur in the cases that have been cited where interest has been awarded upon the mesne-profits year by year. If that mode had been adopted in the present case, the plaintiff would have recovered a greater amount as interest than has been awarded to him, because the Judge has awarded interest from the date of suit only upon the mesne-profits which accrued during the six previous years, and has not given interest upon the mesne-profits year by year from the time that the plaintiff ought and would have received them but for the wrongful act of the defendant. As the plaintiff did not claim this, there is no ground for disturbing that part of the decree of the Court below, although the plaintiff has not got as much as he might otherwise have obtained.

The other question is as regards the rate of allowance and how the amount is to be estimated per beesh. Now, the plaintiff is to be compensated for the loss that he sustained. The evidence shows that before the dispossession by the defendant, he was letting this land at the rate of 9 rupees 2 annas per beesh of 20 beegahs; and we have no evidence that during the period for which the mesne-profits have been awarded, he could have obtained a larger sum. It is possible that he might have done so, but he has not shown that by his witness. The witness says that now, that is, at the time he was giving his evidence, he paid 13 rupees per beesh. The question might have been put to him: "How long have you been paying that?"; but through some misfortune or some mistake of the plaintiff that question was not put, and the plaintiff has not shown for what period rent has been paid at a higher rate than Rupees 9-2 per beesh of 20 beegahs.

Then, with regard to the quantity of land upon which this is to be estimated, the Judge seems not to have been justified upon the evidence in making a deduction of one-fourth for unculturable lands. The evidence certainly shows that more than three-fourths of the lands was culturable, and apparently had been so for a considerable time. The only deduction, therefore, that ought to have been made was on account of the bheel and the other insignificant matter; and a fair allowance for that would be one-eighth instead of one-fourth. It may be that this is not precisely the quantity, but we think we may take it upon ourselves to dispose of this matter, rather than to allow the case to be further litigated.

The decree must be modified in that way; the allowance must be for the time and at the rate fixed in his decree by the Judge, and the deductions for unculturable lands must be calculated at one-eighth instead of one-fourth.

There is another point about collection-charges, which has been already disposed of in the course of the argument. If it had been shown to the Court that there had been any actual expenses incurred by the defendant for collections, a deduction might have been made on that account; but there is nothing to show that any collection charges have actually been incurred, and we are without any evidence that would enable us to make any deduction for collections.

We think each party should pay his own costs of this appeal.

The 20th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Right of suit—Attachment.

Case No. 234 of 1869.

Regular Appeal from a decision passed by the Judge of Hooghly, dated the 14th June 1869.

Arratoon Carapiet, Special Assignee, representative of John Cochrane, Official Assignee to the estate of Joy Gopal Chatterjee, Insolvent (Plaintiff), *Appellant*,

versus

Panna Lall Seal and others (Defendants), *Respondents*.

Baboos Unnoda Pershad Banerjee, Hem Chunder Banerjee, and *Poorno Chunder Shome* for Appellant.

Mr. R. T. Allan and *Baboo Ashootosh Dhur* for Respondents.

A right to bring a suit cannot be attached under the Code of Civil Procedure.

Couch, C. J.—The cause of action set forth in the plaint is that Joy Gopal Chatterjee had obtained a decree against Mothooranath Mullick and Sreenath Mullick; and the decree having been confirmed on appeal, it was executed by the District Court, and the property of the debtors was attached. The plaint then goes on to say that subsequently the decree-holder, Joy Gopal, became insolvent; and the present plaintiff took possession of his estate under an order of the Supreme Court, and proceeded with the execution of the decree which Joy Gopal had obtained, and caused an attachment of the debtor's property as specified at the foot of the plaint.

It then states that the defendants in this suit intervened, alleging that the property which had been attached was mortgaged by Sreenath Mullick, one of the debtors, to the father of the defendants, Baboo Mutty Lall Seal; and proceeds to allege that the allegation of a mortgage was fraudulent, and that this false plea of a mortgage having been set up and a collusive decree obtained, the property was sold under that decree; and it prays for a declaration of the debtor's rights to the property, and that its liability for the decree obtained by Joy Gopal Chatterjee may be declared. Now, the plaint alleges that the cause of action arose at the date of certain summary orders, namely, on the 7th of September and 23rd of November 1867 and 1st of August 1868; but this is not so; for, in reality, this is a suit to set aside the mortgage as being fraudulent. The suit is founded on fraud, because unless the mortgage can be set aside, the plaintiff cannot establish his right to attach the property as that of his judgment-debtors and to sell it free of the mortgage. The mortgage was made on the 14th of October 1841; and it appears that it must have come to the knowledge of Joy Gopal Chatterjee, or of the plaintiff who is his Assignee, so far back as the 16th of March 1848; because there was then a suit against Mutty Lall Seal, and the mortgage was set up by the answer filed in that suit. Therefore, as regards this cause of action, the suit is clearly barred by Section 10, Act XIV. of 1859.

Another case was made which is not very distinctly put forward in the plaint, and it is this—that the defendant's father, when the property was put up for sale under the decree which was obtained upon the mortgage, purchased it himself; and it is alleged that this purchase was invalid, and that the defendants could acquire no title by it. Now, there are two answers to that; one is, that supposing the defendant's father did improperly purchase on that occasion, being the mortgagee and the party who had brought the suit, it would only amount to this—that the persons who were beneficially interested, or who were in the position of Sreenath's heirs, could have complained of that, and could have applied to the Court to set aside the sale; and the Court, if satisfied that a proper case had been made out, might have set aside the sale, and, probably, if the Court had done so, would have done it upon certain terms, such as that the defendant should get back the money which he had paid. But that would only be a right to bring a suit to set aside the sale. Now, a right to bring a suit was not a thing which could be taken in execution of the decree which had been obtained against Sreenath and Mothooranath Mullick. The Code of Procedure does not anywhere allow or provide for the attachment of a right to bring a suit. The plaintiff, as Official Assignee, has only the same rights as Joy Gopal Chatterjee had as execution-creditor, and he cannot claim to have that property sold in execution of the decree; because at the time of the execution there might have been a right to bring a suit to set aside the sale. There is another answer which goes entirely to the merits of the case. It appears that liberty for the mortgagee to bid at this sale was given by the Court, and the purchase was sanctioned by the Court. After that, the Court would not entertain a suit to set aside the sale, because the mortgagee was the purchaser. The giving of this permission to bid and the sanctioning the sale, were in accordance with the practice of the Court.

Then, with regard to another portion of the property, namely, that which originally belonged to Mothooranath, and which was left by him upon trust for the benefit of his family, it is said that Sreenath had no power to mortgage this; that he may have had the power to sell but not to mortgage it; and, therefore, his mortgage of it to Mutty Lall Seal was invalid. On that ground the

plaintiff says that he is entitled to a decree for that portion of the property. Here, again, there is only a right on the part of the family of Mothooranath to complain that, as Sreenath had no power to mortgage, it was a breach of trust on his part to do so. The mortgage might possibly have been set aside if a suit had been brought at the time by the parties entitled to do so, but it could only have been set aside by a suit. The property being in the hands of Sreenath, and he being the person who had the dominion over it, he could by mortgaging it pass a title to Mutty Lall Seal, although it might be improper on his part to mortgage instead of selling it. There might also be circumstances which might make the Court think that, on the whole, the mortgage was not improper. In any way, it was a matter for enquiry in a suit by the parties who had the right to complain, and the remarks already made as regards the right of suit to set aside the sale also apply here; it is not a right which could be taken in execution of a decree. The suit of the plaintiff, therefore, entirely fails. The only real ground of complaint which he could have had, *viz.*, to set aside the mortgage on account of its being a fraudulent one, is barred by the law of limitation, as he had notice of the circumstances regarding that mortgage in 1848, and did not bring the present suit till 1868. The suit in which notice was given of the mortgage was a contested suit, and there could be no doubt that there was abundant notice of this cause of action if this was really a fraudulent mortgage.

This appeal must be dismissed with costs.

The 20th July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Suit—Contract for marriage.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Ranaghat, dated the 27th June 1870.

Juggessur Chuckerbutty, *Plaintiff,*

versus

Panchcowree Chuckerbutty, *Defendant.*

Where plaintiff had paid defendant a sum of money in consideration of a promise made by the latter to give the former his sister in marriage, which contract had been broken and the girl was married to another: HELD that an action would lie to recover the money.

Reference.—PLAINTIFF sues defendant for Rupees 59 paid to him in consideration of a promise made by defendant, that the latter would give plaintiff his sister in marriage, which contract has been broken, and the girl married to another. Defendant was not the legal guardian of his sister—her mother being still alive. Defendant's pleader has taken an objection on the ground that the consideration being an immoral one, no action can lie for the breach of the contract, nor (both parties being equally in fault) to recover money paid on account of it. I consider part of the alleged payments proved, and refer the case for the High Court's decision as to whether the contract is a valid one.

Under the English Law, it would appear that the contract would be regarded as invalid, on the ground of its being contrary to public policy to permit marriage to be made the subject of mercenary speculation. Addison on Contracts, page 741, 5th Edition.

It may, however, be doubted whether the English Law on this subject can be considered applicable to this country, and it appears to be a common practice not only to remunerate match-makers or *ghuttucks* for their services, but also for the husband to pay a certain sum called *pun* to the relatives of the wife previous to the marriage. At the same time, the reasons for discouraging such practices would seem at least equally strong in this country as in England. The practice of demanding from the suitor a *pun*, the amount of which goes entirely to the parent's benefit, none of it being in the nature of a settlement on the wife, must undoubtedly tend to induce the exercise of parental influence from corrupt motives and encourage the buying and selling of women.

As I am not aware that the point has been as yet decided, and as the principle involved is one of considerable importance, I have referred it for the decision of the High Court with an expression of my own opinion that the suit cannot be maintained.

Judgment of the High Court.

Jackson, J.—It appears to us that, in the circumstances of this case, an action to recover back the money paid to the defendant will lie.

The 20th July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Sections 216 and 217, Civil Procedure Code—Execution—Procedure.

Case No. 158 of 1870.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 26th April 1870.

Raj Bullub Shaha (Judgment-debtor), *Appellant,*

versus

Ram Sudoy Ghose and others (Decree-holders), *Respondents.*

Baboo Romanath Bose for Appellant.

Mr. R. E. Twidale for Respondents

When an application is made to execute a decree and notice is issued under Section 216, Civil Procedure Code, and the opposite party presents a petition containing grounds of objection, the Judge is bound, whether a day for hearing is fixed or not, and even if the petitioner is not present, to consider the objections and pass such order as may appear just and proper.

Jackson, J.—In this case application was made to execute a decree, and notice was issued under Section 216 of the Code of Civil Procedure to the party against whom execution was applied for, to show cause why the decree should not be executed. He came and presented by his pleader a petition containing certain grounds of objection, and on that petition, the Judge made the order that it was to be placed before him with the record.

It does not appear that any day was fixed for hearing the petition, but on a subsequent day the Judge states that the case was called on, and was repeatedly placed before him, but the pleader did not attend, and therefore the objections were disallowed.

The judgment-debtor afterwards applied to the Judge to re-consider this order, and the Judge there expressly states that the objection had been disallowed in consequence of the absence of the pleader.

It appears by an order subsequently made on the petition of the decree-holder that the arrest of the judgment-debtor has been ordered in execution.

By Section 217 of the Code, it is provided that, "when such notice is issued, "if the party shall not attend in person or "by a pleader, or shall not show sufficient "cause to the satisfaction of the Court why "the decree should not be forthwith exe-"cuted, the Court shall order it to be exe-"cuted accordingly. If the party shall "attend in person or by a pleader, and shall "offer any objection to the enforcement of "the decree, the Court shall pass such order "as, in the circumstances of the case, may "appear to be just and proper."

It seems that in this case the party had attended by pleader, and had offered objection, in the shape of a written petition, to the enforcement of the decree. The proper course would have been for the Judge to have fixed a day on which the petitioner was to be heard; but whether such day was fixed or not, and even if the petitioner was not present, still I think the Judge would be bound to consider the objection which he had filed, and to pass, as required by the Act, such order as, in the circumstances of the case, appeared to be just and proper. It might be that the ground of objection raised in the petition would be of such a nature as that the Judge might *primâ facie* and without going further into the case see reason for not proceeding with the execution.

I think the Judge's order must be set aside, and he must be desired to take into consideration the objection of the judgment-debtor, and pass such order as he thinks proper.

Glover, J.—I concur generally with Mr. Justice Jackson. I think the case should be remanded to the Judge to try the nature of the objections taken by the judgment-debtor. I also think that, if a day had been fixed and the party had not then appeared, the Judge would have been justified in not going further into the case, but might have disposed of it at once.

The 20th July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Small Cause Court—Jurisdiction—Section 12, Act XI. of 1865—Section 4, Act XXIII. of 1861.

Reference to the High Court by the Judge of the 24-Pergunnahs, dated the 7th June 1870.

Khoda Buksh Mistree, *Plaintiff,*

versus

Banee Mundul and another, *Defendants.*

In a suit upon one cause of action cognizable by a Court of Small Causes, against two defendants, one of whom resided in the local jurisdiction of such Court, and the other within that of a neighbouring Moonsiff:

HELD that, under Section 12, Act XI. of 1865, the Small Cause Court had jurisdiction to try the suit, and that the Moonsiff was debarred from entertaining it; but before proceeding to try it, the Small Cause Court should apply to the High Court for authority to do so.

This case was referred for the opinion of the Judge by the Moonsiff of Alipore, with the following remarks:—

IN reference to the case noted above, I have the honor to state that the suit is brought on a bond jointly executed by the defendants, one of whom is a resident of the town of Calcutta, and the other lives within the jurisdiction of this Court. The cause of action is said to have arisen in Calcutta. The plaint was originally filed in the Small Cause Court at Sealdah, and registered. Even the plaintiff's fee was taken, but afterwards the plaint was returned under an order of the 14th April, on the ground, not endorsed on the plaint, but alleged by the pleader, that the Small Cause Court had no jurisdiction. But I am of opinion that that Court had jurisdiction to entertain this suit, and I have it not.

Section 47 of Act XI. of 1865 (the Small Cause Court Act) runs thus: "* * * * and except as hereinbefore provided, the provisions of the Code of Civil Procedure shall, so far as the same are or may be applicable, extend to all suits and proceedings under this Act." Section 42 of Act XXIII. of 1861 provides: "Act VIII. of 1859 shall "be called the Code of Civil Procedure." Section 44 provides that "this Act (meaning "Act XXIII. of 1861) shall be read and "taken as part of Act VIII. of 1859." Now, Section 4 of Act XXIII. of 1861 provides: "If in any suit there are more defendants than one, and at the date of the institution of the suit all the defendants shall not reside within the jurisdiction of the Court in which the suit is brought, but one or more of the defendants shall reside within such jurisdiction, the suit *shall not* be rejected by reason of all the defendants not residing within the jurisdiction of the Court in which the suit is brought; but the District Court, if the suit is pending in any Court subordinate to such Court, or the Sudder Court, may order that the suit be heard in any Court subordinate to such Sudder or District Court, *and competent in respect of the value of the suit to try the same.*" The Small Cause Court being subordinate to the Sudder, now the High Court, could have taken the permission of that Court to try the suit It had no *power to reject the plaint.*

Section 12 of Act XI. of 1865 provides: "Wherever a Court of Small Causes is constituted under this Act, *no suit cognizable by such Court* shall be heard or determined *in any other Court* having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes." The word *cognizable* here does not mean *triable on bare presentation;* for that this case was not, as the Small Cause Court could try it only upon a contingency, namely, the High Court's permission. We must look to other Sections of Act XI. for the meaning of the word "cognizable." Now, Section 6 goes to say: "The following are the suits which shall be *cognizable* by the Courts of Small Causes, namely, claims for money due on bond, or other contract, &c." But such suits are not *triable* by a Small Cause Court on *bare presentation:* they are triable only upon the happening of a contingency, namely, the defendant's residence, &c., within its local jurisdiction as provided in Section 8, in which the two words *try* and *cognizable* coming together set forth by contrast their respective meanings in clearest light, namely, "The Court of Small Causes may try all such suits as are described in the sixth Section, and thereby made *cognizable* by Courts of Small Causes, if the defendant, at the time of the commencement of the suit, shall dwell or personally work for gain, or carry on business within the local limits of the jurisdiction of such Court; *or if the cause of action* arose within the said local limits, and

the defendant, at the time of the commencement of the suit, shall, by his servant or agent, carry on business or work for gain within those limits." There is no concurrent jurisdiction between a Small Cause Court and an Ordinary Civil Court, established at one and the same locality. The suit is triable either by me or by that Court, and not by both. The High Court cannot, as I understand it, give me the power to try it, for the Subordinate Court must be "competent in respect of the value of the suit to try the same," but the claim being below 500 rupees, the Small Cause Court alone is competent to try it under Sections 6 and 12, and that takes away my jurisdiction.

The pleader contends that, as the Section 8 of the subsequent Act XI. of 1865 in its provision, "if the defendant * * * * shall dwell," &c., clashes with Section 4 of the previous Act XXIII. of 1861, the subsequent Act must prevail. But I do not see this supposed clashing. Section 8 of Act XI. does not say "if *all* the defendants "shall dwell," so that, if the Section 4 of Act XXIII. were passed after the passing of Section 8 of Act XI., there would have been no necessity for repealing any part of Section 8 of Act XI. In fact, that Section 4 of Act XXIII. of 1861 was passed to supply the defective phraseology of the last part of Section 5 of Act VIII. of 1859 and of Section 4 of Act XLII. of 1860 (the former Small Cause Court Act), similar to that used in Section 8 of Act XI. Can we suppose that the Legislature meant to set aside an obvious improvement, when that very Section 8, in its latter provisions "or if the cause of action," &c., is an improvement upon the similar Section 4 of Act XLII. of 1860? There being already that provision in another law expressly applicable to suits under Act XI., it was thought unnecessary to repeat it here.

Another case noted in the margin* is similar to the first, except that the cause of action arose at Chakurbare within the common jurisdiction of both the Courts. But it makes no difference, so long as the defendants or one of the defendants lives within the jurisdiction of the Small Cause Court.

* Sreemottya Bimola Dossee *versus* Raj Luckhee Dossee of Chakurbare, and Mokhod Dossee of Calcutta, laid at Rupees 79-7-3

The pleader says that his client is already harassed, and that the Small Cause Court is not likely to listen to my ruling. But I have no power to refer this matter to the High Court. You alone can do so under Section 28 of Act XXIII. of 1861. I know I have no power to move you to take that step. But then I can do it in this shape. If I am wrong in my interpretation, I must take your permission under Section 4 of Act XXIII. of 1861 before I can go on with these suits. If I am wrong, I beg hereby to have the necessary permission. It is desirable, as the pleader asks, to have the authoritative ruling on the point, for he says that such a contingency daily occurs.

In referring the case to the High Court, the Judge expressed the following opinion:—

I have the honor to enclose in original two letters from the Moonsiff of Alipore, dated the 11th and 20th ultimo, in which he contends that he has no jurisdiction to entertain a suit, which the Court of Small Causes at Sealdah is precluded from trying by reason of the non-residence of one of the defendants within its local jurisdiction.

In the first case to which he refers, one defendant is, and the other defendant is not, subject to the Small Cause Court jurisdiction. Both are generally subject to the jurisdiction of the Moonsiff, and the suit is in its nature cognizable by the Small Cause Court. The Moonsiff says that the Judge of the Small Cause Court might obtain the sanction of the High Court to the trial of the suit in his Court under the provisions of Section 4, Act XXIII. of 1861; and consequently that the Moonsiff has no jurisdiction because the suit might be cognizable by the Small Cause Court under certain contingency.

It appears to me that the Moonsiff's view of the law is incorrect. The Section 4. Act XXIII. of 1861, was not intended to refer to Small Cause Courts. Section 12, Act XI. of 1865, refers to cases which are cognizable, and not those which might be cognizable if the High Court sanctioned, in the exercise of its authority, an enlargement of the jurisdiction of the Court. Moreover, even if the Judge of the Small Cause Court is empowered to ask for sanction to his entertainment of the suit, it appears that he is not bound to do so. Consequently, the jurisdiction of the Moonsiff is not, in my opinion, barred by the provisions of the Small Cause Court Act; and, if it be not barred, he is bound to entertain it.

Certainly, the District Judge has no jurisdiction in the matter, because the Small Cause Court is not subordinate to him.

In the matter of expediency, I am of opinion that the jurisdiction of the Small Cause Court ought not to be extended to persons not subject to it by place of residence, except on very strong grounds.

I solicit, therefore, the order of the High Court on the question whether Section 12, Act XI. of 1865, is applicable to suits to which the jurisdiction of the Small Cause Court may be extended by a special order of the High Court.

The judgment of the High Court was delivered as follows by—

Jackson, J.—In this case, the plaintiff sued upon one cause of action two defendants, one of whom resided in the local jurisdiction of the Small Cause Court at Sealdah, and the other within that of the Moonsiff of Alipore. Both defendants, indeed, are stated to have been generally subject to the last-mentioned jurisdiction.

The plaint was, in the first instance, presented in the Small Cause Court at Sealdah, and after being registered there was returned to the plaintiff. It was then presented in the Court of the Moonsiff of Alipore; and as a difference of opinion has arisen between the Moonsiff and the Judge of the 24-Pergunnahs, he has referred the matter to this Court, the Moonsiff being of opinion that he has no jurisdiction, and the Judge considering that he has. The Judge's view is that this case is not directly cognizable by the Court of Small Causes at Sealdah, but it might become so in the event of the High Court granting permission to that Court to try it.

It has been held in a previous case, on a reference from the Judge of the Small Cause Court at Sealdah, as shown by a letter from the Registrar of this Court to the Judge of that Court, dated 13th July 1863, that the provisions of Section 4, Act XXIII. of 1861, applied to Courts of Small Causes in the Mofussil, and consequently the Small Cause Court ought not to have rejected the plaint in this case, by reason of all the defendants not residing within the jurisdiction of that Court.

The Judge appears to have lost sight of the distinction between a suit being cognizable in a particular Court, and a Court having power to try a suit under the particular circumstance of one of the defendants not residing within the jurisdiction of the Court. It is clear that this was a suit cognizable by the Court of Small Causes at Sealdah, but that, before proceeding to try it in the particular circumstance stated, namely, of one of the defendants being beyond the jurisdiction of that Court, that Court, would have to apply to the High Court for authority to proceed to try the case. The suit, therefore, being cognizable in that Court, it seems to me that, under the 12th Section of Act XI. of 1865, the Moonsiff was debarred from entertaining it, and that consequently his opinion is the correct one.

I should mention that the Madras High Court appear to have come to a similar conclusion in the case reported in the 1st Volume of the Madras High Court Reports, page 103, in the case of Subhaputi Mudah *versus* Mutta Soonni Mudah and others.

Glover, J.—I concur.

The 20th July 1870.

Present:

The Hon'ble W. Markby and Dwarkanath Mitter, *Judges.*

Revenue Courts—Fraud—Jurisdiction.

Case No. 2355 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 17th August 1869, affirming a decision of the Subordinate Judge of that District, dated the 18th February 1869.

Shibo Soonduree Dossee and others (Defendants), *Appellants,*

versus

Panchcowree Chundra and others (Plaintiffs), *Respondents.*

The Advocate-General and *Baboo Taruck-nath Sein* for Appellants.

Baboos Chunder Madhub Ghose and *Mohendro Lall Shome* for Respondents.

An *ex-parte* decree for an arrear of rent having been passed by a Revenue Court against certain tenants, and their land having been put up for sale in execution and bought by the decree-holders, the tenants brought a civil suit to get rid of the sale as well as of the decree. The Lower Courts, finding that the whole of the proceedings had been conducted without the knowledge of the plaintiffs, and that a fraud had been intended, gave them a decree setting aside the sale, and affirming plaintiffs' title in the disputed land.

HELD in special appeal that, as the parties came up on a ground of equity, the High Court could interfere without prejudice to the jurisdiction of the Revenue Courts. Accordingly, on the principle that the defendants should not be allowed to take advantage of their own fraud, it was decreed (the purchase-money being still in deposit in the Collectorate) that the defendants should re-convey the property to the plaintiffs.

Markby, J.—IN this case, it appears that the defendants are owners of a talook which is standing in the name of one of them, namely, Ishan Chunder, that the defendants are the owners of the property, and that the plaintiffs were the holders of certain lands included within the limits of that talook.

In the year 1862, there was a dispute between the plaintiffs and defendants as to their respective rights.

The now defendants brought a suit to resume part of the lands as lakheraj; and they also brought a suit to enhance the rent of another portion, of which the plaintiffs held a mowrosee lease.

They failed in the resumption-suit, and only succeeded in enhancing the rent of a very small portion of the land; and the result was that the plaintiffs in this suit had a claim against the defendants in this suit for Rupees 225.

Now, in the year 1866, the now defendants brought a suit in the Court of the Deputy Collector of Howrah against the now plaintiffs for Rupees 13 as due for rent in arrear; and, on the 17th of August 1866, the Deputy Collector gave a decree *ex parte* against the present plaintiffs for that amount. The amount not having been liquidated, that portion of the above-mentioned lands in the defendant's talook which was held by the plaintiffs under a mowrosee lease was put for sale and bought by the defendants.

In 1868 the plaintiff brought the present suit, the object of which was to get rid altogether of that sale, and of the decree in the suit under the deed of conditional sale by which the rent was declared to be due, and to have their title declared.

They allege as to the 13 rupees in arrear for rent that an agreement was entered into between the plaintiffs and the defendants that that amount should be set off against the costs due to the plaintiff from the defendants for costs of the litigation of 1862; and they say they were never aware of the proceedings in the Deputy Collector's Court; that the whole of the proceedings pending the suit, and up to the time of the sale, were conducted without their knowledge, and that they were advisedly so conducted by the defendants, and that it was a fraud intended by them against the property.

The facts, as now finally found by the Courts below, are these—that the agreement for the set-off which they allege never really did take place; but that the other allegations of the plaintiffs are true, and that the fraud charged to the defendants is true; and on that a decree was given to set aside the sale, and to affirm the plaintiff's title in the disputed lands.

On special appeal before us, the objection taken has been that, inasmuch as the sale-proceeding were founded upon a judgment of a competent Court, and they were carried on and directed by a competent Court, that Court, and that Court alone, can set aside those proceedings.

It appears that the plaintiffs in this suit did go before the Deputy Collector to have the sale set aside; but they did so after the expiration of the time pointed out by Section 58, and on that ground the Deputy Collector refused to entertain the application.

Now, it is not necessary for us in this case to express any opinion whatever as to what would have been the position of the party who had purchased this property at a sale for arrears of rent, who had bought *bonâ fide*, although the landlord had acted fraudulently towards the tenant. Probably in such a case this Court would not interfere, because the usual rule would apply that a Court of equity cannot interfere where the rights of a third party, who is not before the Court, are affected. Nor is it necessary for us to say what would have been the result if such party had gone before the Deputy Collector, and alleged the fraud. Probably it would have been contended that that Court was a competent Court, and that its decision was final. The Revenue Courts in this country have a jurisdiction which is distinct from that of the Civil Courts; but in this case the parties came before us, on a ground of equity, on the facts on which this Court can, I think, interfere without any prejudice to the jurisdiction of the Revenue Courts.

The plaintiffs allege that the defendants are in possession of property which they have obtained from the plaintiffs by means of fraud, and all the plaintiffs ask is, in substance, that we should prevent the defendants from benefiting by this transaction; and this, as it appears to me, is a question with which this Court can deal without touching or interfering with the jurisdiction of any other Court. I mention this because it seems to me very desirable that there should not be any conflict of jurisdiction between the Civil Courts and the Revenue Courts; and what I propose to do will not, in my opinion, in any way infringe upon the authority and jurisdiction of the latter.

The *form* of the decree which has been passed must be slightly altered, so as to give the plaintiffs what they ask for while it keeps the action of the Court perfectly clear.

I do not think it is necessary to set aside the sale; but the principle on which I would act is that the defendants should not be allowed to take advantage of their own fraud. I think we can do this without going the length of setting aside the sale, by directing that the defendants should re-convey to the plaintiffs the property which is the subject of this suit. Had the purchase-money been paid to the plaintiffs, I should have directed that money to be refunded; but as the purchase-money is in deposit in the Collectorate, and has not been paid over to the plaintiffs, the decree will simply be that the defendants do re-convey the aforesaid property to the plaintiffs; and this will be an alteration, not in substance, but only in form as I have already said.

The defendants will pay the plaintiffs their costs both in this Court and in the Courts below.

Mitter, J.—I am of the same opinion.

The 21st July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Execution—Wassilat—Jurisdiction.

Case No. 181 of 1870.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 10th March 1870, reversing an order of the Officiating Subordinate Judge of that District, dated the 13th August 1869.

Punchanun Bose and another (Decree-holders), *Appellants,*

versus

Oomanath Roy Chowdhry (Judgment-debtor), *Respondent.*

Baboo Romanath Bose for Appellants.

Mr. R. T. Allan for Respondent.

After obtaining a judgment for possession, the judgment-creditor sued for wassilat. After decree, an enquiry was made into the amount of wassilat, and on the report of an Ameen, the decree-holder being present and the opposite party not appearing, the Court made an order for the payment of the sum therein mentioned. Subsequently the judgment-debtor appeared and petitioned that the award might be corrected by deductions to which he was entitled. On his application

being refused, he appealed to the Judge who remanded the case with a view to its being ascertained whether any and what amount should be deducted.

HELD that the Judge should not have interfered with the award of wassilat which was a final award so far as the Appellate Court was concerned.

Jackson, J.—IT appears to me that the order of the Judge in this matter is without sanction of law.

This was a case of execution of decree. The special appellant, having obtained judgment for possession, sued the opposite party to recover wassilat of some land from which he had been wrongfully dispossessed.

After decree an enquiry was made into the amount of wassilat, and an Ameen having made his enquiry and report on the 21st May 1869, the decree-holder being present and the judgment-debtor not appearing, the Subordinate Judge, reciting that the decree-holder acquiesced in the report and was willing to take the amount therein assessed, made his order that the judgment-debtor should pay the decree-holder the sum therein stated, *viz.*, Rupees 1,715-2-11.

Afterwards, in the month of June the judgment-debtor appeared and made a petition, called a petition for review of judgment in which it was set forth that the Ameen had improperly made a report to the effect that the plaintiff was entitled to so much wassilat, without making deductions to which defendant was entitled, first, for rent due; and, secondly, for collection-expenses; that the Court had unfortunately sanctioned that erroneous report, and therefore prayed that the award of wassilat might be corrected accordingly.

The Subordinate Judge, who was not the Judge who had passed the previous order, refused to comply with this petition; and thereupon the judgment-debtor appealed to the Zillah Judge, and the Judge recorded this decision: "In this case, it has been declared that the decree-holder, who is the tenant, is entitled to recover from the judgment-debtor, who is the landlord, the net profits realized by the latter while he kept the former out of possession. The amount of profits was ascertained and declared by the Court between the two parties. After an interval, the landlord, debtor, pointed out to the Court that it had not deducted from the profits realized from the land the rent due to himself, but the Acting Subordinate Judge held that he could not review the order. It is obvious, however, that it is not a question of review. The decree is under execution and the debtor points out that although he is liable for the amount found by the Court, yet a portion of that amount would be due to himself as landlord. The Court is bound to ascertain whether any and what amount is payable to the landlord, and that amount must be deducted in calculating the mesne net profits of the land. The case will go back to the Lower Court for disposal."

It appears to me that this was not a question which could properly be determined by the Appellate Court, and that the order of the 21st May constituted a final decision, so far as that Court was concerned, as to the amount due from the defendant to the plaintiff as wassilat, which, whether rightly or wrongly, the Subordinate Judge had so determined. The defendant evidently thought so, because he applied to the then Subordinate Judge to rectify the order made.

A view has been pressed upon us which the Judge appears to have taken below, that what the order of the 21st May determined was not the amount of wassilat payable by the one party to the other, but merely the amount of the profits of the land; and that it was open to the defendant, at any time, to come in and show that a portion of that amount was due to himself upon some other ground.

I think it was not. I think that the time was fixed for ascertaining what was due from the defendant to the plaintiff upon the decree, and that it was the business of the defendant to attend upon that occasion and make out whatever set-off or claim he had against the amount of wassilat.

I, therefore, think the Judge ought not to have interfered with the order made, and that his own order should be set aside.

I do not wish to express any final opinion upon the question; but I may observe that it is not so clear that equity demanded that the defendant who was the landlord should have the set-off of rent allowed to him on this occasion. At any rate, the officer to whom the application was made, who was not the Judge who made the order of the 21st May, nor the Judge who passed the decree, was not the best person to decide upon the justice of that matter. However this may be, I think that in the legal aspect of the case, the Judge had no authority whatever to interfere.

Glover, J.—I concur in reversing the Judge's decision upon the point of law raised in this appeal.

The 21st July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Decree on behalf of a minor—Execution.

Case No. 183 of 1870.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 12th March 1870, reversing an order of the Officiating Moonsiff of Alipore, dated the 6th December 1869.

Hulodhur Roy Chowdhry (one of the Judgment-debtors), *Appellant,*

versus

Judoonath Mookerjee (Decree-holder), *Respondent.*

Baboo Tarucknath Sein for Appellant.

Baboo Grish Chunder Ghose for Respondent.

When a party applies to execute a decree on behalf of a minor, his representative capacity comes to an end by the death of that minor, and further steps in execution, or otherwise, must be taken by the legal representative of the deceased, whoever that may be.

Jackson, J.—In this case the decree-holder, respondent before us, claimed to execute a decree that he had obtained as next friend and guardian of his minor son. The decree was one for contribution on account of the joint-debt of the plaintiff and the defendants, which had been satisfied by the plaintiff.

After decree the minor plaintiff died; and on further execution being asked for, this circumstance was brought to the notice of the Moonsiff. The Moonsiff, thereupon, ordered that the execution could not proceed, unless and until Judoonath obtained the certificate as representative of his deceased son.

Thereupon an appeal was made to the Zillah Judge. The Judge held in these words: "I think that the death of the son made no difference in regard to the authority of the person who recovered the decree. He is empowered to execute the decree, unless it be shown that some other person has been declared to be the representative of Kalachand. Judoonath would have to account to such representative for money realized in the execution of the decree; but it is certainly open to such representative not to interfere in the matter, but to leave it to Judoonath to continue the execution." He, therefore, reversed the judgment of the Lower Court and ordered execution to proceed.

I am not able to concur in the view of the law taken by the Judge. It appears to me that when a party brings a suit to recover his decree on behalf of his minor son, or any minor, by the death of that minor, his representative capacity comes to an end; and further steps in execution, or otherwise, must be taken by the legal representative of the deceased plaintiff, whoever that may be.

It is said (but there is no evidence on the point before us) that the representative of the minor is his widow, who is also an infant; and that all necessary purposes would be answered by our ordering Judoonath to give security to account to the widow or other representative of his deceased son.

In the first place, it seems to me that we have no authority to make any such order; but in the next place, there is another circumstance which absolutely forbids our permitting execution to go on as proposed; because it appears that Judoonath has, by his petition upon the record, set up his own independent right to execute this decree, upon the ground that the payment on which the suit was based was made by him out of his own money, though in the name of his son. He, therefore, sets up an independent right of his own adverse to that of the ostensible plaintiff.

In such a state of things, it is impossible for us, I think, to allow that execution should be carried on by him. I think, therefore, that the Moonsiff is right, and that the execution must be stayed until either some person comes in with a certificate to represent the estate of the deceased son, or until Judoonath has caused himself to be placed upon the record as plaintiff after due notice to the representative of the minor.

I think, therefore, that the order of the Judge must be set aside with costs.

Glover, J.—I concur.

The 21st July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Section 320, Criminal Procedure Code—Right of suit—Jurisdiction.

Case No. 539 of 1870.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 30th December 1869, reversing a decision of the Moonsiff of that District, dated the 4th August 1869.

Mohesh Chunder Mookerjee (Plaintiff), *Appellant,*

versus

Ramoottum Palit and others (Defendants), *Respondents.*

Baboo Bhoyrub Chunder Banerjee for Appellant.

Baboo Rash Beharee Ghose for Respondents.

On a complaint being made in respect of the right of use of a piece of land, the Magistrate, after inquiry under Section 320, Criminal Procedure Code, forbade the opposite party to retain exclusive possession until he obtained the decision of a competent Court adjudging his title to do so. Upon this, he brought a civil suit, and his title was decreed.

HELD that the Magistrate's order was not a final adjudication, and that the plaintiff's right of suit thereafter was one expressly reserved by law.

Jackson, J.—THIS suit is brought by the plaintiff against Ramoottum Palit and others to recover possession of a small piece of land belonging to the lakheraj homestead of the plaintiff.

It appears that the defendant had complained in the Magistrate's Court against this plaintiff in respect of the right of use of this piece of land; and the Magistrate having enquired into the matter under the provisions of Section 320, Code of Criminal Procedure, made an order forbidding the plaintiff to retain possession thereof to the exclusion of the public, until he should have obtained the decision of a competent Court adjudging him to be entitled to such exclusive possession.

The plaintiff being dissatisfied with that order brought his suit in the Moonsiff's Court. The Moonsiff took evidence and found that the land formed part of the plaintiff's homestead. He also found that a private path (over that land I suppose) had been used by the members of the family only, but he observed that "it could not, therefore, be admitted that it was a public road." He was, therefore, of opinion that the plaintiff was entitled to his land but not to damages, and gave him a decree for possession of this land accordingly.

The defendant appealed to the Zillah Court, and the Additional Judge observed that the Moonsiff had based his decision upon a wrong ground. He says: "I do not "think it was competent for him to reverse "a decision of the Fouzdaree Court on a "point of fact which was not appealable to "his Court. If plaintiff was dissatisfied "with the Fouzdaree decision, and wished "to test further the fact of the path being "a private and not a public one, he should "have appealed to the proper Court; but "if he laid his claim to close the path and "take possession of the land on the ground "of his right to it as his private property, "then he was right in applying to the Civil "Court; but there also he must prove his "right to close the road whether it be public or private, and the Moonsiff should "only have decided in issue, whether plaintiff had a right to close a path decided by "competent authority to be a public path. "He had, I conceive, no power to re-open "the question of publicity, and give it a "second trial and investigation, when it was "a point decided by a Court whose decision "was not appealable, and not on appeal to "him."

It is extremely difficult to follow the reasoning of this judgment, because in one place it points out that the plaintiff could have contested the Magistrate's decision by appeal to the proper Court, and in another place states that the decision was not appealable.

In point of fact there is no appeal from a decision of the Magistrate under Section 320 of the Code of Criminal Procedure, and the decision of the Additional Judge appears to have been passed without considering what the real nature of the Magistrate's decision was.

By the provisions of Section 320, the Magistrate did not adjudicate upon the question of this being a public road, but he tried the issue whether it appeared, or did not, that the subject of dispute was open to the use of the public; and upon that he made the only order he was competent to make, namely, that the party claiming the exclusive use of it should not retain exclusive possession until he obtained the decision of a competent Court adjudging him to be entitled thereto. There was, therefore, no final adjudication by the Magistrate; and the law, as

well as the Magistrate's decision, expressly reserved to this plaintiff the right of bringing the suit in order to establish his right to exclusive possession. The Moonsiff does not in this case, I think, pretend to reverse or set aside the decision of the Magistrate. There was no occasion for him to do so.

This case is quite distinct from the case in III. Bengal Law Reports, of which the first judgment is given at page 43,* and the judgment in review at page 305 of the same Volume.† There the decree of the Civil Court was of a very different character from that which the plaintiff applied for or the Moonsiff has given in this case.

I think, therefore, that the decision of the Judge must be set aside, and the case must go back to him in order that he may try the issue which arises, and which the Courts were bound to try in the case, namely, whether the plaintiff was, as he alleged, entitled to the exclusive use of this piece of land. If he was so, the plaintiff was entitled to a decree, the Magistrate's order notwithstanding.

Glover, J.—I am of the same opinion.

The 21st July 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Submersion of land—Riparian rights—Possession—Title.

Case No. 709 of 1870.

Special Appeal from a decision passed by the Judge of Gya, dated the 14th January 1870, affirming a decision of the Subordinate Judge of that District, dated the 20th January 1869.

Maharanee Indurjeet Kooer (Defendant), *Appellant,*

versus

Mohunt Jumna Doss (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Moonshee Mahomed Yusuf* for Appellant.

Baboos Onookool Chunder Mookerjee and *Mohesh Chunder Chowdhry* for Respondent.

In a suit for possession where it was found that a rivulet had come in from a river and formed a disjunction between the disputed land and plaintiff's property, but that the rivulet was closed up, and that the river had returned to its proper channel, and on the surface of the disputed land there still remained marks of its having belonged to the plaintiff:

HELD that the finding sufficiently identified the land in suit as the property of the plaintiff, within the meaning of the Full Bench Ruling at page 61, Volume III. of the Weekly Reporter.

HELD that as the last person found to have had land in occupation was the plaintiff, and as his possession had never been disturbed (the lands having ever since been submerged), there was a sufficient finding of possession to entitle plaintiff to a decree for confirmation of title.

Hobhouse, J.—THE two points which are particularly urged upon us in special appeal, and on which it seems to be necessary for us to give our judgment are these—first of all, whether the lands in dispute are not, upon the finding of the Court below, an accretion to the defendant's estate; and, secondly, when the plaintiff sues to have his possession confirmed, whether there is a sufficient finding of his possession to entitle the Court to give him a decree in confirmation of such possession and of his title.

On the first point, we think, on a proper interpretation of the Full Bench Ruling to be found at page 51, Volume III., Weekly Reporter, that there has been a sufficient finding of the Court that the lands in dispute are not in reality accretions to the defendant's estate, but that they are, in reality, lands which have been submerged, and which have now, when the waters have disappeared from them, re-appeared upon the same surface.

The learned Judges of the Full Bench quoted so much of the decision of a Division Bench of this Court as was at that time before them for consideration. They say that the following is the passage in the judgment which refers to the case then before them, *viz.*: "It never could have been intended that, when the surface of an estate is washed away and the lower portion of it is covered with water and formed into a portion of the bed of a river, the ownership of that portion of the estate, which has become inaccessible in consequence of its being covered with water, should be lost; and that, when the surface is re-formed, it should become the property of an entirely different owner, because he may happen to be the owner of the estate adjoining." After quoting the finding in this passage, the learned Judges go on to say with reference to it—"So, in the case supposed in the passage of the judgment under consideration which we have quoted, the surface stratum may be swept away and lost without disturbing the old ownership in the lands or mines beneath

* 11 W. R., p. 434.

† 12 W. R., p. 199.

(subject perhaps to some limitation or qualification when what is left forms the bed of a navigable river). Where the remaining land can be sufficiently identified, no change takes place in its proprietorship, and whatever becomes annexed to it belongs to the old owner if he is known."

So that, in this part of the judgment, the learned Judges seem to have found a case which seems to us to apply exactly to the finding of the Court which is now before us.

The Court finds that khitta A (plot 1) is and has been the property of the plaintiff, and there is no dispute before us but that it is so. It then finds that on khitta B (plot 2) there was originally a house and a well—the property of the present plaintiff. It then finds that what is called a pyne or rivulet came in from the river and formed a disjunction between khitta A and khitta B, sweeping at the time the surface of khitta B; but the pyne is now closed up, and the river has returned to its proper channel; and on the surface of khitta B there still remain the foundation of the house and the well which are the marks that the lands unmistakeably belonged to the plaintiff. So that, in fact, the Court seems to us to have found that the substratum of the land has never been diluviated and is still traceable, subject only to a certain surface of sand which has been deposited upon it. This seems to us to be a decision on the question of fact which sufficiently identified khitta B as the property of plaintiff, within the meaning of the Full Bench Ruling we have just quoted.

Then upon the second point, we think there has been a sufficient finding of fact of the plaintiff's possession.

What the Judge finds is, in reality, this, namely, that the last person who had this particular land in occupation was the plaintiff; and that, inasmuch as no one else has ever been in possession, and no one could have been because the lands have been submerged ever since their last occupation by the plaintiff, so he must hold that the plaintiff is in possession now of the disputed land; and that, in fact, his possession has never in any way been disturbed by the defendant.

In this view of the case, we think that there has been a sufficient finding of possession to entitle the plaintiff to a decree in confirmation of his title, and we dismiss the appeal with costs.

The 21st July 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Findings—Admissions—Evidence.

Case No. 715 of 1850.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 23rd February 1870, reversing a decision of the Moonsiff of Arrah, dated the 12th July 1869.

Sheo Surn Singh and another (Plaintiffs), *Appellants,*

versus

Ram Khelawun Singh (Defendant), *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Chunder Madhub Ghose* for Appellants.

Baboos Romesh Chunder Mitter and *Ubinash Chunder Banerjee* for Respondent.

In a former suit by *A* against his agent for an account of the collections of a certain share in land, *B* intervened, and was made a party. In that suit the Court declared *A* to be the zemindar, and as such entitled to the rents and to an account: HELD that that finding was binding against *B* in a subsequent suit against him by *A* for recovery of the same share.

Similarly, an admission made by *B* in the former suit is evidence against him, *quantum valeat,* in the subsequent suit.

Hobhouse, J.—WE think this case must go back to the Lower Appellate Court.

We think, in reality, that the Court has committed a substantial error of law in the investigation of the case on the merits, *viz.,* in its treatment of evidence which was before it on the part of the plaintiff.

The plaintiff averred that he was a 4-pie sharer of a certain estate, and he sued to recover possession of that estate.

The defendant admitted that the plaintiff's ancestor had been a 4-pie sharer of the estate, but averred that that ancestor had sold that share to him, the defendant, on account of certain dues. The defendant also averred that the plaintiff had not been in possession of the share claimed at any time within 12 years previous to the suit.

The Court found that the defendant had failed to prove that the plaintiff's ancestor had conveyed to him, the defendant, the share in question. But the Court found that the plaintiff's suit was barred by the

application of the statute of limitation, because the plaintiff had not proved that he had been in possession of the share at any time within 12 years of suit.

The evidence before the Court was that of a decree of a Deputy Collector of the 17th of October 1863, a statement made by the defendant of date the 29th April 1867, certain account-papers of the years 1264 to 1270, and the evidence of witnesses.

The Judge begins his judgment by stating that there is "not one particle of proof of "the plaintiff's possession within 12 years;" and then he goes on to say that the defendant's admission, that is, the admission of the 29th April 1867, is no proof; that the mere fact of the plaintiff's having got a decree, that is, the decree of the 17th October 1863, is no proof. And in the matter of the oral evidence, the Court remarks that the plaintiff has failed to prove his case "except by oral "evidence on which the Lower Court relies "implicitly."

So that it seems to us that the Court has substantially said that the decree of the 17th of October 1863 is no proof; that the admission of the 29th April 1867 is no proof; and that the oral evidence on which the Lower Court has relied implicitly is no proof of plaintiff's case.

If this is the meaning of the Court, and we can attach no other meaning to the words used by the Court, then there are errors of law in the Court's finding on the investigation of the case on its merits.

The decree of the 17th of October 1863 was obtained in this wise. The present plaintiff, who was then also the plaintiff, and became the decree-holder, sued a certain person as an agent employed by him in the management of this land and in the collection of the rents of this land, for the accounts kept by such agent in the course of such employment. The present defendant intervened in the case and was treated, rightly or wrongly, as a defendant and a party to the case. And in the presence of such defendant, the Deputy Collector found, in the words of the law (Section 24, Act X. of 1859), that the plaintiff was the zemindar in receipt of the rents of this land; that the defendant Narain, that is, the agent-defendant in that case, was an agent employed by the plaintiff in the collection of the rents, and kept accounts in the course of such employment. And therefore in the presence of, and notwithstanding the opposition of, the present defendant, the Court found that the plaintiff was entitled to receive the accounts which were kept by the agent-defendant, the manager Narain.

It seems to us that it is impossible to say that, when a competent Court has found, and that in the presence of the present defendant, who himself, however illegally it might have been, was the person who made himself a party to the suit, when such Court has found that the plaintiff was the zemindar in receipt of the rents of these lands, and therefore entitled to call for an account of those rents, that this is not evidence against defendant for whatever it may be worth; for it surely is evidence that plaintiff, in the presence of the defendant, was in the year 1863 exercising an act of ownership over these lands as the zemindar receiving the rents of them.

Then again as to the admission of the 29th April 1867. That admission, no doubt, is not a distinct admission of the plaintiff's right to the share in question; but it is an admission entitling it to be properly considered as evidence by the Court.

The plaintiff in the case, in which that admission was made, was suing for moneys in the hands of the manager of the zemindaree collected as rents due to the zemindar. The present defendant again intervened, and again, rightly or wrongly, was made a party to the suit. And on that occasion the present defendant seems to have admitted that the ancestor of the present plaintiff had been a 4-pie sharer in the estate. He also admitted the accuracy of certain accounts which showed that he, the defendant, through a common manager, had been collecting rents of the estate up to so late as the year 1270, in the name, not only of the defendant's own ancestor, but also of the plaintiff's ancestor. And although the defendant did in that petition deny that any of the rents collected from the estate had been paid to the plaintiff, yet he did not deny in so many terms, as he had denied in the previous suit, that the plaintiff had no right to the share in question. On the contrary, he seems to have said that, if the plaintiff had any right, that right was to be obtained by application made to him, the defendant, and not by the suit which was before the Court.

So that it seems to us that here again, in the statement made by the defendant in the litigation of the year 1867, and in the accounts from 1264 to 1270, there was evidence,

whatever it might be worth, to the fact that the plaintiff had some sort of right as owner to a part of the lands in question.

And, finally, as regards the oral evidence given on the part of the plaintiff—evidence which, in the words of the Lower Appellate Court, the first Court "relied upon," that is, believed "implicitly," there is in that evidence, unless the Court which tried the case had reasons to disbelieve it—and if it had, it should have expressed those reasons—direct proof in the matter of the share of the lands claimed.

We do not at all wish to interfere with the judgment of the Court below in coming to a decision upon the evidence upon the record; but we wish to point out to the Court that the evidence we have specified, and more especially the oral evidence, when relied upon by the first Court which heard it, as in this case, is evidence; and we remand the case that the Court may treat it as such, giving it its due weight, and then come to a decision upon the evidence on the record before it on the merits.

The decision of the Lower Appellate Court is reversed, and the case remanded for decision upon the evidence on the record on its merits.

The costs will follow the ultimate decision of the case.

The 21st July 1870.

Present:

The Hon'ble Sir Charles Hobhouse, *Bart.*, *Judge.*

Copy of a decree—Old stamp law—Court Fees' Act.

In the Matter of

Hureehur Mahtoon (Respondent in Special Appeal No. 1794 of 1869), *Petitioner.*

Baboo Bama Churn Banerjee for Petitioner.

Where a decree had been prepared while the old stamp laws were in operation, and 6 rupees were awarded in it as the value of the stamps for a copy thereof, the Court allowed a copy to be taken for 4 rupees by a party applying after Act VII. of 1870 came into operation.

Note by the Deputy Registrar.—THIS is an application for a copy of a decree of this Court, dated the 7th of March last, herewith submitted for reference.

The applicant has, with his application, filed a stamp of the value of 4 rupees for the copy, and urges that he is entitled to the copy on a stamp of that value under the Court Fees' Act (VII. of 1870), which came into operation from the 1st of April last.

The decree, it will be observed from the date it bears, was prepared when the old stamp laws were in operation; and in accordance with its provisions, 6 rupees have been allowed (*vide* schedule of costs in the decree) for the stamps for the copy now applied for, and which may be recovered in execution of the decree from the party cast.

This application, it will also be observed, has been filed subsequent to the date of promulgation of the Court Fees' Act, which supersedes the old stamp laws; and does not *re-enact* the "general rule" at foot of Schedule B of those laws, according to which the additional stamp of the value of 2 rupees (which made up the value of stamps required ordinarily for a copy of a decree under the old laws to 6 rupees) were required to be used when the subject-matter of a decree, &c., could not be written on one stamp.

The point which I would refer for the orders of the Court is—Whether, as the decree was *prepared* while the old stamp laws were in operation, and the sum also of 6 rupees is awarded in it for the stamps for a copy thereof, which may be recovered in execution, the applicant is entitled to the copy on a stamp of the value of 4 rupees, simply because this application happens to be filed *after* the new law came into operation.

Hobhouse, J.—Let 4 rupees be taken for a copy.

The 21st July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Appeal by Vakeel—Certificate by himself.

In the Matter of

Thakoor Doss Mookerjee, *Appellant,*

versus

Ameer Mundul and others, *Respondents.*

The Appellant in person.

No one for Respondents.

Where a party appealing to the High Court is himself a vakeel of the Court, he is not at liberty to certify his own grounds of appeal.

Note by the Deputy Registrar.—THE appellant in this appeal, Baboo Thakoor Doss Mookerjee, is a vakeel of this Court. He has, as appellant, executed a vakalutnamah in his own favor, and coupled with his own name the names of two other vakeels,* who, though they have accepted the vakalutnamah, have not signed the certificate prescribed by the Resolution of the Court, dated the 10th of May 1866, the appellant, *as vakeel,* having alone signed it.

I beg the orders of the Court, this being the first instance of the kind, on the point whether a pleader of this Court (an appellant) may *certify* the grounds of his own appeal.

Jackson, J.—We are of opinion that the party in this case, Thakoor Doss Mookerjee, is not at liberty to file his appeal in Court upon his certificate.

The rule of the Court is that such grounds of appeal must be certified by the vakeel of the party. It is not intended that where the party is himself a vakeel by profession, he should himself certify his grounds of appeal under a vakalutnamah granted by himself. We think the grounds of that rule, and the reason why it does not apply, are very manifest. A party is not usually in a position to judge of the soundness of the grounds of appeal in his own case, even if he ordinarily possesses the requisite knowledge, or of the justice of his own cause. The Court requires the certificate of a pleader who regards the matter from the point of view of his responsibility to this Court, and not from the point of view of his own interest as a party. We think, therefore, that this petition must be presented in Court by the party in person.

* 5 W. R., *Rules,* p. 15.

The 22nd July 1870.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Rights of a zemindar—Plaintiff's rights.

Case No. 180 of 1869.

Regular Appeal from a decision passed by the Deputy Commissioner of Lohardugga, dated the 19th May 1869.

Lalljeenath Sahee and others (Plaintiffs), *Appellants,*

versus

Luchmun Christian and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Mohesh Chunder Chowdhry* for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

The right of a zemindar to hold lands in his own hands, and his right to grant them out to ryots or in putnee, ijarah or other tenure, are different modes of enjoying the right of ownership.

In a suit for possession where defendants claim to hold under a specified tenure, plaintiffs have a right to raise the question of the existence of that tenure in any way which they think proper and the law permits. They cannot be compelled to ask for more than they choose.

Markby, J.—IN this case, the plaintiff sues for possession of 7¼ powas of *doon mujhus* land, alleging that he was dispossessed therefrom by an order passed in a Criminal proceeding under Section 318 of the Code of Criminal Procedure, dated the 26th August 1868.

The defendants admit that the plaintiffs are the proprietors of these lands, but they allege that they hold under the plaintiffs a tenure which they describe as a khoontruitee tenure.

What the precise nature of that tenure is has not been stated; but we will assume for the purposes of the present case that, if that tenure were established, the present suit would fail.

The defendants say that there are several Khoonts, and that the disputed lands lie

within the Khoonts of defendants Nos. 1, 2, 4, and 5, who, with other shareholders in the said Khoonts, have all along been cultivating and paying rent for the same.

Two issues were fixed for trial; 1st, whether the 7½ powas of land in Hatoodamee, subject of suit, are plaintiff's mujhus or defendant's khoont-ruttee; 2nd, whether defendants dispossessed plaintiffs or not.

We have some little difficulty in understanding the decision of the Deputy Commissioner. He says: "The whole evidence "leaves, I think, no doubt that the defendants "have been holding this mouzah for some "time and the lands in question as khoont-"ruttee. Whether their title to Hatoodamee as "khoont-ruttee is a valid one or not, cannot, "I think, be gone into in this suit, as it is a "question which affects plaintiff's right as to "the whole mouzah, and which, if he wish to "test, he can only do in a suit for the whole "lands of the village."

It appears to us that the issue which was to be tried between the parties in this case was that laid down by the Judge, namely, whether or no the defendants had the khoont-ruttee tenure which they claimed. The defendants were in actual possession of the land and were cultivating it. They based their right to the possession on a certain tenure. If that tenure does not exist, they must surrender possession to the plaintiffs, whom they admit to be the zemindars.

It is true that the plaintiffs allege facts which have been found to be false. They allege that they were in possession of the whole mouzah, and enjoyed the profits till the year 1924 S. This is found not to have been the case, and the defendants are found to have been for some time in possession claiming a khoont-ruttee tenure. But there is no pretence that this occupation by the defendants has lasted long enough to give them a title to hold such a tenure. And the false allegation of the plaintiffs upon a point which is immaterial will not justify the Court in dismissing the plaintiff's suit, if the other facts proved are sufficient to establish their case.

It was argued for the defendants that the zemindars seek to have a special right declared, namely, a right to hold these lands in their own hands; and that they cannot have that right declared, unless they prove that prior to the suit they were so holding these lands. But as now pointed out by Baboo Mohesh Chunder Chowdhry in his reply, there is a fallacy in this argument. The right of a zemindar to hold lands in his own hands, and the right to grant them out to ryots or in putnee or in ijarah or on any other tenure, are not different rights, but different modes of enjoying the same right, namely, the right of ownership. It may, indeed, well be the case that sometimes a person who fails to prove a tenure which he claims may yet prove a right of occupancy in himself, or some other person, which would defeat a suit by the zemindar for the recovery of immediate possession. But the defendants in this case have set up no such right in themselves or any one else.

The ground given by the Deputy Commissioner for refusing to go into the question of the khoont-ruttee tenure fails, we think, entirely. The plaintiffs have a right to raise the question of the existence of that tenure in any way they think proper and which the law permits. No law compels them to ask for more than they choose; and if the shape in which this suit is brought is prejudicial to them in any future litigation, they will, of course, have to take the consequences.

In this view of the case, therefore, the Deputy Commissioner ought to have tried the question whether or no the defendants hold under a khoont-ruttee tenure; and if he found that they did not, he ought to have given the plaintiffs a decree for possession. It is clear, however, that the defendants have not had a full opportunity of going into their case upon this point, and therefore we think the plaintiffs are not entitled at present to a decree; but the case must be remitted, under Section 354 of the Code of Civil Procedure, to the Deputy Commissioner with a direction to try now the issue which he ought to have tried before, and return his finding with the evidence adduced by the parties to this Court.

There is no reason, as far as we can see, to suppose that the defendants are trespassers; and if they have paid rent for their lands, they are, of course, not liable for mesne-profits; and it would appear to be only equitable, should the plaintiffs ultimately succeed, that the defendants should remain in possession until the end of the current season. Indeed, the plaintiffs' decree for possession (should they succeed) will, in all respects, be subject to such equitable considerations as may eventually appear to arise when the case shall have been fully tried, and on this point our judgment must, of course, be reserved.

The 22nd July 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Settlement—Limitation—Rights.

Case No. 268 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 31st January 1870, affirming a decision of the Moonsiff of that District, dated the 31st March 1869.

Rughoonath Surmah and others (Plaintiffs), *Appellants,*

versus

Gobind Chunder Roy and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Mohinee Mohun Roy* and *Kalee Mohun Dass* for Appellants.

Baboos Sreenath Dass and *Romesh Chunder Mitter* for Respondents.

Certain land having been settled by Government for a period of ten years, one S bought the benefit of that settlement at an auction-sale for arrears of rent, and afterwards sold his rights to one M On the expiration of the temporary settlement, Government effected a permanent zemindary settlement with M. In the following year (1865) the zemindary title was sold, and the purchaser now (1869) sues to recover possession of certain specified land. The Lower Appellate Court, finding that none of the persons above-mentioned had possession within 12 years immediately preceding the filing of the plaint, considered the suit barred.

HELD that the question was one solely of a private right, and that the plaintiff did not stand in the position of Government in regard to the Statute of Limitation.

HELD that plaintiff's claim was traceable solely through M from whom he bought; that at the time of settlement Government had itself nothing more than a right of action with regard to the land in dispute, by virtue of its being proprietor, and not the right of action which S had as auction-purchaser; and that it was only the former right which was passed by the settlement.

Phear, J.—THE Lower Appellate Court has dismissed the plaintiff's suit on the ground that it is barred by the operation of the Limitation Act.

It appears that the land, which is the subject of suit, together with some other land, was, in the year 1853, settled by the Government for a period of ten years; and in April 1861, one Sree Narain bought the benefit of that temporary settlement at an auction-sale held to recover arrears of rents. In August of the same year, Sree Narain sold his rights to one Mohessuree Dossia. In 1864, the temporary settlement having come to an end, Government effected a permanent zemindaree settlement with Mohessuree. In the following year, namely, in April 1865, the present plaintiff bought Mohessuree's zemindaree title. He now sues to recover possession of certain specified land, amounting to upwards of 2,000 beegahs.

The Lower Appellate Court finds as a fact on the evidence that no one of these persons, whom I have mentioned as following one another in the chain of title, have had possession and enjoyment of the lands which are the subject of suit during the period of 12 years immediately preceding the filing of the plaint, and on this ground the Lower Appellate Court has come to the conclusion that the plaintiff's suit is barred.

Two grounds of special appeal have been insisted upon before us.

The first, I may take it, is that the plaintiff, in reference to this his present right of action, stands in the same position as the Government would stand in regard to the operation of the Statute of Limitation, and therefore has the benefit of 60 years limitation, instead of 12 years.

I think that clearly this is not so. The question between the contending parties is a question solely of a private right. The plaintiff is not asserting any right on behalf of Government, and Government will not be affected by the results of his suit.

The second ground of special appeal is certainly much more substantial than that which I have just mentioned.

It is urged that the present plaintiff is suing upon the cause of action which Sree Narain obtained by reason of his purchase in 1861, and that that cause of action, by the operation of the Acts of the Legislature, dated from the day of his purchase. In other words, that Sree Narain bought a tenure which comprehended the land, the subject of suit, at the auction-sale for arrears of rent, under such circumstances that he was entitled by the statute to recover the tenure free of all incumbrances.

It appears to me that there are two insuperable obstacles to the plaintiff's success on this ground. The first is that he is unable to show to the Court what were the terms on which the tenure bought by Sree Narain was held; and it is now,

I think, made clear by a succession of decisions in this Court that it is only tenures which involve certain special terms which can be sold by the zemindar free of incumbrances for arrears of rent.

It lies upon the plaintiff to make out that his cause of action did accrue within the 12 years. The burthen is, therefore, on him of proving that the tenure which Sree Narain bought was, in fact, by the operation of law, sold to him free of incumbrances, and that he thereby obtained a statuteable right of action against all trespassers upon the tenure, dating from the day of his purchase.

The plaintiff having failed to discharge the onus, must suffer the disadvantage which the Statute of Limitation puts upon him.

The second obstacle is, that even if Sree Narain by his purchase obtained the cause of action which dated from that time only, the plaintiff has failed to make out that the cause of action on which he sues, is the special cause of action on which Sree Narain might have come into Court.

The plaintiff does not claim through Sree Narain; he has not bought any thing of Sree Narain; his title is traceable solely through Mohessuree, from whom he bought; and as far as we can see from the evidence her title commenced in 1864. After the expiration of the temporary settlement under which Sree Narain for a time held, the Government made an entirely new settlement with Mohessuree.

If then the finding of the Lower Appellate Court is correct as to the facts at the time of this settlement, the Government had itself nothing more than a right of action with regard to the lands which are now the subject of suit. This settlement could only pass this right of action, and it was not the right of action which Sree Narain had as an auction-purchaser. It was nothing more or less than the right of action which the Government had by virtue of being the proprietor of the land.

In this view of the result of the facts found by the Lower Appellate Court, it seems to me that we cannot possibly here, on special appeal, say that the decision of the Lower Appellate Court is wrong.

I think, therefore, that the special appeal should be dismissed with costs.

Jackson, J.—I also think that the appeal should be dismissed.

The Lower Appellate Court has found distinctly on the facts, which the defendant had no opportunity of answering, that the cause of action alleged in the plaint was not proved; that the plaintiff was not dispossessed at the time when he states he was; and that for 12 years previous to suit, neither the plaintiff nor those through whom he claims were in possession of this disputed land.

Baboo Kalee Mohun Dass, who appears for the plaintiffs, appellants, now claims a new cause of action, but he does not state at what date this cause of action accrued.

His argument, as I understand it, is that more than 30 years ago the Government was in possession of the land, and that since then the Government had let it out in temporary settlements; that the plaintiff purchased the right of one of the temporary holders, and that he has subsequently bought the rights of Government. These are the facts alleged by Baboo Kalee Mohun, and his allegation is that while the temporary settlement lasted, the defendants managed to dispossess his clients. He does not state at what date they were dispossessed; but his argument is that, if at any time since the Government gave possession to its under-tenants, the dispossession took place, the plaintiffs are entitled to recover.

It seems to me impossible to decide this point of limitation without specific proof of the facts alleged. These facts, if relied on, should have been alleged in the plaint, and the defendants should have had an opportunity of answering them. But there has been no such allegation, and there has been no answer to it, therefore, from the defendants; and the result is that Baboo Kalee Mohun upon being now asked to show that these facts had been specifically proved, is unable to do so. There is no proof that the Government were formally in possession. There is no proof when the under-tenants were dispossessed.

Even the settlement under which Sree Narain purchased is not on the record; none of the deeds of settlement are on the record. The Lower Court was right to decide on the cause of action raised before it, and its decision on that point was quite correct. I would also dismiss the appeal with costs.

The 22nd July 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Enhancement of rent—Procedure—Section 13, Act X. of 1859.

Case No. 627 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 21st January 1870, reversing a decision of the Deputy Collector of that District, dated the 27th September 1869.

Zinnut Bibee (Defendant), *Appellant,*

versus

Jaffur Ali (Plaintiff). *Respondent.*

Baboo Okhil Chunder Sein for Appellant.

Baboos Bykuntnath Paul and *Grish Chunder Ghose* for Respondent.

In a suit for a kubooleut at enhanced rates to correspond with the terms of a pottah which had been tendered at some date preceding the suit, where the Lower Court decreed the plaintiff's appeal:

HELD that the decree was defective, inasmuch as it did not declare what the kubooleut was to which the plaintiff was entitled, and that the claim of the plaintiff could not succeed, inasmuch as it demanded higher rent for a period which had already elapsed when the suit was instituted—a right forbidden by Section 13, Act X. of 1859, without giving such notice as therein prescribed, which notice the plaintiff had failed to give in this case.

Phear, J.—THIS is a suit brought by the plaintiff to obtain from the defendant, what is sometimes called, "a kubooleut at "enhanced rates of rent."

The Lower Appellate Court gives its decision in these words:—

"There is sufficient evidence in the record "to show that Rs. 4 a kanee upon 2 kanees "15 g. 1d. is in the present case a reasonable "demand, and the plaintiff's appeal must be "decreed accordingly with costs."

There is no specific decree drawn up upon this decision. There is no decretal order of the Court declaring what is the kubooleut which the plaintiff is entitled to obtain from the defendant, and we have not the means of supplying this defect ourselves. We do not find any thing in the judgment of the Lower Appellate Court, or on the record, which would entitle us to say specifically what is the kubooleut which the defendant ought to be decreed to execute. And when we look at the plaint, we find a reason for this want of definiteness with regard to this kubooleut. For it seems to us, from the plaint, that the plaintiff did not sue for a kubooleut to take effect at a future period, but he sued on the allegation that he had tendered a pottah at some date preceding the suit, and that he was entitled to recover from the defendant a kubooleut corresponding with the terms of that pottah.

If this claim of the plaintiff were decreed, the effect would be that the plaintiff would become entitled to demand rent from the defendant, in respect of a period which had already elapsed when the suit was instituted, at a higher rate than the defendant had paid in the year preceding.

But Section 13, Act X. of 1859 forbids, or rather prevents, the plaintiff from acquiring such a right as this, unless he had served on the defendant the notice prescribed by that Section.

Now, it is, we think, admitted by the plaintiff that he has not served on the defendant a notice confirming to the conditions of Section 13.

It seems, therefore, that not only is the decree of the Lower Appellate Court defective, as we have already pointed out, but also that the plaint on which the plaintiff came into Court is one on which he ought not to succeed.

Under these circumstances, we think that the decree of the Lower Appellate Court should be reversed, and plaintiff's suit should be dismissed with costs in all the Courts.

The 23rd July 1870.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Public obstruction—Right of suit.

Case No. 777 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 17th February 1870, affirming a decision of the Moonsiff of Nattore, dated the 28th August 1869.

Raj Luckhee Debia (Defendant), *Appellant,*

versus

Chunder Kant Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Rash Beharee Ghose* for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

HELD, in concurrence with a former decision that no one has a right to institute a civil suit for the removal of an obstruction to a public road, without showing that he has sustained some particular inconvenience beyond that which is sustained by any other member of the public in consequence of that obstruction.

Loch, J.—THIS was a suit to remove an obstruction from a public thoroughfare. The defendant, it appears, has built up a small door-way across the public road, and its dimensions are such that a man can scarcely squeeze through the passage left open, and the progress of cattle, processions, &c., by that road is altogether stopped, there being no possibility of these being able to pass through the door-way, which is described to us as being about three feet high and two feet broad.

The Lower Courts have found for the plaintiff, and a special appeal is preferred on the grounds—1st, that this being a suit for the removal of an obstruction from a public thoroughfare, it will not lie; and, 2nd, it being established that there was formerly a gate-way on the identical spot, the order for the removal of the present gate-way is erroneous.

In the course of the argument, we were referred to a judgment of a Division Bench of this Court (the Chief Justice and Mr. Justice Mitter) reported at page 160, 12 Weekly Reporter, in the case of Buroda Pershad Moostofee, in which it was held that—"No one has a right to sue for obstructing a public road, even if he gave the road to the public, without showing that he has sustained some particular inconvenience beyond that which is sustained by any other member of the public in consequence of that obstruction." And the reason given for this opinion is that, if such a suit were maintainable, the defendant might be ruined by innumerable actions by persons who have not sustained any damage; that the Legislature appears to have made such cases cognizable by the Magistrate alone, who is required to proceed under the provisions of Section 308 of the Criminal Procedure Code, and, if demanded by the party charged, to summon a Jury to try whether the order is reasonable and proper; that as there is no such thing as a Jury in a civil case in this country, if the jurisdiction were to be taken from the Magistrate and given to the Civil Court, parties would be deprived of a right which the law has intended to give them of having a Jury appointed to decide whether an order in such a case is reasonable or not.

It does not appear from any thing that has been shown us, that plaintiffs have sustained any peculiar inconvenience beyond that which is sustained by the public in general; and concurring in the view expressed by the learned Judges who passed the decision referred to above, we think this case must be dismissed with costs, though without prejudice to any application for the removal of the alleged obstruction which the plaintiff, if so advised, may think fit to present to the Magistrate.

The special appeal is decreed, and the plaintiff's suit is dismissed with costs in all Courts.

The 23rd July 1870.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Agency—Breach of Contract—Cause of action.

Case No. 817 of 1870.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 25th February 1870, reversing a decision of the Subordinate Judge of Pubna, dated the 11th August 1869.

Bhogeeruth Adhikaree (Plaintiff), *Appellant*,

versus

Tarinee Chunder Pakrassee (Defendant), *Respondent*.

Baboo Mohinee Mohun Roy for Appellant.

Baboo Umbika Churn Banerjee for Respondent.

Defendant having required his agent to procure certain articles, the latter borrowed money for the purpose, giving a bond to which plaintiff, as a pleader employed by defendants, also put his name. The articles were purchased with the money and sent to defendant. The lender subsequently obtained a decree, with interest, against the agent and his principal; but (in spite of plaintiff's applications to defendant) realized the whole amount from the plaintiff who now sues defendant to recover the money.

HELD (*by Loch, J.*, whose opinion prevailed) that there was an implied contract between the parties, the breach of which took place when defendant refused to pay the amount on plaintiff's applying to him for it.

HELD (*by Jackson, J.*) that plaintiff's cause of action arose when he was forced to pay up the money which he had borrowed for defendant.

Loch, J.—THE plaintiff's statement is this. The defendant, who is a zemindar in the Rajshahye district, required certain articles for his daughter's marriage, and required his agent Kalee Chunder Bhuttacharjee to procure them. Kalee Chunder not having any ready cash, borrowed the sum of Rupees 700 from Tara Chand Moitro, for which Kalee Chunder gave a bond, to which also the plaintiff, at the request of Kalee Chunder and as a pleader employed by the zemindar, put his name. The bond is dated the 27th Assar 1268 (10th July 1861). The articles required were purchased with the money so borrowed and sent by Kalee Chunder to his master.

On 30th August 1864, the creditor Tara Chand Moitro obtained a decree for the amount of the loan, with interest, against Kalee Chunder and Bhogeeruth Adhikaree, the plaintiff in the present suit; and in spite of plaintiff's applications to the defendant for whose benefit the money had been borrowed, the plaintiff had to pay the whole amount of the decree, which he did in two instalments, *viz.*, Rupees 281 on 4th July 1866, and Rupees 390 on 30th June 1868; that being unable to obtain the money from the defendant notwithstanding his promises to pay, the plaintiff brings the present action to recover it.

The suit was brought on 22nd June 1869, eight years after the money was borrowed and made over in the shape of articles purchased to the zemindar, and about five years after the decree was passed against the plaintiff and Kalee Chunder, who died in 1867 and within a year of the liquidation of the sum decreed.

The Judge, in appeal, has held that the suit is barred by limitation; that it is, in fact, a suit to recover money advanced by plaintiff for defendant's accommodation; that when plaintiff advanced that money, he entered into a quasi-contract with defendant that the latter would repay him; and that in the absence of any promise in writing from the defendant promising to pay the debt, the plaintiff was out of Court.

It appears to me that the Judge is right, as between the defendant and the original money-lender, Tara Chand Moitro, there is no privity. The defendant has nothing to do with the money-lender. The plaintiff is in the position of a party who has advanced his own money to purchase the articles required by defendant, and looks to the latter to recoup him; and if this be the case, there is an implied contract between the parties, and the breach of it took place when the defendant refused to pay the amount on the plaintiff applying to him for it, and this occurred according to the plaintiff's own showing between the years 1270 to Assar 1275, during which period he says he addressed several letters to the defendant asking for payment. Now, the end of 1270, to take the demand no further back, corresponds with April 1863, and this suit was not instituted till June 1869, or more than six years after the first demand, supposing that to have been made on the last day of 1270. Concurring, therefore, with the view taken by the Judge, I think the special appeal should be dismissed with costs.

Jackson, J.—I regret to differ from my learned colleague; but I am of opinion that, if the plaintiff can prove all the facts alleged by him in his plaint and written statement, his suit is not barred by limitation, and that he has a cause of action against the defendant. His allegation is that the defendant's agent at Tirhoot purchased for the defendant a quantity of necessary articles for the defendant's daughter's marriage, and that to enable him to do so the defendant's agent borrowed money from a money-lender, and that the plaintiff stood security for the re-payment of that money; that the money-lender has since, by decree of Court, recovered that money from the plaintiff, and

that the defendant has, on repeated applications made to him by the plaintiff, admitted his liability to repay that money, and has agreed to repay it. The plaintiff has, I think, on such a state of facts, a cause of action against the defendant, and his cause of action, in my opinion, arose at the time when he was forced to pay up the money which had been borrowed for the defendant. If I am right in this view, it is admitted that the plaintiff is within time.

I think it is clear, upon the facts stated by the plaintiff, that he was in the position of a security. He lent his name as security to the money-lender. It may be that on trial the plaintiff will not be able to make out all the facts he alleges, and it will depend on what he can prove and what the defendant can disprove whether the plaintiff can obtain any decree against the defendant. All I would decide now is that, on the facts alleged by the plaintiff, he is not barred by limitation, and that the Lower Appellate Court should go into the merits of the case.

The 25th July 1870.

Present:

The Hon'ble G. Loch, F. B. Kemp, and F. A. Glover, *Judges.*

Joint and several decree—Mesne-profits—Judgment-debtor.

Case No. 165 of 1869.

Miscellaneous Appeal from an order passed by the Officiating Subordinate Judge of Tirhoot, dated the 23rd March 1869.

Gunesh Dutt, and on his decease, Hureehur Pershad (Judgment-debtor), *Appellant,*

versus

Bulwunt Singh (Decree-holder), *Respondent.*

Mr. C. Gregory and *Baboos Unnoda Pershad Banerjee* and *Mohesh Chunder Chowdhry* for Appellant.

Baboos Chunder Madhub Ghose and *Kalee Kishen Sein* for Respondent.

On an appeal from an order passed in execution of a decree for possession and mesne profits, the High Court laid down the principle that, though the decree was in words a joint and several decree for mesne-profits, yet where it could be proved incontestably that out of a number of defendants any one had been in possession only of particular lands or a distinct mouzah or lease, his liability to satisfy the decree would in equity extend no further than to such particular land, mouzah, or lease; and for such land the decree-holder could take out execution as against lessor and lessee; the principle was then applied to the case under appeal.

HELD, in explanation of that opinion, that, as the appellant was the lessee of one village, he could be held jointly and severally liable with the proprietors (co-defendants), and the decree-holder could proceed against him either severally or jointly with those defendants, and realize the wassilat due on that village.

Loch, J.—IT appears that, on the 30th June 1855, a decree for possession with mesne-profits was passed against Sheo Shahye Singh and others, defendants Nos. 1 to 4; against one Mr. Smith, defendant No. 5; against two claimants of the property, defendants Nos. 6 and 7; and against Gunesh Dutt, defendant No. 8, appellant before us. The decree was a joint and several decree, and it declared that the plaintiff was entitled to recover mesne-profits from the defendants generally This decree was confirmed by the late Sudder Court, and the Subordinate Judge in executing the decree held that, with regard to the principal defendants 1 to 4 and their lessee Smith, who held the village of Hurisinghpore, and Gunesh Dutt, who held the village of Allumpore, the proper mode of assessing the mesne-profits was by a certain proportion to be paid by the lessors, and the other proportion to be paid by the lessees. This order was passed on the 20th August 1864.

An appeal was preferred to this Court, which was disposed of on the 20th April 1865; see 2 Weekly Reporter, p. 51, Miscellaneous Rulings. The decree-holder, who was the appellant, urged that he was entitled to carry out his decree for mesne-profits against each and all the defendants jointly or severally, as he pleased; while, on the other hand, it was pleaded that, as Smith, one of the lessees, and Gunesh Dutt, another of the lessees, held a very limited interest in the property, it would be very hard to make them liable for the whole amount of mesne-profits due from the estate, and subject them to the difficulty and the harassment of bringing a fresh suit to recover by contribution from their co-defendants. And the Court laid down this principle, that though the decree was in words a joint and several decree for mesne-profits, yet where it could be proved incontestably that, out of a number of defendants, any one defendant had been in possession only of particular lands or a distinct mouzah or lease, his liability to satisfy the joint and common decree would in equity extend no further than to such particular

land, mouzah, or lease; and for such land the decree-holder could take out his execution both as against lessor and the lessee.

The Court then proceeded to apply this principle to the case of Smith and Gunesh Dutt. With the case of the former we have nothing to do. With regard to the latter, the Court found that he, Gunesh Dutt, defendant No 8, had a lease of the Mouzah Allumpore from the defendants Nos. 1 to 4. and they said that, such being the case, he was jointly liable with the lessors under the terms of the decree for the amount of mesne-profits, and therefore the order of the Subordinate Judge apportioning a certain sum to be paid by the lessee and a certain sum to be paid by the lessor was erroneous, and must be modified, and that the decree-holder was at liberty to proceed against the defendant No. 8, Gunesh Dutt, severally or jointly with the defendants Nos. 1 to 4, his lessors.

On the case going back to the Lower Court, the Subordinate Judge, on the 29th January 1867, drew up a proceeding in which he referred to an account prepared by an order of the 10th January 1867: in that proceeding he inserted what he considered to be the meaning of the Court's order of the 20th April 1865.

The order is written somewhat confusedly, and of course has given rise to question. In it, the Subordinate Judge said that the decree-holder might proceed against defendants Nos. 5 to 8 either severally or jointly with the proprietors, defendants Nos. 1 to 4.

But in a proceeding of the 30th January 1867, which has been shown to us to-day, it appears that the Subordinate Judge understood what the Court's judgment really was; for in his proceeding of that date which related to Smith's liability, the amount due from Smith is specially mentioned as being about 12,000 and odd rupees, and the Subordinate Judge allows a sum due to Smith to be set-off against the decree-holder's claim, and directs the decree-holder to proceed for the balance due by Smith either against him or against him and the proprietors, *i. e*, defendants Nos. 1 to 4.

An appeal was preferred by Gunesh Dutt from the order of the 29th January 1867, to the effect that he, as lessee, having a limited interest in one village only, should not be made liable with his lessor for the whole of the mesne-profits due from that village. But the Court rejected the appeal on the ground that the question had already been disposed of by this Court's proceeding of the 20th April 1865.

The case again came before the Lower Court in execution, and on the 23rd March 1869, the present Subordinate Judge, Babo Bnooputty Roy, entirely overlooking the opinion that had already been expressed by this Court in its judgment of the 20th April 1865, held that, as the original decree was a joint and several decree, therefore each one of the judgment-debtors was liable for the whole amount of mesne-profits, and that the decree-holder might proceed against any one of them for the whole amount.

From this order the present appeal by Gunesh Dutt has been preferred. The case was before a Division Bench of this Court on the 26th June 1869, and the further hearing of it was postponed till Mr. Justice Loch, one of the Judges who passed the judgment of the 20th April 1865, could sit with the Judges then hearing the case, because a difficulty was said to have arisen with regard to the meaning of the judgment passed on the 20th April 1865. The case has been before us this day, and the explanation of that judgment is as follows: The Court, first of all, laid down the principle that, where it could be proved that out of a number of defendants, one defendant had been in possession only of a particular land or of a distinct mouzah or lease, his liability to satisfy the joint and common decree would in equity extend no further than to such particular land or mouzah or lease, and for such land the decree-holder might take out execution against the lessee, or the lessor, or both. The Court then, applying this principle in the case of Gunesh Dutt, held that, as he was the lessee of one village, Allumpore, he could be held jointly and severally liable with the proprietors, defendants Nos. 1, 2, 3, and 4, and the decree-holder could proceed against him either severally or jointly with the defendants, Nos. 1, 2, 3, and 4, and realize the amount of wassilat which was found due upon that village which he held in lease. This principle was also applied to the case of Smith. And it was further held that, if applicable to the other defendants Nos. 6 and 7, with regard to whom a further enquiry was ordered to be made by the Lower Court, it should be applied.

b

Such being the meaning of the judgment of this Court of the 20th April 1865, it is clear that the order passed by the Principal Sudder Ameen on the 23rd March 1869, making Gunesh Dutt liable for the whole amount of mesne-profits, is erroneous, and must be set aside. He can only be made liable for the amount of mesne-profits due from the village of which he is the lessee The order of the Subordinate Judge will be reversed, and this appeal decreed with costs in this Court and in the Lower Court. Five gold-mohurs are allowed for pleader's fees.

The 25th July 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart*, *Judges*.

Section 308, Criminal Procedure Code—Nuisance by the public.

Case No. 145 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 25th November 1869, reversing a decision of the Moonsiff of that District, dated the 6th March 1869.

Becharam Ghorooee (Plaintiff), *Appellant*,

versus

Boistubnath Bhooyan and another (Defendants), *Respondents*.

Baboo Prosunno Coomar Roy for Appellant.

Baboo Anund Chunder Ghossal for Respondents.

Section 308 of the Code of Criminal Procedure is not applicable where a private individual charges the public with committing a nuisance in the exercise of an admitted right.

Loch, J.—PLAINTIFF sues in this case to establish his right to make use of a certain piece of land situated on the bank of the Basoomut tank as a place of cremation, and he alleges that his right to do so has been interrupted by the defendants who, on the occasion of his (plaintiff's) taking his wife's corpse to be burnt at the usual place, prevented the plaintiff from making use of it, and plaintiff had in consequence to take away the body and burn it elsewhere.

The defendant admits that the bank of the Basoomut tank was used as a place of cremation by the villagers, but that, on his application to the Magistrate, that functionary had issued a proclamation, forbidding the villagers from burning their dead at the said ghât, and directing them to make use of the Moysha tank for that purpose.

The Subordinate Judge reverses the decision of the Moonsiff, on the ground that the Magistrate's proceedings were taken for sanitary purposes; and the Magistrate had authority to make such an order under the provisions of Section 308 of the Criminal Procedure Code; and further he held that the decision of a Division Bench of the High Court in the case of Buroda Pershad Moostofee, reported in 12 Weekly Reporter, page 160, was applicable to this case, and he found also that plaintiff had suffered no injury.

We have the Magistrate's order before us; but we are not shown under what law he acted when he issued the proclamation forbidding, not the plaintiff or any one specially, but the villagers generally, from making use of the ghât at the Basoomut tank for the purposes of cremation. He may have acted under some Municipal Act, but the provisions of Section 308 of the Criminal Procedure Code do not appear to be applicable to such a case. By his order, the Magistrate has restricted the people of certain villages from the enjoyment of an admitted right; and that, on the application of the defendant who appears to have recently built a house near the burning ghât, and found it a nuisance. It is difficult to see how the Magistrate could have proceeded under the provisions of Section 308, which relate rather to nuisances caused by individuals upon which notice can be served, and the question tried by a Jury if the party charged with causing the nuisance demand a Jury; but here the public were charged with committing a nuisance by a private individual in the exercise of an admitted right, and we are not shown under what law the Magistrate proceeded when he prohibited the public from making use of this right.

The case is not one which is governed by the decision quoted by the Subordinate Judge. Here, no doubt, the plaintiff was put to special inconvenience by the act of the defendant acting under an order passed by the Magistrate on the defendant's application, of the existence of which the plaintiff pleads total ignorance. In the absence of any proof that the Magistrate had

authority to make the order he did, we think the plaintiff is entitled to a decree declaring that he has a right to use the place in question as a burning ghât. Whether he can exercise it in the face of the order passed by the Magistrate is not for us to determine in this case. All that we can say is that such a right exists to the plaintiff, and under this view of the case we reverse the judgment of the Lower Appellate Court, and affirm that of the first Court. Plaintiff will get the costs of this and the Lower Appellate Court.

The 25th July 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Petition for lease—Registration—Section 17, Act XX. of 1866—Stamps—Section 78, Act X. of 1859.

Case No. 768 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 2nd March 1870, reversing a decision of the Deputy Collector of that District, dated the 6th January 1870.

Choonee Mundur and another (Defendants), *Appellants,*

versus

Chundee Lall Dass (Plaintiff), *Respondent.*

Baboo Nil Madhub Sein for Appellants.

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Respondent.

Section 17, Act XX. of 1866, does not provide for the registration of a petition asking for a lease.

Such petition, when used as evidence of a contract to be entered into between parties, is not subject to the payment of stamp-duty.

Where a judgment-debtor fails to invoke the protection of Section 78, Act X of 1859, against a decree-holder, he cannot afterwards in special appeal claim the 15 days' time allowed under that Section.

Bayley, J.—We think this special appeal should be dismissed with costs.

The suit was for arrears of rent and for ejectment. The plaintiff's allegation was that the defendant petitioned his (plaintiff's) agent on the 28th Chyet 1275, F. S., for a lease of certain estates, offering to execute a kubooleut for the same; that the plaintiff received Rupees 1,308-4 annas in advance, and granted an amulnamah to the defendant under which he obtained possession of the estates and collected the rents, but that defendant declined to execute a kubooleut.

The defendant denied the petition relied on by the plaintiff, but alleged that there was another petition for the lease which was granted by the plaintiff at an annual jumma of Rupees 4,700, of which Rupees 1,179 was paid in advance, and Rupees 1,300 at various times as rent.

The first Court held the petition to be spurious, and dismissed the plaintiff's suit.

The Lower Appellate Court reversed that decision, and ordered that the "plaintiff's "claim be decreed with interest and all costs, "with interest at the usual rate of 12 per "cent. per annum till the date of payment, "and the defendants are to be ejected, pro-"vided the plaintiff pay into Court Rupees "48, together with the penalty of Rupees "960 prescribed under Clause 2, Section "15."

There are four grounds of special appeal taken on the part of the defendants, and the plaintiff has taken a cross-appeal under Section 348, Act VIII. of 1859.

The first ground taken by the special appellant is that the petition relied on by the plaintiff not having been registered is not admissible in evidence.

With regard to this objection, we have to remark that Section 17, Act XX. of 1866, does not provide for the registration of such a document. That Section says that registration is necessary for the documents *therein specified* and mentioned, and then "leases" are mentioned; but a petition asking for a lease, such as the present document is, is not mentioned. It is, however, contended that, as the plaintiff sues upon this document as his lease, and gave an amulnamah under it, it should have been registered; but, in fact, it is not so. It is only an evidence of a contract for a lease and for a counterpart to be executed at a future time, and is put in, not as a lease, but as evidence of the contract between the parties.

It is secondly urged that the decree for ejectment is inconsistent with the terms of Section 78. But we find that there was a clear prayer in the plaint for ejectment under that Section, and the decree of the Lower Appellate Court is in accordance with it.

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The special appellant urges that he ought to have been allowed 15 days' time under that Section within which to pay the money, but it was quite within his power after the decree was passed to pay the money, and invoke the protection of the Section. He did not do so, and his objection at this late stage of the case cannot be allowed.

It is thirdly argued that, as the petition operated as a lease, it should have been stamped; and on this point the Lower Appellate Court has passed an order in the defendant's favor, and made the decree subject to the payment of the stamp-duty, from which the cross appeal on the plaintiff's part arises.

We are of opinion that the order of the Lower Appellate Court on this point is wrong. The petition was not, as the Lower Appellate Court has regarded it, a lease. It was simply evidence of the contract which was to be entered into between the parties, and therefore so much of the decree of the Lower Appellate Court as directs the payment of the stamp-duty is reversed.

The fourth and last point taken in special appeal is that interest has been wrongly charged on the defendants, as there was no provision for payment of the rents by instalment. It appears that no issue was raised by the defendants on this point and no evidence tendered; and we do not know what would have been the result, if any such issue had been asked for by defendant and evidence gone into. We cannot, therefore, allow this objection at this last stage of the case.

Thus we dismiss this special appeal with costs.

Mitter, J.—I concur.

The 26th July 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Section 260, Act VIII., 1859—Right of suit—Fraud—Execution-sale—Incumbrances.

Case No. 503 of 1870.

Special Appeal from a decision passed by the Judge of Gya, dated the 1st December 1869, affirming a decision of the Subordinate Judge of that District, dated the 28th August 1867.

Mussamut Shama Keshee (one of the Defendants), *Appellant,*

versus

Mussamut Raj Kissur (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter, Chunder Madhub Ghose, and *Nuleet Chunder Sein* for Appellant.

Mr. C. Gregory and *Baboos Mohesh Chunder Chowdhry* and *Kalee Mohun Dass* for Respondent.

I and B borrowed a sum of money on a mortgage of property. Shortly after this, they granted a mokurruree of the property to plaintiff, and afterwards sold their rights as proprietors to one R R. Subsequently to this, the mortgagee brought a suit against the mortgagors, and obtained a decree declaring the property liable to be sold in satisfaction of his debt. The property was accordingly sold in execution, and purchased by one K D, and the sale-proceeds were made over to the judgment creditor. Plaintiff as mokurrureedar now sues to obtain possession on the ground that the debt being paid off, the mortgage is no longer in existence. The Judge having found that the purchase by K D was not *bonâ fide*, but for and on the part of R R who was in actual possession:

HELD that Section 260 of the Code of Civil Procedure was no bar to the suit, the ground of fraud alone giving plaintiff sufficient right to question the legality of the sale.

HELD that, by purchasing the property in the name of another, R R simply paid the debt which, as representative of the mortgagor, he was bound to pay, and by doing so he did not alter his position with regard to any incumbrance created on the estate before he purchased.

Loch, J.—THE facts as given by the pleader for the special appellant are these: Mussamut Immamun and Mussamut Bunnoo in the year 1855 borrowed the sum of 11,000 rupees from one Luchmee Pershad, and mortgaged the property in suit to him. Subsequently, in 1856, they granted a mokurruree of this property to the plaintiff; and subsequently, in 1861, they sold their rights as proprietors to one Ram Rutton Neoghy. In 1863 Luchmee Pershad brought a suit to recover the amount of his debt against the mortgagors, and on the 31st December 1863 obtained a decree declaring that the mortgaged property was liable to be sold in satisfaction of the debt. He took out execution, and on the 11th July 1865 the property was sold and purchased by one Kally Dass Biswas, and the sale-proceeds were made over to the judgment-creditor Luchmee Pershad. The plaintiff as mokurrureedar now seeks to obtain possession on the ground that the mortgage no longer being in existence, as the loan had been paid off, he is entitled to obtain possession of the property for which he got a mokurruree lease in 1856.

The Judge, in appeal, confirms the judgment of the Court below which gave a decree to the plaintiff, and in his judgment he finds that the purchase in the name of Kally Dass Biswas was not a *bonâ fide* transaction, but it was a purchase made for and on the part of Ram Rutton Neoghy, the former proprietor and purchaser from the judgment-debtor, who is the party in actual possession of the property. The Judge finds also that this sale was made in order to defraud the plaintiff, and to enable Ram Rutton to get rid of the mokurruree held by the plaintiff.

In special appeal it is urged—

First, that this suit will not lie, it being a suit brought against the certified purchaser at an auction-sale.

And, secondly, if it does lie, the sale itself has swept away all incumbrances created subsequent to the original mortgage, and, whether Kally Dass be the real purchaser or Ram Rutton, the plaintiff cannot recover.

With regard to the first objection, we are referred to Section 260 of Act VIII. of 1859, and more particularly we are referred to the words "another person."

The words of the law run thus: "*** "Any suit brought against the certified "purchaser on the ground that the purchase "was made on behalf of another person "not the certified purchaser, though by "agreement the name of the certified pur-"chaser was used, shall be dismissed with "costs."

It is argued that the words "any suit" and "another person" show that the suit contemplated by the Section is not one simply between parties each claiming to be the real purchaser, but it is a suit brought by *any* person whatever to declare that the certified purchaser is not the real purchaser. In support of this argument, a judgment of the Full Bench, reported in XI. Weekly Reporter, page 16, has been quoted. That, however, does not appear to me to support the case put to us. In that case, the dispute was between the one party claiming to be the real purchaser and the other party claiming under the certificate. It does not appear to me that the law ever intended to shut out a third party, who, not claiming to be the real purchaser, but having an equity, seeks to question the reality of the sale on the ground of fraud perpetrated against him by which he had suffered injury. The ground of fraud alone appears to me to give him a sufficient right to question the legality of any such sale. I think, therefore, the objection raised to this suit on the ground that Section 260 is a bar to it falls altogether.

With regard to the second objection, I think the pleader for the special appellant is wrong in supposing that Ram Rutton Neoghy and Kally Dass are exactly in the same position, supposing that the sale had been a *bonâ-fide* sale. Had Kally Dass purchased *bonâ fide*, it is probable that he would have been entitled to succeed to all that is covered by the mortgage-bond made in 1855, and all incumbrances created subsequent to that would, under the sale, have been set aside. But it is a very different thing when Ram Rutton, who is the purchaser from the mortgagors and who stands in their shoe, comes forward and under a feigned name pretends to purchase this property in the name of another, while actually purchasing it himself. He, in fact, does nothing more by that act but simply pay the money, which he, as representative of the mortgagor, is bound to pay if he wished to preserve the estate, and by paying that money he does not alter his position with regard to any incumbrance created on the estate before he purchased. It cannot be said, therefore, even supposing that Ram Rutton had come forward and purchased in his own name at the auction-sale, that the effect would have been the same as if it had been purchased by a stranger *bonâ fide*. Ram Rutton, though a purchaser, still continued to represent the original mortgagors, and is subject to all the incumbrances that they created; and as he has been found by the Judge to be the party in possession, and Kally Dass has been found no purchaser at all, it is clear that Kally Dass cannot resist the plaintiff's claim. We think that the Judge is right, under the circumstances, in declaring that the plaintiff is entitled to enter upon possession.

In this view of the case, I think that the special appeal must be dismissed with costs.

Hobhouse, J.—I concur in the judgment just delivered by Mr. Justice Loch, and I have another reason for thinking that the plaintiff before us is not one of those persons who is intended to be concluded by the provisions of Section 260. Those provisions say

that any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person no the certified purchaser shall be dismissed. So that it seems to me that the provisions of the Section are expressly made to apply to the case of a person suing upon the particular ground mentioned, and upon that only. But here, as I understand it, the plaintiff does not sue on the ground in question. He does not say that the purchase was made on behalf of another, but he says that there was no purchase at all. He says that the person who was the proprietor of the estate, and who was also the judgment-debtor, was in possession of the estate, and instead of, as he might have done, paying off the mortgage by a direct payment of the money, he in fraud of the plaintiff allowed the estate to be put up for sale, and paid the money off in that way; and though he paid it himself, yet he put up another person with the same object in view, namely, to defraud the plaintiff to pay it. So that, in fact, the ground of the present suit is the fraud committed by the defendant-appellant conniving with the owner of the estate; and it seems to me that this is very much like some of those exceptional cases, which are specially mentioned in the Full Bench Ruling alluded to as not cases concluded by the provisions of Section 260.

The 26th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Plaint—Issues—Procedure.

Case No. 51 of 1870.

Regular Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 31st December 1869.

Arbuthnot & Co., of Madras (Plaintiffs), *Appellants*,

versus

Mr. C. G. D. Betts and others, proprietors of the Aurungabad Concern (Defendants), *Respondents*.

Mr. G. C. Paul for Appellants.

Baboos Sreenath Doss and *Ashootosh Dhur* for Respondents.

A Judge is not bound to try a suit in the manner in which the plaint is framed. The object of the plaint is to bring the whole matter in dispute between the parties before the Court; but upon the settlement of issues, the Judge is to ascertain what is the real question to be tried, and at the hearing, if he can determine that question, he ought to do so.

The Procedure Code does not limit parties to particular forms of action. Provided the facts on which the plaintiff relies are fully disclosed in the plaint and written statement, it rests entirely upon the Courts to attach the legal consequences to those facts, and award the relief to which those facts entitle the plaintiff.

Both parties having been heard on the preliminary point as to whether this Court, if it were of opinion that the decision of the lower Court could not be supported, should remand the case under Section 354, Code of Civil Procedure, or proceed to try the case on its merits, the Court passed the following order:—

Couch. C. J.—I think, looking at the letters and the invoice which was annexed to one of them, that of the 9th May 1868, that the plaintiffs were, as one of them stated, acting as agents for the defendants in making the purchase. The first letter is ambiguous in this respect, because, coming as it does from the plaintiffs, it says: "If you send us an order, we will endeavour to execute it to the best of your interests." That might be an order to them, and indicates that they would sell the seed to Mr. Betts; but then from the following letters, it appears that this is not what was intended, because the letter of the 13th February 1868 says: "I have this day despatched a "telegram to you, requesting you to secure "at once, on the most favorable terms, one "thousand maunds best fresh indigo-seed;" and then the telegram of 21st February is: "Bought 1,000 maunds seed, ten rupees "per maund: do you want more?" The telegram is not that of a person who is selling seed to the defendant, but of one who was acting as agent or broker in making purchases of seed. And the invoice which I have referred to makes it clear that it was in that character that the plaintiffs were acting; because I find that they include in the invoice the price of 425 bags of indigo-seed at 20 rupees each bag: charges for freight, shipping, warehouse-rent, fire insurance, telegrams, and petty charges; and they charge a commission at 5 per cent. upon those sums, making out their claim, not as persons selling the seed to the defendant, but as agents for the purchase of it.

The plaint, therefore, was not correctly framed; but then the question arises, whether,

notwithstanding that, the Judge was right in dismissing the suit.

Now, the plaintiffs having acted as agents if they had paid for this seed, as I think there is no doubt they did, they would have been entitled to recover from the defendants the money which they had paid, unless there was something in their conduct with regard to the purchase which would prevent it. And if they were the sellers, they would be entitled to recover the price of the seed, if it was of the quality and description which had been ordered, and which the defendants would be bound to take.

As regards the substantial defence in this case, the form of the plaint made no difference. If the seed was not such as defendants had ordered, they would not be bound to take it or pay for it; and if it was not such as they had employed the plaintiffs to purchase, the plaintiffs would not have acted properly as agents, and could not recover any money which they might have expended in purchasing seed such as they had not been ordered to purchase. They would have to suffer the consequences of their own negligence in not purchasing seed of the description which had been ordered.

So that, substantially, the question to be determined was whether under the circumstances the defendants were liable to pay the price of the seed; and the issues which were raised are issues which admitted of that question being tried. The third issue was—"What were the exact terms of the contract entered into between plaintiff and defendants." Upon that, it was right and proper for the Judge to find what really was the contract between the parties, whether it was a contract for purchase or of employment as agent to purchase from other persons Then the fourth issue was—"Have plaintiffs fulfilled their part of the said contract," that is the contract which would be found upon the third issue. The Judge might then have enquired and determined whether the plaintiffs had put themselves in a position to entitle them to recover this money. And the fifth issue is—"Are plaintiffs entitled to a decree, and, if so, to what extent?" So that, in reality, no amendment of the issue would have been necessary.

Section 141 of the Code of Civil Procedure says that, at any time before the decision of the case, the Court may amend the issues or frame additional issues, and all such amendments as may be necessary for the purpose of determining the real question or controversy between the parties shall be made. What the Act directs, and what the whole procedure of the Code requires, is that the real question in controversy between these parties shall be determined, and in order to determine that, the Court is authorized to frame such issues and to make such amendments as may be necessary.

The Judge, I think, was wrong in saying that he was bound to try the suit in the manner in which the plaintiffs framed their plaint. The object of the plaint is to bring the matter in dispute between the parties before the Court, but upon the settlement of issues the Judge is to ascertain what is the real question to be tried; and at the hearing, if he can, either upon the issues already framed, or upon amended issues, determine that question, he ought to do so. Instead of dismissing the plaintiff's suit on an objection taken to the frame of the plaint, the Judge ought to have enquired into the merits of the case. I think we must now hear the case upon the merits.

Jackson, J.—I am of the same opinion. I think that the Procedure Code does not prescribe or even encourage parties to do anything more than state broadly and simply the facts upon which they rely, and the relief which they ask for. The Procedure Code, it appears to me, does not limit the parties to particular forms of action; and provided that the facts upon which the plaintiff relies are fully disclosed in the plaint and written statement, it rests entirely upon the Courts to attach the legal consequences to those facts, and award to the plaintiff the relief to which those facts entitle him. Section 32 points out that, even if the plaint on the face of it should not disclose a cause of action, yet, after questioning the plaintiff, if that cause of action appear, the Court may proceed with the trial; and the Court may, in any case where there is a deficiency in that respect, allow the plaint to be amended so as to disclose a sufficient cause of action. It is quite clear that it is not because one of the plaintiffs in his evidence made a statement as to his view of the relation between the parties, which was at variance to that set up in the plaint, that the plaint was therefore to be thrown out, and the suit to be dismissed. I think the Judge ought to have framed and tried the issues on the merits.

I think also that in this case it is better to try the case upon the evidence which

has been recorded by the Judge than send it to the Judge for that purpose, the greater portion of the evidence being documentary, and the depositions of witnesses taken on commission.

The 27th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble E. Jackson, *Judge.*

Declaration of title—Cause of action.

Case No. 504 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 26th January 1870, reversing a decision of the Sudder Moonsiff of that District, dated the 28th April 1869.

Radha Madhub Panda and others (Defendants), *Appellants,*

versus

Juggernath Dooab (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee and *Anund Chunder Ghossal* for Appellants.

Baboo Nil Madhub Sein for Respondent.

When a person obliges the tenants of an estate to pay rent to him, his act may be treated as a dispossession of the party wronged, sufficient to entitle the latter to sue for declaration of title.

Couch, C. J.—The question raised in this appeal is one of fact upon which the Court below had to decide. If it was proved, as it seems to me it was, that the plaintiff and his ancestors had been in possession of land in this locality from generation to generation, that fact may be connected with the grant which was only a grant of a certain quantity of land without giving any further description of it. These two facts must be put together, and from them the Court may infer that the land now held by the plaintiff was the land included in this grant to their ancestors. In many cases, that may be the only evidence procurable as to the identity of lands held under such ancient documents, and it would be impossible to give any further evidence upon it.

Another objection has been taken, which we have already noticed, namely, that the plaint does not show any cause of action. I understand this plaint as stating that the talookdar, the present appellant, has got the tenants under his control, and obliged them to pay rent to him. When a person obliges the tenants of an estate to pay the rents to him, it may be treated as a dispossession by him sufficient to entitle the party wronged by his act to bring a suit to have his title declared.

The appeal must be dismissed with costs.

Jackson, J.—I also think that there are no grounds for interfering with the decision of the Lower Court.

The 27th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble E. Jackson, *Judge.*

Tenancy under a part-owner—Ejectment by co-sharer.

Case No. 84 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 18th December 1869, affirming a decision of the Moonsiff of that District, dated the 10th December 1868.

Bissessur Kurmokar (Plaintiff), *Appellant,*

versus

Juggobundoo Kurmokar and others (Defendants), *Respondents.*

Baboo Jadub Chunder Seal for Appellant.

Baboos Bhyrub Chunder Banerjee and *Umbica Churn Banerjee* for Respondents.

Where land is held jointly, and there is no partition, one part-owner cannot insist on the ejectment of a person who has been holding under the other part-owner for 16 or 17 years.

Couch, C. J.—It appears to me that the questions that have been attempted to be

raised by the grounds of special appeal do not arise in this case.

The Subordinate Judge lays down two issues: first, whether it has been proved that the 7 gundahs of lakheraj land, with regard to which exception has been taken by the defendants, are situated within the boundaries of the land purchased at auction by the plaintiff; secondly, is it a fact that the defendant Ram Doollubh, having taken his alleged mâl land in dispute in jumma from the debtor and other defendants prior to the purchase at auction by the plaintiff, held its possession by raising a house thereupon.

And as to the second issue, he says that the pottah produced by the defendant had clearly been recently prepared, and therefore he finds that that pottah has not been proved to be genuine. He then goes on to say that it has been proved by the evidence of the witnesses cited by both parties that the said defendant Ram Doollubh got 2 beegahs 1 chittack 1 gundah of mâl land in dag No. 1 of the chittah prepared by the Sudder Moonsiff, and held its possession under the remaining defendants for a period of 16 or 17 years by raising a house thereupon; and that, under these circumstances, the plaintiff is not entitled "to obtain khas possession of "the said land by removing the said thatch "raised by the said defendant, and that he "can only obtain possession as a pro-"prietor." That is not a decision on the ground that Ram Doollubh had any right of occupancy by having built a house upon the land or by occupying the land and the house, but the ground of it is this—that he had his possession under the remaining defendant, the other part-owner in this property, and that the plaintiff, who had purchased a share in the property under a decree against one of the part-owners, had not the right to turn Ram Doollubh out contrary to the wishes of the other part-owners. I do not know of any authority which says that one part-owner can, where the land is held jointly, and there has been no partition of it, insist upon a person who has been holding under the other part-owner for 16 or 17 years being turned out, and the possession of the land being given up to him. The authorities quoted do not touch that question, and the point attempted to be raised of a wrong decision come to with regard to the right of occupancy really does not arise upon this case.

The appeal must be dismissed with costs.

The 27th July 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Cause of action—Mutual dealings—Contract—Limitation—Section 8, Act XIV. of 1859.

Case No. 703 of 1870.

Special Appeal from a decision passed by the First Subordinate Judge of Shahabad, dated the 20th January 1870, modifying a decision of the Moonsiff of Buxar, dated the 25th June 1867.

Luchmee Narain (Defendant), *Appellant,*

versus

Choomun Meah and another (Plaintiffs), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Hem Chunder Banerjee* for Appellant.

Baboo Tarucknath Dutt for Respondents.

The parties to this suit had had mutual dealings, each paying to the other money and receiving from the other an equivalent in bills. In a former litigation the present defendant sued the present plaintiff upon what he averred to be an adjusted account. The Court, finding that the account had not been adjusted, dismissed the suit, but incidentally found that there was a balance rather to the present plaintiff, who now sues for that balance.

HELD that the decree of the Court could not be said to be any adjustment of the balance which it found to be due, so as that plaintiff could date his cause of action from such adjustment.

HELD that the present suit, although for balance of account between merchants and traders who had mutual dealings, under the description in Section 8, Act XIV. of 1859, was in reality founded upon a contract; and as that contract was not in writing, the plaintiff's cause of action would ordinarily have arisen when there was a breach of the contract, and he would have had 3 years from such breach. But in this particular case the law gave plaintiff 3 years from the close of the year in the accounts of which the last item occurred showing the continuance of the mutual dealings, *i. e.*, of the contract.

Hobhouse, J.—THIS was a suit for a balance of accounts. The material facts are these:—

The plaintiff and the defendant, it is admitted, had mutual dealings with one another of this kind. The plaintiff would sometimes pay in money to the defendant and receive from the defendant the equivalent for the same in the shape of bills upon Calcutta; or the defendant would sometimes pay in moneys to the plaintiff and in

his turn receive bills for the same from the plaintiff. These transactions went on up to the Sumbut or mercantile year 1921, which it is admitted closed, for the purposes of the suit, in March 1865.

After the last transaction between the plaintiff and the defendant, there was some dispute between them as to the amount of certain bills (hoondees) which had been dishonored; and thereupon the defendant sued the plaintiff in Court for a balance of account. That suit was dismissed on the 3rd April 1866.

In that litigation, the present defendant, who was then the plaintiff, sued upon an adjusted account, as he averred it to be. The Court, however, found as a fact that the account had not been adjusted, and for this reason it dismissed the plaintiff's suit, but incidentally the Court went into the question of the accounts between the parties, and found that there was a balance rather to the present plaintiff than to the present defendant. The present plaintiff then, on the 29th March 1869, sued the defendant for that balance of account, averring that his cause of action arose when the Court discovered for him on the 3rd April 1866 that the said balance was due to him.

On the other hand, the defendant contends that the plaintiff's cause of action arose at the time when the transactions between the two terminated by reason of their disagreement, *i. e.*, in December 1864, and he further contends that the transaction between the parties was a transaction of the nature of a contract; that the disagreement between the parties constituted a breach of the contract; and that, therefore, inasmuch as the plaintiff has not sued within three years from the time of that breach, the suit is barred by the application of the Statute of Limitation, Clause 9, Section 1 of Act XIV., 1859.

On the other hand, the plaintiff contends that the dealings between the parties constituted them merchants and traders with mutual dealings, as defined by the provisions of Section 8 of the Act, and therefore the plaintiff contends that his limitation is 6 years from the date of the last transaction, and so that he is in time.

The first question that we had best perhaps determine is whether or not this is a suit for a balance of accounts between merchants and traders who have had mutual dealings. We think, after the best consideration that we can give to this point, that this is a suit of that nature. The plaintiff and the defendant were evidently upon their own admissions persons who were merchants and traders, each of them, in the district of Shahabad, and who, as such, had mutual dealings with one another, the plaintiff being sometimes the person who advanced money and received bills in exchange, and the defendant being at other times such person. But still it remains to be seen whether, if the plaintiff and the defendant were merchants and traders within the meaning of the Section quoted, whether the plaintiff has the benefit of the 6 years' limitation on which he relies, or whether, on the other hand, he is not bound by the provisions of Clause 9, Section 1 of the Act. The decisions of this Court on which the plaintiff relies are these:—

First of all, one to be found at page 24 of the 3rd Volume of the Weekly Reporter, Small Cause Court References. In this case, after considering it carefully, it seems to me that the Judges had not distinctly before them the question whether the provisions of Clause 8, Section 1, or the provisions of Clause 9, Section 1, governed the matter which was before them. The question which they seem to have decided was, whether, as they put it in their judgment, the goods sold by the plaintiff were or were not sold by retail. And the Judges determined upon the facts of the case that the goods in question were not articles sold by retail within the meaning of the 8th Clause of the 1st Section of Act XIV. of 1859. Then the Judges, without stating whether or not, in their judgment, Clause 16 of Section 1 of the Act, or Clause 9 of Section 1 of the Act, applied to the case, simply remitted the case to the Small Cause Court with their opinion that "the goods sold were not articles sold by retail;" so that I think that in this particular precedent on which the plaintiff relies the learned Judges did not give any opinion upon the question which is now before us.

The next case is that to be found in page 36, VII. Weekly Reporter. But neither does this, in my judgment, bear at all upon the question which is before us. In that case, the learned Judges seemed to have held that, when the suit was for a balance of account after dissolution of partnership, then the limitation which applied to such a suit was 6

years from the time of the dissolution. The case before us is not a question of partnership; it is, as I have said before, a question of merchants and traders having mutual dealings. Such a question, I need hardly remark, is entirely distinct from a question referring to a dissolution of partnership.

The next case is to be found in page 383 of the 7th Volume of the Weekly Reporter. Here, again, I do not think that the decision of the learned Judges has any bearing, except in the way of opinions expressed upon the point which is now before us. In that case, the suit was on the part of one of several shareholders claiming from another shareholder contribution for a certain payment for land-revenue, which the plaintiff, as one of the shareholders, had made or was said to have made for the other shareholder and himself in order to save their joint-estate from sale for arrears of revenue. In that case, the Judges held that a suit for contribution of the nature before them was not a suit upon a contract or upon a *quasi* contract, but was a suit founded, as I understand it, upon an equitable obligation lying upon one shareholder to re-pay that which the other shareholder had been obliged to pay on the first shareholder's behalf in order to stay the sale of the common estate. It is possible, as I shall show hereafter, that the Judges may have made some remarks in their judgment in that case which may help us to determine the point which is now before us, but otherwise the case is not, I think, in point.

The next case relied upon is that to be found at page 139, II. Bengal Law Reports.* That, again, in my judgment, was a case which is not in all fours with the case which is before us. That was a suit to recover money, due from an agent after an account taken; and the learned Judges then held that the cause of action in such a suit arose from the termination of the agency, that is, as in that case, from the time of the death of the agent. And although they said incidentally that the period of limitation which governed such a case was 6 years, yet that particular point does not seem to me to have been the point upon which they were called upon to come to any determination, and it seems to have been a point which was rather assumed without any argument that one which was, after argument, determined. Even if, however, the learned Judges did in that case intend to determine that in such a suit the period of limitation was 6 years, I need hardly remark that a suit to recover money due from an agent trusted with the management of an estate and receiving money to that end is entirely of a different nature from that which is now before us.

The only case which seems to me to be at all in point on the part of the plaintiff is that to be found at page 4, VIII. Weekly Reporter. But even there, again, although the Judges in so many words determine that in a suit between merchants and traders with mutual dealings the period of limitation is 6 years from the termination of those dealings, yet it would seem that the dealings to which they were referring were not dealings of the nature such as are those before us, but were dealings such as are described by the learned Judges in these terms: "Wine and other articles appear to "have been taken by the defendant at "various times and not in the way of "ordinary and private consumption, but "evidently for the objects of a limited trade "on his own account." And then the learned Judges go on to refer to the case at page 24, Weekly Reporter, Volume III., Small Cause Court Rulings, which I have above referred to, and which I venture to say is not a ruling upon the point which was either before those Judges or is now before us.

But whether that is so or not, I think it is clear that the dealings which were found to have passed between the merchants and traders in that instance were dealings of an entirely different nature to those simple dealings which alone passed between the merchants and traders in the case before us. Therefore, I think that this particular case cannot be treated by us as a ruling in point.

The last ruling on which the pleader for the plaintiff relies is that to be found at page 98 of the 4th Volume of the Weekly Reporter. Here, again, I think that this ruling is not in point. That was a case in which the plaintiff sued to recover money due upon an accepted hoondee; and although the learned Judges then held that, inasmuch as that hoondee was a written document, and that inasmuch as that document did not require under the laws applicable at the time, t was executed to be registered, therefore

* 11 W. R., p. 76.

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the period of limitation was not 3 years under Clause 9, Section 1, but 6 years under Clause 16, Section 1; yet if I read the plaintiff's suit aright, he does not sue to recover money upon any hoondee, but he sues upon an account and upon a balance of account which is made up not of this or of that accepted and paid or dishonored hoondee, but upon an account generally and upon items shown in that general account.

The pleader for the plaintiff further avers that his suit is in reality upon an adjusted account, and that inasmuch as that account was adjusted on the 3rd April 1866, so he was in time when he sued within 3 years from that date.

The answer, however, to this is that the account was not, in fact, adjusted on the 3rd April 1866. The Court which then passed judgment between the parties did not, in reality, come to any finding by way of adjustment of account, but it found that, in truth, there had been no such adjustment, and so on this account it dismissed the plaintiff's suit; and though incidentally it thought right to take the account, and upon taking such account found a balance due to the present plaintiff, yet, in truth, there was no such balance struck, because if there had been, as pointed out by the pleader for the defendant, then there would have been an adjustment formally made by the Court under the provisions of Section 195 of the Code, provisions expressly made, it seems to me, for that purpose. No doubt the decree of the Court of the 3rd April 1866 is evidence, for what it is worth, of the actual balance, if any, due to the plaintiff, but it cannot, I think, be said to be any adjustment of that balance so as that the plaintiff can date his cause of action from such adjustment.

It is then, however, contended by the pleader for the plaintiff that when we have found that the suit is for a balance of account current between merchants and traders who had mutual dealings, he must necessarily obtain the benefit of 6 years' limitation from the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings. But it seems to me that this does not follow at all. On the contrary, I find a case reported in 7, Weekly Reporter, page 68, in which these remarks occur at page 70.

"But even if the case falls within Section 8, it does not appear that the suit was "brought within the period of limitation. "The transaction between the plaintiff and "defendant were founded upon a contract "not in writing. Although no express contract was proved to have been entered "into between the parties, still their dealings were evidence from which it might "be properly assumed that they had agreed "to carry on business on the terms upon "which we find them carrying it on. It "was an engagement on the part of defendant that he would sell the plaintiff's cotton, "and that he would guarantee the purchasers. That was a liability on the part "of defendant not arising from a wrong, "but a liability arising out of an engagement which he must be assumed to have "entered into with the plaintiff. It, therefore, falls within Clause 9 of Section 1. "It is a suit for the breach of a contract "not in writing. The period of limitation "is 3 years from the time when the debt "became due, or when the breach of contract in respect of which the suit is "brought first took place.

"Now, assuming the case to be a case "within Section 8, the period of 3 years "is to be computed from the close of the "year in the accounts of which there is "the last item admitted or proved indicating "the continuance of mutual dealings. Now, "it cannot be shown that in the accounts "between the parties, there is any such "item within four years next before the "commencement of the suit. Taking three "years from the end of the year in which "the last item appears, more than three "years elapsed between the date of that "item and the date of institution of this "suit. Therefore, whether the case falls "within Section 8 or not, it appears to me "that the suit is barred by limitation."

I understand from these words of the learned late Chief Justice, that even in the case where the suit is for a balance of account current between merchants and traders who had mutual dealings, still if the transaction between the parties were founded upon a contract not in writing, then, although the cause of action would date from the end of the year in which the last item appeared in the accounts between them, still the cause of action would be the breach of the contract, and so the plaintiff in such a case would only enjoy the privilege of a limitation running three years

from the date of the end of the year in which the last item appeared in the account.

Now, I think that the ruling laid down in that case applies to the case before us, and that this case is somewhat of the nature of the one described in these terms at page 384 of the 7th Volume of the Weekly Reporter. Treating there of a contract and a *quasi* contract as distinct from equitable obligations, the learned Chief Justice uses this illustration of what would be a contract or a *quasi* contract. He says: "If one man "pays money for the use of another at his "request, there is, in the absence of cir-"cumstances showing that the money was "advanced as a gift, an implied promise for "re-payment by the person on whose account "the money is paid."

Now, here there are undoubtedly not even any circumstances, but not even any allegation that the moneys which passed between the parties, and which were from time to time advanced by one to the other, were at any time advanced as a gift. They were in reality moneys advanced by one party to the other party for a consideration, and there was, it seems to me, in the nature of every one of these transactions, all the elements of a contract; there was in every case the consideration, and in every case a promise to pay. No doubt, it was not an expressed contract, it was only an implied contract; but it seems to me that it was an implied contract of the clearest nature. When the plaintiff, for instance, advanced moneys to the defendant for the particular hoondees, which seem to have been the bone of contention in the present litigation, in the matter of debit and credit of the account, then he himself did, in reality, give the defendant a certain sum of money for a consideration: that consideration was the receipt from the defendant, and the promise to pay in the shape of certain hoondees. When, therefore, that promise to pay was not fulfilled, when the bills which, in fact, were the expression of the promise were dishonored, then there would have been a cause of action as in an ordinary case of contract, it seems to me, to the plaintiff to recover the money which he had advanced to the defendant in consideration for the bills. So that I think that in the case both of the plaintiff and of the defendant, and in the matters of the accounts current between them, there was in every case either on the one side or the other an implied contract—a contract in this case on the part of the defendant before us to re-pay the plaintiff the money which the plaintiff advanced to him, in the event of the bills, which the defendant gave in exchange for the money, being dishonored.

In this view of the case, I am of opinion that the suit before us, even although it is a suit for balance of account between merchants and traders who had mutual dealings, is in reality a suit founded upon a contract, and that, therefore, as that contract was not in writing, so the plaintiff's cause of action would ordinarily have arisen when there was a breach of the contract, and he would have had three years from the period of such breach. But in this particular case, the law to some extent further favors the plaintiff, and gives him three years, not from the breach of the contract, but from the close of the year in the accounts of which there is the last item showing the continuance of the mutual dealings, *i. e.*, of the contract. Now, that last item, as I have said in the commencement of my judgment, is of date Sumbut 1921, and so plaintiff's cause of action would arise from the close of the mercantile Sumbut 1921, or, as is admitted, March 1865; and inasmuch as the plaintiff has not sued within three years from that date, I think we must hold that he is out of Court.

I would, therefore, reverse the decision of the Courts below, and dismiss the plaintiff's suit with costs in all the Courts.

Loch, J.—I concur in the judgment passed by my colleague in this case.

I have referred to the judgment passed by the Subordinate Judge on 3rd April 1866, which the plaintiff says is the date of his cause of action, and which we were told showed that Rupees 387 were found to be due to the plaintiff who was the defendant in that suit; but this is not the case. There was, among other issues fixed, one to this effect—whether the plaintiff had anything to receive from the defendant, or whether the defendant had paid in excess, and was entitled to recover the balance; but the Court did not decide this issue. After declaring the defendant to be entitled to credit for certain sums, the amount of dishonored hoondees, it held that plaintiff had failed to show that he was entitled to recover anything, and the suit was dismissed. Plaintiff, considering that judgment to give him a cause of action seeks to

recover the sum of Rupees 387 due according to his own account, and Rupees 137 interest on the same Rupees 524. He does not seek to recover the amount of any particular hoondees, but urges that, in making up the accounts, a balance to the above extent stands in his favor which he is entitled to recover. The Lower Courts, overruling the plea of limitation raised by the defendant, hold that the present suit being brought within three years of the judgment passed in the former suit is within time, and the Subordinate Judge considers plaintiff entitled to recover Rupees 366, the sum found to be due in the former case, with interest. But what the Court found in the former case was this: The defendant, then plaintiff, claimed a balance of Rupees 1,506 on adjustment of accounts. He debited the plaintiff (then the defendant) with the sum of Rupees 12,985, and gave him credit for Rupees 11,479. The defendant in that case urged that he was entitled to a further credit of Rupees 1,872 on three hoondees, and the Judge found that he was; and such being the case, he held that plaintiff was not entitled to recover anything from the defendant, and dismissed the suit. Of course, if the plaintiff in that case only claimed Rupees 1,506, and the defendant, in the judgment of the Court, was held to be entitled to a credit of Rupees 1,872, which the plaintiff had not given him, the plaintiff would have nothing to receive, but a balance would necessarily exist in favor of the defendant. There was, however, no adjustment of accounts ; nor did the Judge declare the defendant entitled to recover the amount.

In the present case the plea of limitation is raised, and to determine this question it is necessary to consider the nature of the transactions between the parties and their position. They appear to me to come under the description given in Section 8, Act XIV. of 1859, as being merchants and traders having mutual dealings, and as such they are privileged to have the period of limitation computed from the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings. That year expired at the close of the Sumbut year 1921 (March 1865) ; and it is contended that if the parties come within the description given in Section 8, the plaintiff is entitled to six years within which to bring his action. I quite agree with my colleague, Justice Sir C. P. Hobhouse, that this contention is not sound, and that in determining the period from which limitation is to be computed, we must look at the nature of the transactions between the parties; and if these were of the nature of a contract, the period for bringing the suit would be that allowed by Clause 1, Section 1, Act XIV. of 1859, which, in the case of merchants and traders having mutual transactions as described in Section 8 of that Act, would commence to run from the close of the year in which their mutual transactions were closed. Now, the transactions between the parties were the purchase of hoondees, plaintiff sometimes purchasing a bill on defendant's house in Calcutta, and the defendant sometimes purchasing from the plaintiff; and these transactions appear to have continued for some years. Some of the hoondees purchased by plaintiff from defendant were dishonored, and the amount appears not to have been re-credited to him in the defendant's accounts, and hence arose, as plaintiff alleges, a balance in his favor. Now, as pointed out by my colleague, transactions of this kind are of the nature of contracts. The party receiving money and giving a bill contracts to re-pay that money in a particular manner and at a particular time; and if on presentation the bill be dishonored, there is a breach of the contract; and in ordinary cases a suit for recovery of the money would have to be instituted within three years from the breach of such contract; but in the case of dealers, as described in Section 8 of the Act, the period from which limitation commences to run is from the close of their mutual transactions, and from that date a period of three years in the case of contracts is allowed. In the present case, the dealings between the parties closed in Sumbut 1921 (March 1865). This suit was not brought till 1869, and the plaintiff is, therefore,

under the view of the case expressed above, too late, and his suit is barred by limitation.

The special appeal must be decreed, and the plaintiff's suit dismissed with costs in all Courts.

The 27th July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Suit by talookdar—Possession—Onus probandi—Civil Ameen.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 16th December 1869, modifying a decision of the Subordinate Judge of that District, dated the 26th May 1869.

Shustee Ram Paul and others (some of the Defendants), *Appellants,*

versus

Nobo Kant Roy Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Khetter Mohun Mookerjee for Appellants.

Baboo Anund Chunder Ghossal for Respondents.

A talookdar who had purchased in execution-sale the under-tenure of one of his tenants, sued him to obtain possession of the land contained in the purchased holding, from some of which he said he had been dispossessed, and in regard to the remainder of which his title was disputed.

HELD that the deputation of an Ameen was improper, and that the onus lay on the plaintiff to prove his case.

Jackson, J.—IN this case, the Judge's decision is completely erroneous, and must be set aside.

The suit was one by a talookdar who had purchased in execution-sale an under-tenure of one of his tenants. That tenant held some other land in the same talook, and the plaintiff now sues him to recover possession of the land contained in the purchased holding, from some of which he says he has been dispossessed, and in regard to the remainder of which his title has been disputed by the defendant.

It appears that the plaintiff gave no documentary evidence whatever, although he being a landlord, that is, putneedar, it is impossible to suppose that he should not have been in possession of any documents from which the area and contents of the holding in question could be shown. He gave some oral evidence, and he applied that an Ameen should be deputed to hold an enquiry on the spot, and this enquiry appears to have been held.

The Subordinate Judge, taking into consideration the report, was of opinion that the plaintiff's case had not been made out and dismissed the suit.

The Judge thought that the plaintiff had not given any documentary evidence to prove his case, but he thought that the onus lay upon the defendant, because the contents of his holding being matter within his special knowledge, he was bound to show what the contents of that holding were, or that the lands that he contended he was now entitled to hold were his under some other title than that alleged by the plaintiff.

It appears to me that the plaintiff having purchased this tenure at auction he had to make the best of his purchase, and being also the landlord, he was in an advantageous position for that purpose ; and I cannot concur with the Judge in thinking that he was entitled to call upon the defendant to prove his case.

Clearly, too, this is a case in which the deputation of an Ameen was improper. There was nothing which the Ameen could enquire into which could not, with equal convenience, have been proved in the Court. The Subordinate Judge apparently gave way to the importunity of the plaintiff, and having done so he afterwards did what, I think, he was bound to do, that is, he held that it was the business of the plaintiff to prove his case by satisfactory evidence in Court.

I think the decision of the Lower Appellate Court must be reversed, and that of the Subordinate Judge restored, with costs.

We have been asked to remand this case in order that the Judge might re-consider it upon the oral evidence given by the plaintiff. I do not think we are under any obligation to do this, as the interest of justice does not require it.

Glover, J.—I am of the same opinion.

The 27th July 1870.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Contract to pay costs—Contribution—Right of action.

Reference to the High Court by the Judge of the Small Cause Court at Pubna, dated the 5th July 1870.

Raj Luckhee Debia and others, *Plaintiffs,*

versus

Mohesh Chunder Mozoomdar and others, *Defendants.*

Baboo Issur Chunder Chuckerbutty for Plaintiffs.

No one for Defendants.

M C M and others took a share of a turuff in putnee by executing a kubooleut towards R L D and others, which contained a stipulation that, if a suit brought by certain parties against the former, and then pending in the High Court, were decided against the lessors, the lessees would pay whatever costs of suit might be payable by the lessors, and if decided in favor of the lessors, the costs awarded would go to the lessees. The case was decided against the lessors.

HELD on the construction of the kubooleut that the lessees were liable to pay the whole of the costs paid by the lessors—not only the costs to which they were justly liable on account of their own share, but also all costs that might be recoverable from them; but *quære,* whether the Small Cause Court Judge should provide for the lessees being enabled to use the rights which the lessors would have for recovering in a suit for contribution the costs which they had paid on behalf of the other parties to the suit.

Reference.—ON the 23rd Kartick 1274, when the suit brought by Kirpa Nund Shah and others against the plaintiffs' guardian Dropodi Debya, &c., was pending in the High Court, the defendants took 12-annas share of Turuff Pakureah in putnee by executing a kubooleut towards the plaintiffs, which contained a stipulation to the effect that, if the above case be decided against the plaintiffs, the costs thereof would be paid by the defendants. The plaintiffs, having paid Rupees 429-1-0 as costs of that case with interest on the 24th Cheyt 1276, have brought this action for recovery of the same from the defendants in accordance with the contract contained in the kubooleut alluded to.

The defendants Mothoora Nath and Sham Chunder Mozoomdar, having admitted the kubooleut in their deposition, pleaded, among other things, that there was no contract for paying the costs of the Lower Courts except those incurred in the High Court, and that, as five other persons besides the plaintiffs were debtors of the decree for costs, for the satisfaction of which they paid the above amount, they cannot get from defendants more than what they paid in satisfaction of their own share of the liability under the decree.

The issue or point for reference is this :—

TRANSLATION.

চরের জমির বাবতি অন্যায় রূপে কৃপানন্দ সাহা প্রভৃতি আদালতে নালিস করায় ঐ মোকদ্দমা প্রবল হাইকোর্টের জের উপরিতে আছে ঈশ্বর না করুন আপনকারদের প্রতিকূলে নিষ্পত্তি হইয়া যদি ভূমি সাধারণ দখল নইলে ঐ মোকদ্দমার আদালত খরচা যাহা দেনা হয় তাহা আমরা দিব আর ঐ মোকদ্দমা আপনকারদের অনুকূলে নিষ্পত্তি হইয়া আদালত খরচা যে পাওনা হয় তাহা আমরা পাইব।

Kirpa Nund Shah and others have brought an unjust suit for the chur lands, which case is now pending in the High Court; God forbid, if the case be decided against you, and the land in possession be taken possession of by the Shahs, we will pay costs of the suit which may be due; and if the case be decided in your favor, we will get the costs which may be awarded in the case.

Whether the contract, stated in the margin, was for payment of the costs of the High Court only, or all costs incurred in the suit, and what amount the plaintiffs can get under the terms of the contract.

It appears to me, on reading the contract, that the phrase "costs of the suit" used in the contract did not mean the costs of appeal only which was lodged in the High Court. It includes all costs incurred in the case, the words "pending in the High Court" being used in the contract only to identify the case. If the terms "costs of High Court" had been used in the agreement, defendants' objection would have been well founded. The expression "costs of the suit" used in it shows that the contract included all costs of the case which have been paid by plaintiffs. Both parties are equally bound by the agreement entered into between them, to the effect that the defendants would get or pay costs of the suit according as the result of it would be

in favor or against the plaintiffs. The defendants' allegation, that they are liable to plaintiffs for that share of the costs which was paid by the latter on account of their own share of the liability under the decree passed against them and others, being contrary to that agreement, is of no weight. It has been proved that the plaintiffs paid the whole amount of costs due under the decree. Under these circumstances, they are entitled to get the amount claimed which was paid by them as costs. I, accordingly, decree the case, contingent on the opinion of the High Court, on the question as to the construction of the contract stated above.

The judgment of the High Court was delivered as follows by—

Jackson, J.—It appears to us that the view taken by the Small Cause Court is correct.

There is no doubt whatever that the costs to be paid were the whole of the costs of litigation, and not the costs of the Court of appeal only. That is too clear for argument, and in point of fact no argument was offered on that point on the side of the defendants.

The other question admits possibly of a little doubt. It is whether the liability of the defendants in this suit extended to all the costs, which the other parties to the contract might have to pay in the suit then pending, or merely to those properly recoverable on account of their share.

It appears to us that the words of the contract are quite sufficiently wide to cover the larger meaning. The words are very general —"ঐ মকর্দ্দমার আদালত খরচা যাহা দেনা হয় তাহা আমরা দিব," that is to say, whatever costs of suit may be payable (by you), those we will give or pay.

It is contended that, if, while on the one hand the defendants before us could only be entitled to receive the proper costs of the plaintiffs who were co-defendants in that suit, that is to say, the costs which they themselves had incurred as defendants, on the other hand, they would be bound to pay, not only the costs to which these parties were justly liable in consideration of their own share, but also costs that might be recoverable from them, the liability would be extremely disproportionate; but that, we observe, would be so in any case under the circumstances stated, because the costs of a defendant are always very considerably less than the costs of a plaintiff; and it is not suggested that there was any special circumstance in the case which should make it inequitable to put the proposed construction on the contract. This promise is merely one of the conditions annexed to the granting of a putnee by the plaintiffs to the defendants. In this case, it seems quite probable that the whole of the liabilities of the parties were fully considered in making the agreement, and that, with reference to these liabilities, the large words employed in the contract were used.

We think, therefore, that the defendants are liable to pay the whole of the costs claimed. It may be matter for consideration whether the Judge of the Small Cause Court should provide for the defendants being enabled to use the rights, which the plaintiffs would have for recovering, in a suit for contribution, the costs which they had paid on behalf of the other parties to the suit.

The 27th July 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Declaratory suit—Section 246, Act VIII., 1859—Limitation—Clause 3, Section 1, Act XIV., 1859.

Case No. 687 of 1870.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 10th March 1870, reversing a decision of the Moonsiff of Futtickcherry, dated the 27th August 1869.

Syud Abdoollah (Plaintiff), *Appellant,*

versus

Shaikh Shokoor Ali (Defendant), *Respondent.*

Mr. G. A. Twidale for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A suit for a declaration that certain property which has been ostensibly held by one of the defendants was, in fact, the property of another of the defendants, who was the judgment-debtor of the plaintiff, is not governed by Clause 3, Section 1 of the Limitation Act of 1859, but by Section 246, Act VIII. of 1859.

Phear, J.—CLEARLY the Lower Appellate Court has made a mistake with regard to the question of limitation. This is not a

suit to set aside the sale of any property within the scope of Clause 3, Section 1 of the Limitation Act of 1859.

It is simply a suit brought to obtain a declaration of the Court, that certain property which has been ostensibly bought and held by one of the defendants is in truth and fact the property of another of the defendants, this latter defendant, being the judgment-debtor of the plaintiff. The plaintiff appears to have brought this suit entirely within the time prescribed by Section 246 of Act VIII. of 1859, and there is no reason in law why the subject of his suit should not be enquired into.

The decision of the Lower Appellate Court must be reversed, and the case must be remanded to that Court for trial on the merits.

Costs of the suit will abide the event.

The 28th July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Ootbundee tenures—Enhancement of rent.

Case No. 640 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 2nd February 1870, reversing a decision of the Deputy Collector of that District, dated the 24th July 1868.

Dwarkanath Misree (Plaintiff), *Appellant,*

versus

Noboo Sirdar and others (Defendants), *Respondents.*

Baboo Khetter Mohun Mookerjee for Appellant.

Mr. H. E. Mendies for Respondents.

Whether land is held under an *Ootbundee* tenure or not, the tenant is entitled to notice under Section 13, Act X. of 1859, before the rate at which he pays can be enhanced.

Jackson, J.—It appears to me that the decision of the Lower Appellate Court in this case is substantially correct.

The plaintiff's allegation was that he held, as it were, a three-fold title as landlord: being first the putnee talookdar, then the gantidar, and lastly the holder by purchase of a jumma formerly belonging to the defendant's uncle Kanayee Sirdar. He then alleged that the defendant held under him in his quality of owner of the jumma 107 beegahs and 19 cottahs of land in *ootbundee;* that by measurement made in 1274, he had ascertained the rent of that holding to be Rupees 217-4-2 according to the prevailing rate, and he brought his suit accordingly for arrears of rent at such rate.

The Lower Appellate Court dealt with this suit in its first judgment as one for enhancement, and, finding that no notice had been served on the defendant according to law, dismissed the suit.

When the case came up here in special appeal, the learned Judges who then heard it observed that the plaintiff did not sue to enhance the rent. They pointed out that the plaintiff alleged the defendant's holding to be an *ootbundee* holding, and that the rent was Rupees 217 according to the assessment of the year in which he sued, such tenures being liable and subject to yearly assessment. They directed that the Lower Appellate Court should try the issues whether this tenure is an *ootbundee* tenure, and what the proper assessment is.

It is to be observed that the defendant's allegation in this case was that the plaintiff had, as alleged, purchased the jumma of the defendant's late uncle Kanayee Sirdar, and that, in consequence of the defendant's domicile being situated on the land in dispute, they continued to occupy the land under the plaintiff, and had, in consideration of being allowed to remain there, consented to an increase of 15 rupees upon the rent originally paid by Kanayee Sirdar; and this arrangement appears to have been sanctioned by an ammulnamah granted by the plaintiff's gomashta.

Upon the case going down again for re-trial, the Additional Judge, going very fully into the evidence and facts of the case, finds that there was no *ootbundee* tenure held by the defendant. He found, in fact, that the defendant continued to occupy the land in question under the plaintiff and upon the terms of the ammulnamah just mentioned. He considered that the gomashta had no authority to grant the ammulnamah so as to bind the plaintiff, but that he had, in fact, granted it, and he held that, as the

plaintiff's main allegation of *ootbundee* failed, and as the defendant had not agreed to pay rent at the rate claimed or at any enhanced rate, he was of opinion that the suit must be dismissed.

Now, it seems to me, that the holding of this land on the part of the defendant was clearly not a continuation of the tenure of Kanayee Sirdar, but was a new holding under the plaintiff subsequent to his purchase; and that, whether or no the gomashta had authority to make an agreement binding his employer, the defendant unquestionably came within the terms of Section 13, Act X. of 1859, and could not be called upon to pay a higher rent than he had paid in the preceding year, without notice being duly served on him.

Some little confusion appears to me to have been introduced into the case by the use of the term *ootbundee*. So far as my experience and knowledge of the matter go, an *ootbundee* tenure is one by which a ryot holds a certain area of land (which I believe is usually defined), but for which he pays rent according to the quantity of that land which year by year he cultivates. The rent will, therefore, vary according to the actual cultivated area; but I am not aware that there is any authority for saying that a landlord is at liberty to vary at his pleasure the rate at which a tenant holding at *ootbundee* tenure pays for the land which he cultivates without due notice being served on him under Section 13. It appears to me that, whether the land is held under *ootbundee* or not, the tenant will still be entitled to notice before the rate at which he pays can be enhanced.

Under these circumstances, I think the plaintiff's suit was properly dismissed so far as it sought for an enhanced rate. A decree will issue for the plaintiff for the amount of rent admitted by the defendant but without costs of suit, but the plaintiff will pay the costs of the appeal.

The Court regrets very much to observe that the decree of the Judge does not exactly state the relief granted, but simply states that the appeal be decreed according to the reasons given in the English judgment. The decree should state precisely the relief granted. It should not be worded merely by reference to the reasons given in the judgment.

Glover, J.—I am of the same opinion.

The 29th July 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Registration — Refusal to register—Appeal—Sections 32, 82, and 83, Act XX. of 1866.

Case No. 2 of 1869.

Registration Appeal, under Act XX. of 1866, from an order passed by the Registrar of the Cossiah and Jyntiah Hills, dated the 11th August 1869.

S. M. Sarkies (Petitioner), *Appellant,*

versus

Sungram Singh and another (Opposite Party), *Respondents.*

Baboo Sreenath Doss for Appellant.

Mr. M. L. Sandel and *Baboo Onookool Chunder Mookerjee* for Respondents.

An order by an officer officiating for a Sub-Registrar refusing to register a document tendered to him for registration is appealable to the Registrar-General.

Act XX. of 1866 does not give any appeal against an order refusing to exercise the authority given by the first part of Section 32, neither does such an order fall under the operation of Section 83, nor is it an order made under Section 82.

Phear, J.—I THINK that, under the circumstances of this case, Major Stewart's order of refusal to register was an order passed by him as Sub-Registrar within the meaning of Section 83. Major Stewart was, in fact, at the time doing the Sub-Registrar's duties by appointment of his superior officers, and the document was tendered to him for registration, because he was the person who was duly officiating for the Sub-Registrar in the absence of the latter. It appears to me, therefore, that by force of Section 83, an appeal against his order of refusal lay to the Registrar-General.

But even if my view on this point is not correct, and Major Stewart's order is properly a refusal to exercise the authority given him by the first part of Section 32, it seems to me that the Act does not give any appeal against such a refusal. Neither does snch order of refusal fall under the operation of Section 84, for it is clearly not an order of refusal made on appeal under Section 83, and I think also that it is not an order made under Section 82,

because the exception in the first part of the Section appears to me expressly to exclude it. The document was one which the *Registrar*, by reason of Section 32, might "in his discretion receive and regis-"ter," and must, therefore, I suppose, be a document "which he had a discretion "(as Registrar) to refuse to accept for "registration" within the meaning of Section 82. I think, therefore, that this petition of appeal should be rejected with costs.

Mitter, J.—I concur in rejecting this appeal.

The 29th July 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Partition—Res adjudicata.

Case No. 922 of 1870.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 8th March 1870, modifying a decision of the Moonsiff of Madareegunge, dated the 30th November 1869.

Shaikh Besharut-oollah and others (Plaintiffs), *Appellants,*

versus

Shaikh Ajoo (one of the Defendants), *Respondent.*

Baboo Kalee Prosunno Roy for Appellants.

Baboo Bama Churn Banerjee for Respondent.

Where a plaintiff's claim to have a property declared *ijmalee* had been dismissed in a former suit, his suit for a partition of the same property was held to be barred against a defendant who had been a party to that suit, as well as against defendants who are not in possession.

Phear, J.—It seems to us that the Lower Appellate Court has taken quite the right view on the issue whether or not the suit was barred with regard to the 10½ cottahs.

Clearly the first issue which had to be decided in this suit. before the right to partition could be declared, was whether or not the property was *ijmalee* property liable to be divided.

With regard to the 10½ cottahs, the plaintiff's claim to have it declared *ijmalee* was dismissed in a former suit. That decided it once for all as between them and the defendant who was a party to that suit. That being so, it renders it impracticable for him to have a partition of this property as against the remaining defendants in this suit, who are not, in fact, persons in possession of this land.

We think, therefore, that the suit was rightly dismissed, and this appeal must also be dismissed with costs.

The 29th July 1870.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Under-valuation—Jurisdiction—Stamps.

Case No. 344 of 1870.

Special Appeal from a decision passed by the first Subordinate Judge of Gya, dated the 27th November 1869, affirming a decision of the Moonsiff of Nowabad, dated the 23rd March 1869.

Mewa Lall (Plaintiff), *Appellant,*

versus

Beharee Lall and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Mr. R. T. Allan, Baboo Bhowanee Churn Dutt and *Moonshee Mahomed Yusuf* for Respondents.

A Lower Appellate Court was held to have done right in dismissing a suit on the ground of under-valuation, although the plaint had been admitted and acted on by the first Court without objection by the parties.

Where a pre-emption suit was valued at Rupees 31, though the consideration was Rupees 2,000, the High Court in special appeal refused to remand the case to enable plaintiff to make up the deficient stamp-duty.

Bayley, J.—We think this special appeal must be rejected with costs.

The ground of special appeal is that the Lower Appellate Court is wrong in rejecting the plaint for *under-valuation*, when it was admitted and acted upon by the first Court

favor of and into the possession of his son Rajah Hurendro Kishore, the plaintiff in this case. By that deed, trustees for the management of the estate during the minority of the son were appointed, of whom the Rajah of Benares was one, and Rajah Rajendro Kishore himself was another, and the manager of the estate, whoever might be appointed the third. It may be true that there is no such relinquishment as there would be in the case of a person who became a mendicant or retired into a religious order, because the Rajah, as shown by the terms of the deed, receives a maintenance out of the proceeds of the estate. But so far as the possession of the estate and his right to the estate are concerned, we see that he has relinquished in favor of his son. He says: "I do hereby appoint my son Raj "Coomar Hurendro Kishore Singh, Bahadoor "(may he live for ever), who is fully enti-"tled to be my heir after my death, as malik "(owner), and invest him with all power "and authority under the following condi-"tions, and myself fully waive and renounce "all claims." It is clear, therefore, that the Rajah Rajendro Kishore has relinquished the whole of his right to his son. Whether the document be revocable or not is not a question before us; it has not been revoked, and as it stands, we see that by it the Rajah has given up his right and possession to his son.

With regard to the objection that the son Hurendro Kishore has not been properly represented in this case, we find both in the terms of the deed of relinquishment, as also in the proceedings of the Court under which Mr. Gibbon was appointed manager on the part of the minor under the provisions of Act XL. of 1858, that the Rajah Hurendro Kishore is fully and properly represented by the manager Mr. Gibbon, who has brought the present suit.

It is said that during his father's lifetime, the present plaintiff, Rajah Hurendro Kishore, cannot question any of the acts done by his father. Now, if the effect of the relinquishment be that it gives the property entirely into the hands of the son, we think that there can be no doubt that he can question and challenge, even it may be, any acts that were done, and certainly any acts that are simply alleged to have been done by his father and are denied by the father. We think in a case like the present, where the validity of the mokurruree grant pleaded by the defendant is at issue, that Rajah Rajendro Kishore himself, though he is alleged to have given the lease, might have questioned it; and if he might question on the ground that he never executed it or of fraud or any other reason, there can be no reason for saying that his heir cannot question it. Now, in this case, the plaintiff does question the lease on the ground that this lease was never given, and we think that he is quite in a position to raise this objection.

Then with regard to the mokurruree itself the Lower Courts have found that no such mokurruree was given. It was alleged that the mokurruree had been given by the Rajah Rajendro Kishore in compliance with the promise made by his father Rajah Nowul Singh. But Rajah Rajendro Kishore in his statement, when called upon to show cause why he should not give his evidence in this case, most distinctly denies ever having given this lease, and of knowing any thing about it. He says that he heard from his servants that his younger brother, Baboo Mohendro Pershad, had executed a deed, and had affixed his, the Rajah's, seal to that deed; but he nowhere says that he confirmed it. Nor is it shown that with his knowledge he received the rents for the same, and thereby ratified the acts of his brother.

The last objection taken is the refusal by the Courts below to examine the Rajah Rajendro Kishore. The Judge says that he considers the first Court acted very properly in refusing to summon the Rajah, because it has become a practice to summon the Rajah upon every possible occasion, merely with the object to give annoyance to the Rajah. We find, however, looking at the proceeding of the Subordinate Judge, that he called upon the Rajah to show cause why he should not be summoned to give evidence; he required his attendance as a witness, and a summons was issued and a return was made thereto. But on the Subordinate Judge being asked to proceed to the mofussil, for what purpose we are not shown, the Subordinate Judge considered that there were no grounds for examining the Rajah as a witness, and cancelled the order. The defendant, therefore, had, we think, opportunity; and we do not see that this objection now taken is a sufficient ground for admitting a special appeal, or sending the case back for taking the evidence of the Rajah. The Rajah's knowledge with regard to the giving of the lease is merely asserted in a petition not given on

oath; and on the other hand, in his petition to the Court, the Rajah distinctly denied any knowledge of the lease, and that petition was verified by the Rajah himself. Under these circumstances, we think the Court would have been quite right at once to have refused to summon the Rajah, when the party asking the Court so to do did not come forward, and on oath declare that the Rajah was himself acquainted with the circumstances.

For the reasons given above, we think that there are no grounds for admitting this special appeal, which we, accordingly, dismiss with costs.

The 4th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Right of way—User—Evidence.

Case No. 569 of 1870.

Special Appeal from a decision passed by the Judge of Patna, dated the 28th December 1869, affirming a decision of the Subordinate Judge of that District, dated the 27th May 1869.

Imambundee Begum (Plaintiff), *Appellant,*

versus

Sheo Dyal Ram and others (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboo Roopnath Banerjee* for Appellant.

Mr. R. T. Allan and *Baboos Kishen Succa Mookerjee* and *Kalee Mohun Dass* for Respondents.

A right of way may be created either by grant or by immemorial custom or by necessity, and it is necessary for a party seeking to establish a right of this kind to prove its existence, and that it is ancient, and has been exercised without interruption.

No specific time is sufficient to establish a right of user. The determination of the existence of the right is a question depending on the evidence in each case, the right being inferred from the evidence.

Loch, J.—The dispute in this case relates to a right of way across a piece of waste ground belonging to the plaintiff, which she has now enclosed and so deprived the defendants and others, as the defendants assert, of the use of a road open to the public from time immemorial; and the defendants claiming this right of way by prescription, applied to the Magistrate who appears to have proceeded under the provisions of Section 321, Criminal Procedure Code, and referred the plaintiff to the Civil Court to establish her right to keep possession of the land to the exclusion of the defendants and others.

The first Court dismissed the plaintiff's claim to close the road, and, on appeal, the Judge affirmed the order of the first Court stating—"that the defendants' witnesses "prove beyond all doubt that there has been "for many years a regular track in frequent "use. Several witnesses prove the exist-"ence of this for more than 12 years. Um-"bika Pershad, whose age is 32, speaks "of it as existing as far back as he can re-"member; and Saroda Pershad distinctly "swears to its being in use for the past 21 "years."

In special appeal it is urged that the Judge has not found the right of way to have existed from time immemorial; that it was for the defendants to prove this, and their evidence did not support their allegation; and further they have not shown an uninterrupted enjoyment of the right; that the uninterrupted enjoyment of an easement for 12 years and upwards did not give a right by prescription; and the Courts in this country have abstained from fixing any period which might give that right.

We have been referred to a number of decisions of the High Court on the subject, and during the course of the argument have found others to which we shall refer hereafter.

It is necessary for a party seeking to establish a right of this kind to prove its existence, and that it is ancient and has been exercised without interruption. A right of way may be created either by grant or by immemorial custom or by necessity. It not unfrequently happens in this country that a piece of waste ground remains untouched and unused by its owner for many years; and if, as in the present case, the land have a public road on two sides of it, passers-by to avoid going round by the road make a short cut across the field, and so form a track along which men and animals pass without interruption from the proprietor, who for the time has no use for the land and makes no objection to its use by the public. But it is a matter of consequence to the owner, if when he requires to make

use of the land, he is prevented in the exercise of his rights by a claim of a right of way raised by persons who have merely by the tacit acquiescence of the owner been allowed to make a short cut across the field, when they should have kept the high road which abutted it; and it is, therefore, necessary when a claim of the kind is put forth which, if established, causes manifest injury to private property, that the Court should require from the claimant strict proof that the user is ancient and has been uninterrupted—1 Weekly Reporter, page 230.

We now proceed to notice some of the cases referred to above. It has been held by the High Court (II. Bengal Law Reports, page 323, and 11 Weekly Reporter, page 237) that no fixed period has been laid down within which a right by prescription may be gained in this country. The evidence must be such as to justify the Court in inferring the existence of a valid ancient right, having regard to the nature of that right and the circumstances under which it has been exercised. And in a case reported in III. Bengal Law Reports, page 325,* it was ruled that no period has been definitely fixed to create a right by prescription, and there is no decision to the effect that a finding that the user had lasted for at least 12 years is necessary, or that such a finding of a user for 12 years would be conclusive. And in another case reported in III. Bengal Law Reports, page 281, it was held that a party claiming the right of user by prescription over the property of another must show, not only that the right has existed from ancient days, but also that it has been exercised *as a right* and has not been interrupted. A user all along (7 Weekly Reporter, page 1) and from before does not necessarily prove a right. Its existence must be proved from a time from which the right would be gained or presumed to have been gained. A right of way in this country (7 Weekly Reporter, page 271) need not be proved by user for a definite period of 20 years in order to give a right by prescription or presumption of a grant. Proof of well established and fixed user will be sufficient. A right of way may be created (10 Weekly Reporter, page 363) by use continued for many successive years, even though such use is limited to some particular seasons of the year.

From the above rulings, we may gather that no specific time has been held as sufficient to establish a right of user. The determination of the existence of the right is a question depending on the evidence in each case, the right being inferred from that evidence; and it was held (11 Weekly Reporter, page 285) that where the Subordinate Judge had found substantially that plaintiffs had proved their right of user for a period which would give them a right by prescription, the Court would not interfere in special appeal; and where there is evidence (12 Weekly Reporter, page 274) showing a long and continued user, it is sufficient for the Court to find whether it has or has not lasted long enough to confer the right to it without particular reference to a specific number of years.

In some cases the evidence as to user may not cover more than a period of 10 or 12 years, but the evidence may be of such a nature that the existence of the right may be inferred, while, on the other hand, the mere passing of passengers across a piece of waste land for 20 or 30 years by the sufferance of the owner (Gap Number, Weekly Reporter, page 293) who did not for the time require it would not necessarily establish a right of way. The evidence in this case is to the effect, and the Judge holds that the path has been used for many years as a regular track in frequent use, and that it is too late now for the appellant to extinguish the right of way. It appears to me that in this country great caution is required in presuming the existence of a *right* of way from the fact of a user, particularly in cases of the kind now before us, where open spaces of waste land are left for years untouched, and passengers pass across it by the sufferance of the owner who, so long as he does not require it, allows people to make a short cut over his land. The Judge, though holding that plaintiff cannot now extinguish the right of way, has, it appears to me, failed to find from the evidence that any such right ever existed. It is true that the witnesses speak to having used the track for many years, but the mere use except it go back to an ancient period is not sufficient to establish the right, unless such right can be inferred from the evidence, and the Judge does not in this case say that the existence of the right can be so inferred from the evidence.

Under this view of the case, I think the judgments of the Lower Courts should be set aside, and the plaintiff should get a decree with costs in all Courts.

Hobhouse, J.—I am of the same opinion.

* 12 W. R., p. 274.

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I think that the finding of the Judge is not, under the particular circumstances of this case, a sufficient finding of the right.

I think, too, that there is not on the record evidence on which any Court would in law be justified in finding a right in such a case.

The 4th August 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Judgment in another case—Evidence.

Case No 2050 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 4th June 1869, affirming a decision of the Moonsiff of Pursa, dated the 2nd December 1868.

Lalla Rung Lall and others (Defendants), *Appellants,*

versus

Deo Narain Tewaree (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Grija Sunkur Mojoomdar* for Appellants.

Baboo Kalee Kishen Sein for Respondent.

A judgment in a case against the same defendants, where they raised the same contention as at present, though not conclusive evidence against them, is admissible as evidence for what it is worth.

Loch, J.—The question raised in special appeal is whether the judgment pronounced in the case of Umbika Pershad against the defendants, special appellants, relative to Mouzah Goondha, can be used as evidence in this case.

It appears that defendants are purchasers in execution of a decree of Mouzah Bhugwanpore, and claim a right to, and are in possession of, Mouzah Goondha as the dakhilee village attached to Bhugwanpore.

Plaintiffs are the purchasers of the rights and interests of Ram Golam Singh in Mouzah Goondha, and sue for possession, alleging that it is a separate village from, and not the dakhilee of, Bhugwanpore. . . . .

It appears that one Umbika Pershad having purchased the rights and interests of Nunkoo Roy in Mouzah Goondha brought a suit for possession against the present defendants; and the contention before the Court in that case was similar to that in the present suit, the plaintiff alleging that Goondha was a separate village, and that defendants had no right thereto by virtue of their purchase of Bhugwanpore, while the defendants asserted that Goondha was a dakhilee of Bhugwanpore; and when they purchased the latter they necessarily purchased the former. The Courts, however, held that Mouzah Goondha was a separate village and not the dakhilee of Bhugwanpore, and, consequently, the plaintiff Umbika Pershad was entitled to a decree for possession, which decree has become final.

In disposing of the present case, the Courts below have made use of the judgments passed in the case of Umbika Pershad as evidence to prove that Goondha is separate from Bhugwanpore; and it is contended before us that the said judgment cannot be used as evidence in the present suit; for though the point to be decided is the same, and the present defendants were defendants in that suit, yet the plaintiffs are different; and if this be so, the present suit, in the absence of other sufficient evidence, must be dismissed.

It appears to me that the decision in Umbika Pershad's case is admissible in evidence in the present case. The same question was raised then as now, *viz.*, whether Goondha was or was not separate from Bhugwanpore; the defendants in that case were the same as in the present, and they raised the same contention then as they do now. The judgment in that case was against the defendants. It decided that Goondha was separate from Bhugwanpore. Why should it not be evidence regarding the same matter against the same defendants in this suit? No doubt it could not have been used as evidence against the other defendants, nor can it be held to be conclusive evidence against the present defendants; but still it appears to me to be some evidence and admissible in this case—evidence which, if defendants can do so, they may rebut; and in this view I think I am supported by a judgment of a Division Bench of this Court reported in 6 Weekly Reporter, pages 232-233.

Taylor in his treatise on Evidence, Section 1495, says: "That judgments *inter*

parties cannot be received in favor of a stranger even as against a party thereto, because it is thought, *with very questionable propriety*, that the previous rule, *i. e.*, that no man should be bound by proceedings to which he is a stranger, might work injustice unless its operation were mutual."

Starkie lays down the law thus, I. Volume, page 220: "Where the parties are not the same, one who would not have been prejudiced by the verdict cannot afterwards make use of it, for as between him and a party to such verdict the matter is *res novo*, although his title turn upon the same point. And the verdict ought not to be admitted to prejudice the jury against former litigant. Besides the former verdict may have been obtained upon the evidence of the party who afterwards seeks to take advantage of it."

From these statements of the law, it is clear that a judgment of the kind referred to is not conclusive between the parties; but I do not think it to be altogether inadmissible as evidence; and under this view of the law, I think the case should be remanded to the Lower Appellate Court, who should be instructed to treat the judgment referred to, not as conclusive between the parties to this suit, but as a piece of evidence to be used for what it is worth; and the Lower Court, taking it into consideration with any other evidence put in by the parties now in the record, will dispose of the case.

Mitter, J.—I am also of the same opinion.

That decisions like the one under our consideration have been frequently admitted in our Courts as evidence, is, I believe, a proposition beyond all dispute; and I do not see any reason why we should depart from this practice, merely because it is opposed to the English Law of Evidence.

The principal objection urged against the admissibility of this decision is want of mutuality; but I entirely concur with Mr. Taylor in thinking that this objection is "of very questionable propriety." An admission made by A is certainly receivable in evidence against him in a suit between him and B; and yet it is perfectly clear that there is no mutuality of any kind whatever in such a case. I do not mean to say that the case of an admission stands exactly on the same footing as the one now before us; but I refer to it simply for the purpose of showing that the mere absence of mutuality is not a sufficient ground *by itself* for the exclusion of evidence.

The point involved in this case is precisely the same as that involved in the case of Umbika Pershad; and if the decision of a Court of competent jurisdiction on a question of fact directly raised before it is capable of throwing any light on that question when it is raised in a subsequent litigation, I do not see any reason why the decision in the case of Umbika Pershad should be rejected as utterly valueless in the present suit. The special respondent was not a party to that case, it is true; but this circumstance cannot, in my opinion, afford any valid ground of complaint to the special appellant, who was admittedly a party to it and who had, therefore, every opportunity to defend his own interests in the best manner he could. It has been said that if the special appellant had succeeded in the suit brought by Umbika Pershad, the decision in that suit could not have been used as evidence against the special respondent. But this case would have stood on a quite different footing; for it would have been obviously unjust and improper to allow the interest of the special respondent to be affected by a decision passed behind his back, and against which, therefore, he had no opportunity to protect himself.

The other objection referred to in the passage from Starkie, quoted by my learned colleague, namely, that "the former verdict "may have been obtained upon the evidence "of the party who afterwards seeks to take "advantage of it," must also fail. There might have been considerable force in this objection, when the parties to a suit were not at liberty to give evidence in their own favor; but it can no longer be of any validity whatever now that the law on the subject is quite otherwise.

With reference to the second ground of special appeal, I am of opinion that the Lower Courts are certainly wrong in treating the decision in the case of Umbika Pershad as conclusive in this case. Not only are the parties to the two suits not exactly the same, but the subject-matters are also different. Umbika Pershad sued for one-half of Mouzah Goondha, and the present suit is brought for the other half.

The 4th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Ghatwalee tenures — Forfeiture — Regulation XXIX. of 1814—Suit to set aside a transfer—Limitation—Clause 4, Section 1, Act XIV. of 1859.

Case No. 84 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 24th January 1870.

Chittro Narain Singh Tekait (Plaintiff), *Appellant,*

versus

The Assistant Commissioner of the Sonthal Pergunnahs and another (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Onookool Chunder Mookerjee and *Juggadanund Mookerjee* for Respondents.

When a ghatwal becomes a defaulter, it is in the power of the authorities, according to Regulation XXIX. of 1814, to transfer his tenure, and that power is not put an end to by the money being offered before the tenure is actually made over to another person.

A suit to set aside a transfer of land made by the Revenue Authorities for arrears of Government revenue comes within the words of Clause 4, Section 1, Act XIV. of 1859.

Couch, C. J.—We think the decision of the Lower Court must be affirmed on both the grounds. First, with regard to the validity of the transfer, Section 5, Regulation XXIX. of 1814, says: "If any of the ghatwals "at any time fail to discharge their stipu-"lated rents, it shall be competent to the "Governor-General in Council to make over "the tenure of such defaulter to any person "whom the Governor-General in Council "may approve, on the condition of making "good the arrear due; or to transfer it by "grants assessed with the same revenue, or "with an increased or reduced assessment, "as to the Government may appear meet, or "to dispose of it in such other form and "manner as shall be judged by the Governor-"General in Council proper." It is not disputed by the pleader for the appellant that default was made; but he says that when the money was tendered before the tenure was actually made over, the default, as he expresses it, had ceased We think that is not so. The party had become a defaulter, and the power to make over the tenure was given to the Governor-General in Council, and to the authorities who now act for him in such matter. If the Governor-General in Council had thought fit to waive the default, he might have done so; but still the power existed, and on default being made it was competent to the Governor-General in Council to transfer the tenure to another person if he thought proper. According to the principle in ordinary cases, if a person holds land on a condition and does not perform it, his interest in the land ceases. The lessor, no doubt, may waive the forfeiture if he pleases; but he is not bound to do so. Now, applying the same principle to this case, we think, according to the Regulation to which we have referred, there was a power in the Governor-General in Council to transfer the tenure, and that power was not put an end to by the money being offered before the tenure was actually made over to another person. It appears that this has already been decided by Mr Justice Raikes and Mr. Justice Seton-Karr on the 21st November 1862, in the case of Sumbode Singh, and others, ghatwals, *versus* the Commissioner of the Sonthal Pergunnahs on behalf of Government.

As to the second point, it appears to us that the suit is barred by Limitation. It was a suit to set aside a transfer of land made by the Revenue Authorities for arrears of Government revenue, and, therefore, it comes within the words of Clause 4, Section 1, Act XIV. of 1859.

The appeal is dismissed with separate costs to the respondents who appear separately.

The 4th August 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Execution sale—Plea of limitation.

Case No. 699 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 13th January 1870, affirming a decision of the Moonsiff of Soorujgurrah, dated the 30th September 1869.

Syud Alai Ahmed (Defendant), *Appellant,*

versus

Bodhoo Singh (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory and *Baboo Boodh Sein Singh* for Respondent.

A party by whom malikana was payable obtained a decree against the maliks, and executed it by selling their right to malikana. The purchaser then sued the decree-holder for arrears of malikana, and the plea set up by defendant was limitation.

HELD that as defendant had caused the right to malikana to be sold, he could not avail himself in equity of the plea of limitation, and say that what was purchased was not a substantial right actually existing at the time.

Mitter, J.—THIS suit was instituted by the plaintiff, now special respondent before us, to recover certain arrears of malikana alleged to be due to him from the special appellant for the years 1270 to 1275. F. S.

It appears that the malikana of the mehal mentioned in the plaint was originally payable by the special appellant to certain individuals, Nunda Mahata and others, under the terms of a settlement made with him by the Revenue Authorities in respect of that mehal. In the year 1862, the right of Nunda Mahata and others to the said malikana was put up to sale in execution of a decree obtained against them by the special appellant, and the special respondent became the purchaser of that right.

Both the Courts below have given a decree against the special appellant overruling the plea of limitation, which was, in fact, the only plea set up by him in his defence.

In special appeal, it is contended before us that the Lower Courts have committed an error in law in overruling the plea of limitation, without determining upon the evidence whether the special respondent, or the parties through whom his title is derived, had received any malikana from the special appellant at any time within 12 years next before the commencement of this suit.

We are of opinion that this contention is not sound. Whether Nunda Mahata and others had received any malikana from the special appellant prior to the year 1862, or not, does not appear to us to be really material to the right determination of this case. There can be no doubt whatever that up to that date there was no repudiation by the special appellant of their right to the malikana of the mehal above referred to. On the contrary it was the special appellant who caused that right to be sold; and it does not, therefore, lie in his mouth to say that what was purchased by the special respondent was a mere shadow, and not a substantial right actually existing at the time. Under such circumstances, we are fully justified in assuming that nothing adverse to that right had been set up by the special appellant up to that date; and if this is once conceded the contention, that the cause of action upon which this suit is brought had accrued at any time prior to the date of the plaintiff's purchase in 1862, must necessarily fall to the ground It is to be borne in mind that the special respondent is not suing for any arrears of malikana that might have fallen due to Nunda Mahata and others prior to the date of his purchase in 1862; nor could he have maintained such a suit if he had brought it. What was sold to him was not the right to receive any arrears of malikana that had already become due, but the right of Nunda Mahata and others to receive future malikana from the special appellant. Under such circumstances, it is perfectly clear that no cause of

action could have accrued to the special respondent prior to the date when the first instalment of such future malikana became due to him by virtue of his purchase, and as this event has accrued admittedly within the period prescribed by the Statute of Limitation, the plea raised by the special appellant must necessarily fail.

Suppose, for instance, that the special appellant had not paid any malikana to Nunda Mahata and others at any time within 11 years and 11 months prior to the date of the auction-sale in question; and suppose also that the first instalment of malikana payable to the purchaser by virtue of that sale did not fall due until after a year from that date. The purchaser could not have sued for the arrears of malikana due to Nunda Mahata and others, as those arrears were not included in his purchase. On the other hand, it is equally clear that he could not have sued for any malikana payable to himself before the first instalment of such malikana became actually due. Can it then be reasonably contended that the special appellant would be permitted in such a case to plead the law of limitation in bar of the purchaser's suit for that instalment, merely upon the ground that neither the purchaser himself nor the persons through whom his title is derived had received any malikana from him for a period of 12 years next before the commencement of the suit, supposing, of course, that the suit is brought within the period prescribed by the law from the date when that instalment became due? Suppose again that the special appellant had not paid any malikana to Nunda Mahata and others for a period of more than 12 years prior to the date when he caused their right to receive malikana from himself to be sold in execution of his decree. A Court of equity and good conscience could not allow him to take advantage of the law of limitation against the purchaser, upon the ground that the right to the malikana in question had been already extinguished by lapse of time before the date of the auction-sale. The special appellant must not be allowed to succeed upon such a plea. It would, indeed, be to countenance a fraud, and we are, therefore, of opinion that, upon the facts stated above, no cause of action did or could accrue to the special respondent prior to the date of his purchase in 1862.

For the above reasons we dismiss this special appeal with costs.

The 5th August 1870.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Execution—Appealed decree—Duty of applicant—Procedure.

In the Matter of
Toondun Singh, *Petitioner,*

versus

Pokh Narain Singh and others, *Opposite Party.*

Mr. J. W. B. Money for Petitioner.

Baboos Mohendro Lall Shome and *Mohesh Chunder Chowdhry* for Opposite Party.

Where the decree to be executed is that of the Zillah Court, and that decree has been affirmed in appeal by the High Court, the party applying for execution should state whether or no a further appeal to the Privy Council has been preferred.

The application to execute the decree of an Appellate Court should be made to the Court which passed the first decree, upon or after the receipt by that Court of the copy of the decree certified by the Appellate Court; but *quære* whether execution should be allowed to issue upon a certified copy procured by the parties and presented to the Judge by petition.

Jackson, J.—THIS application as worded in the amended petition of Toondun Singh, is an application to set aside the order of the Judge of Patna for execution in two cases against the said Toondun Singh; but, on the argument, the learned Advocate who appeared for the petitioner, rather invoked the interference of the Court by way of asking for the exercise of its discretion in ordering security to be taken from the opposite party.

The facts are these: That Toondun Singh was appellant in two regular appeals before this Court, both of which were dismissed by this Court on the 20th April last. On the 21st April, that is, a day after that, an application was made to the proper officer of this Court for a memorandum or estimate of costs, with a view to the filing of an appeal to England against the decision of this Court; and that, on the 3rd of May following, the petitioner actually completed his petition for leave to appeal to Her Majesty in Council in those cases, by making a deposit for costs and giving the usual security. But in the meantime, on the 2nd May, the opposite party made an application to the Zillah Judge for execution of the decrees which they had obtained, that application being made upon certified copies of the decrees of this Court.

It is stated that, on the 2nd of May, the petitioner had addressed a petition to the Judge of Patna on stamp-paper, despatched by post and registered, stating that it was his intention to appeal to Her Majesty in Council, and that he had taken the requisite preliminary steps; and this statement is supported by the production of the registered receipt for the cover despatched to the Judge.

The Judge, on receiving the application to execute, called for a statement from his office, which statement informed him that the record of the case had not been received from the High Court. On the 5th of May, the Judge ordered execution to issue; and, on subsequent dates, the petitioner made various ineffectual efforts to obtain stay of execution, both in this Court and in the Zillah Court.

It appears that a separate appeal has been made in the usual way against the order of the Judge ordering execution, with a view of having that order set aside. It is not at all clear to me, but that I might proceed on the present application to set the order aside, but as an appeal has been preferred for that purpose, I think it advisable not to enter upon that question but to restrict myself to the question which has been submitted for decision, namely, whether this is a case for the exercise of the discretion of the Court in ordering security to be taken from the opposite party.

This case bears a curious resemblance to a case which came before the late Chief Justice and Mr. Justice Mitter on the 10th July 1869, that is, the case of Ram Koomar Koondoo and another *versus* James Macqueen. That was also a case in which the party in possession of the decree of this Court had used a very remarkable and unusual diligence in applying for execution, although the unsuccessful party was just then taking proceedings to appeal to the Privy Council. In that case, the Chief Justice, taking the circumstances into consideration, was of opinion that they amounted to a sufficient cause for exercising such discretion, and accordingly security was ordered to be taken.

It appears to me that the present case is even a stronger one than the case of Macqueen. It is true that the application for the admission of an appeal took place a few days earlier in the case of Macqueen than it did in the present case, but that is accounted for by a slight difference in the practice which has since obtained in the matter of appeals to the Privy Council. At that time an application to appeal to England was put in on a deposit merely of 500 rupees for costs. The practice has since become more stringent, and parties are obliged to apply for an estimate of those costs and to deposit the amount estimated at the same time with their petition of appeal; and, consequently, when under the present practice a party makes application to obtain an estimate, he may be considered as forward in his appeal as under the old practice when he actually put in the petition of appeal.

The Chief Justice pointed out in Macqueen's case that it was the duty of the party applying for execution to fill up the proper column in the tabular form of his application with a statement whether an appeal had been preferred against the judgment which it was proposed to execute. Of course, when the decree to be executed is that of the High Court, the very matter necessary to be certified is whether an appeal to the Privy Council has taken place or not, I am of opinion that where the decree is that of the Zillah Court, and that decree has been affirmed in appeal by the High Court, it is still necessary to state whether a further appeal to the Privy Council has been preferred or not. It appears that, in the case before me, both the decree of the High Court and the decree of the Zillah Court were sought to be executed. It was clearly the duty of the decree-holder, therefore, when he was going to apply for execution, to satisfy himself by enquiring in the proper office of this Court whether any steps had been taken by the party towards lodging an appeal to the Privy Council. I do not absolutely say that he would be bound to state in his application to execute the decree the fact that an estimate had been applied for, though he certainly would be bound to state the fact of an appeal having been lodged, and though it would add greatly to the good faith of his application if he also informed the Court of the preliminary step which had been taken. In this case, it seems that the appeal had not been lodged, and therefore the party applying for execution was not bound to intimate to the Zillah Court the fact of the intention to make an appeal; but, on the other hand, it seems that the

petitioner had communicated to the Judge the fact that he was about to appeal; and I think we are entitled to assume that the Judge had received that intimation, because the registered receipt for the letter containing it has been produced. In short, I see no reason to doubt but that the communication in question did reach the Judge, and ought to have put him on his guard.

But, besides that, it seems to me there were other reasons why the Judge should have hesitated in issuing this order for execution. In the first place, the application was made upon a certified copy of the decree of the High Court. Section 361, Act VIII. of 1859, provides that "a copy "of the decree or other order disposing of "the appeal, certified by the Appellate Court "or the proper officer of such Court, and "sealed with the seal of the Court, shall be "transmitted to the Court which passed the "first decree in the suit appealed from, and "shall be filed with the original proceedings "in the suit, and an entry of the judgment "of the Appellate Court shall be made in "the original register of the suit;" and then Section 362 provides: "Application for exe-"cution of the decree of an Appellate Court "shall be made to the Court which passed "the first decree in the suit, and shall be "executed by that Court in the manner and "according to the rules hereinbefore con-"tained for the execution of original de-"crees."

From these two Sections and from the order in which they appear, I apprehend that the application to execute the decree of an Appellate Court should be made to the Court which passed the first decree, upon or after the receipt by that Court of the copy of the decree certified by the Appellate Court and transmitted to the original Court; but I am inclined to think that execution should not be allowed to issue upon a certified copy procured by the parties and presented to the Judge by petition.

In addition to that, it appears that the Zillah Judge, when applied to for execution, was not even in possession of the record or original decree which he was asked to execute. He was informed by his own officer that those papers had not yet been received from the High Court. Section 15, Act XXIII. of 1861, provides that "if "it shall be shown to the Court on receiv-"ing application for execution of the de-"cree that the particulars do not corre-"spond with the original decree, the Court "shall either return the application for "correction to the person making it, or "shall, with the consent of such person, "cause the necessary correction to be "made." Now, this Section is one which takes the place of a repealed Section of Act VIII. of 1859, namely, Section 215, by which the Court is actually directed to compare the application for execution with the original record of the suit, and if they shall be found to correspond, to order execution to issue. The provision which is now in force is less stringent; and it has been contended that it cannot be necessary in all cases to compare the application to execute with the original decree and record; because, if so, it would be impossible to take out execution of decrees which had been appealed from.

It is not necessary to decide how far the circumstance of the record having been transmitted to the Appellate Court is an impediment to execution, but it seems to me that the application to execute under those circumstances is made at such a time and in such a manner as to induce at any rate considerable caution in the Court which is asked to execute the decree.

In addition to that, Section 216 of the Code of Civil Procedure provides that "if an interval of more than a year shall "have elapsed between the date of the "decree and application for its execution, "the Court shall issue a notice to the party "against whom execution is applied for, "requiring him to show cause why the de-"cree should not be executed against "him."

Now, we have no actual statement before us that any such notice was issued, but from the dates I have given it seems tolerably clear that no such notice could have been given, because the order allowing execution was issued only three days after the application was filed. Now, in a case of this nature, where the interests were very large and the contest very keen, and where such remarkable alacrity had been exhibited by the decree-holder, it was surely advisable on the part of the Judge to exercise a little circumspection, and to satisfy himself that no one would be prejudiced by issuing the warrant.

Section 221, Code of Civil Procedure, to which I referred in the Full Bench case which

has been cited to-day, reported in 6 Weekly Reporter, page 84, points out that the Judge is to weigh and consider before he issues the warrant of execution, and is not to issue it if he sees any reason to the contrary.

Now, I should be the last person to discourage or punish unusual diligence on the part of decree-holders We have too much reason to complain of the contrary practice, and if it appeared that the party was exercising reasonable and proper activity in securing his own rights, I should think it proper to assist and encourage him in every way. But where the diligence is of so extraordinary a character as it appears to be in the present case (because it had become known that measures were being taken to prosecute an appeal to the Privy Council), I think that the conduct of the parties suggests a reason for exercising the discretion which this Court possesses of ordering security to be taken even after execution has been taken. That this Court possesses this power is, I think, clear, not only from the decision of the Chief Justice, but from the case in 10 Moore's Indian Appeals, referred to in the Full Bench case.

I am of opinion from the whole of the circumstances of this case, that good cause has been made out for exercising the discretion of this Court, and that the Judge should be ordered to call upon the decree-holder to give security to his satisfaction for executing the decree which may be passed by the Privy Council; and in default of giving such security, the petitioner should be allowed to resume possession of his property on giving such security.

The 5th August 1870.

Present :

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Hindoo Law (Mitakshara)—Brother's grandson.

Case No. 392 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 21st December 1869, reversing a decision of the Moonsiff of Pursa, dated the 29th June 1869.

Mussamut Oorhya Kooer (Defendant), *Appellant,*

versus

Rajoo Nye Sookool (Plaintiff), *Respondent.*

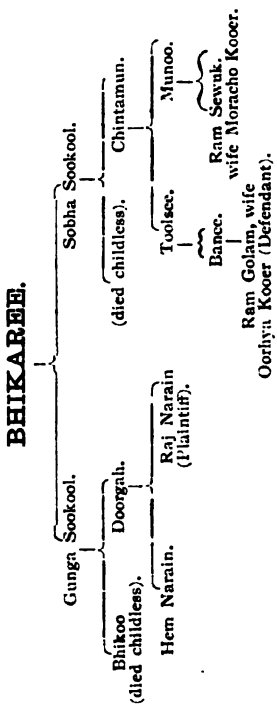
Baboo Womesh Chunder Mitter for Appellant.

Baboos Debendro Narain Bose and *Taruck-nath Dutt* for Respondent.

Under the Mitakshara law, a brother's grandson may be an heir.

Bayley, J.—We think the judgment of the Lower Appellate Court in this case must be reversed, and the case remanded for re-trial on the merits.

It is admitted on both sides that Bhikaree was the common ancestor of the family. He had two sons, Gunga Sookool and Sobha Sookool. Gunga Sookool died leaving two sons, Bhikoo and Doorga Bhikoo died childless. Doorga had two sons, Hem Narain and Raj Narain. Raj Narain is the plaintiff in this case.



Sobha Sookool died leaving two sons, of whom one died childless, and the other Chintamun had two sons, Toolsee and Munoo. Toolsee had two sons, of whom one died childless and the other Banee was the father of Ram Golam, the husband of Oorhya Kooer, the principal defendant No. 1 in this case.

Munoo, the second son of Chintamun, had two sons. Dull and Ram Sewuk. Dull died childless, and Ram Sewuk is the husband

of Moracho Kooer, whose property the plaintiff claims in this suit.

The allegation of the plaintiff is that after the death of Munoo, Ram Sewuk inherited his property, and after his death, his wife Moracho Kooer was in possession; that Moracho Kooer died in 1269; Ram Golam, the husband of defendant No. 1, died during the lifetime of Ram Sewuk; and therefore he (plaintiff) was entitled to the estates left by Moracho Kooer, being the next of kin.

The defendants denied these facts, and alleged that Dull and Ram Sewuk, the sons of Munoo, had pre-deceased Munoo; that, on Munoo's death, Ram Golam, the husband of defendant No. 1, who was then living, inherited his property, and after Ram Golam's death, she (defendant) as the legal heir and representative of her deceased husband, was in possession of the disputed property.

Upon these statements of the facts, the first Court held that the plaintiff failed to prove his allegations; that defendant No. 1 had proved her allegations as to the sons of Munoo having pre-deceased him, and that Ram Golam inherited the estates left by Munoo. The first Court, therefore, dismissed the plaintiff's suit.

On appeal, the Subordinate Judge, without adjudicating the conflicting facts alleged on one side and denied on the other, held that even if the sons of Munoo pre-deceased him and Ram Golam was living when Munoo died, yet when Ram Golam was the brother's grandson of Munoo Sookool, he, under the Mitakshara law, was not entitled to Munoo's property, and that the plaintiff as cousin of the deceased was entitled to succeed. The Lower Appellate Court, therefore, reversed the first Court's judgment.

We are of opinion that the Lower Appellate Court is clearly wrong in holding that, under the Mitakshara law, a brother's grandson is no heir. The judgment of the Lower Appellate Court must, therefore, be reversed, and the case remanded to the Judge of the District for trial of the following issues:—

1stly.—Whether, as alleged by the plaintiff, Ram Sewuk inherited the property of his father Munoo Sookool and was succeeded in it by his wife Moracho Kooer, or whether, as alleged by the defendants, Ram Sewuk and his brother pre-deceased Munoo.

2ndly.—If it is proved that the property was inherited by Ram Sewuk and succeeded to by his wife Moracho Kooer, the question will have to be decided whether, as alleged by the plaintiff, Ram Golam pre-deceased Ram Sewuk or his widow Moracho Kooer. If, on the other hand, it is proved that Ram Sewuk and his brother pre-deceased their father Munoo, the question will still have to be determined as to whether Ram Golam pre deceased Munoo.

The Judge will come to a clear finding on these points, and then apply the Mitakshara law to the facts as found.

The 5th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Sir Charles Hobhouse, *Bart., Judge.*

Section 271, Act VIII., 1859—Equity—Redemption – Sale of mortgagee's rights— Money-decree.

Case No. 184 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Tirhoot, dated the 12th February 1870, reversing an order of the Moonsiff of Mozufferpore, dated the 4th September 1869.

Fukeer Buksh (Decree-holder), *Appellant,*

versus

Chutturdharee Chowdhry (Judgment-debtor), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Mr. R. E. Twidale for Respondent.

The proviso in Section 271, Act VIII. of 1859, applies to a case where the property is actually sold subject to a mortgage, and where the purchaser is, in fact, only buying the equity of redemption which remains in the judgment-debtor; and it does not apply where there is merely the right by law in the mortgagee to enforce his mortgage against the purchaser.

Where a mortgagee brings a suit upon his bond, and obtains a decree for the money due, which decree says that execution shall be had against the property pledged and then against the person, it is competent for him to waive his right as mortgagee, and resting upon his money-decree to seek to have a share in the surplus proceeds of sale under Section 271.

Couch, C. J.—We think that Section 271, Act VIII. of 1859, or rather the proviso in that Section, is intended to apply to a case where the property is actually sold subject to a mortgage, and where the transaction is such that the purchaser is buying

the property subject to the mortgage, where he is, in fact, only buying the equity of redemption which remains in the judgment-debtor; and it does not apply to a case where there is merely the right by law in the mortgagee to enforce his mortgage against the purchaser. This appears to have been the view taken by this Court in a decision reported in 6 Weekly Reporter, Miscellaneous Rulings, page 13. There the Court says: "It is not equitable that the purchaser who purchased and paid for only the mortgagor's interest in this property, should hold it released from Gregory's lien." Now, here it does not appear that the sale to the purchaser was, in fact, subject to the mortgage. By "in fact" we mean that it was not so subject by the contract of sale, and there was merely a legal right existing which might be capable of being enforced. It seems that a petition which was presented by the present appellant was not taken notice of, and neither in the proclamation of sale nor in any of the sale-proceedings is mention made of the existence of any mortgage. Nor is there anything to show that only a limited right of the judgment-debtor was to be sold. Therefore, upon that construction of Section 271, we should say that the proviso does not apply to the present case.

We think there is another ground upon which it may be held that the above Section does not apply; and that is this, that it was competent for the present appellant to waive his right as a mortgagee, and to bring his suit for the recovery of the money due to him upon the bond. He did bring that suit, and got a decree for the money. It is true that that decree says that the execution shall be had against the property which was pledged and afterwards against the person. Nevertheless, it is a decree for the money which was due upon the bond; and we think it was competent for him to say I am content to rest upon the decree which I have obtained, and waive the right which I have as mortgagee; and resting upon that decree, I now seek to have a share in the surplus proceeds of sale under Section 271. We think he is entitled to do that.

For both these reasons, it seems to me that the decision of the Court below is wrong This view is in accordance with the decision of Mr. Justice Steer and Mr. Justice Levinge, reported in the Gap Number, Weekly Reporter, 1864, page 325.

We reverse the decision of the Lower Appellate Court with costs of this Court and of the Lower Appellate Court, and the order of the first Court will stand.

The 5th August 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Cross-Appeal.

Case No. 961 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 14th February 1870, modifying a decision of the Deputy Collector of Nurrail, dated the 31st March 1868.

Shama Churn Ghose (Plaintiff), *Appellant,*

versus

Radha Kristo Chaklanuvis (Defendant), *Respondent.*

Baboo Bungshee Dhur Sein for Appellant.

Baboo Anund Chunder Ghossal for Respondent.

There can be no cross-appeal after the appeal is withdrawn.

Bayley, J.—The pleader for the special appellant requests to withdraw the special appeal, offering to pay the costs of the respondents, who have appeared in this Court. The Court was prepared to accede to this request when the respondent's pleader urges that he had a cross-appeal to make, notwithstanding the withdrawal; and that he has given intimation of this to the special appellant's pleader.

Section 348, Act VIII. of 1859, provides that "upon the *hearing*" of an appeal, the respondent may take any objection to the decision of the Lower Court. It is clear that, by the withdrawal of the special appeal, there was no *hearing* of the appeal, and there being no appeal the respondent had nothing to file a *cross-appeal* against.

The 8th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Registration in zemindar's sherishta—Sale of tenure—Zemindar's assent—Dakhilas.

Case No. 529 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of West Burdwan, dated the 30th December 1869, reversing a decision of the Moonsiff of that District, dated the 20th September 1869.

Bharut Roy (Defendant), *Appellant*,

versus

Gunga Narain Mohapattur and others, (Plaintiffs), *Respondents*.

Baboo Umbika Churn Bose for Appellant.

Baboo Bungshee Dhur Sein for Respondents.

Non-registration in the zemindar's sherishta does not invalidate the sale of a tenure.

By accepting rent the zemindar assents to the transfer of a tenure whether the whole is sold or a part only.

The party producing dakhilas is bound to give some evidence of their having been signed by the person by whom they purport to have been granted, although the opposite party does not deny the signature.

Couch, C. J.—The decision of the Judge that the purchase by Bharut Chunder was invalid, because he had not got his name registered in the zemindar's sherishta, is opposed to many decisions of this Court, and cannot be supported.

Assuming it to be the case, although there is no evidence of the fact upon the record, that this was a sale of a part of the tenure, it would make no difference in the application of the rule laid down in those cases, that the zemindar, if he accepts rent, assents to the transfer of the tenure, because he may assent to a sub-division of it. The act of receiving rent would be evidence of assent in the one case as much as in the other.

But the case must be remanded, because there is no finding by the Lower Appellate Court upon the question whether the zemindar did accept rent or not. It was alleged that dakhilas which were produced were signed by the plaintiff, and it may probably be inferred that they are genuine, because the plaintiff did not deny that he had signed them. But we think we cannot sanction that mode of proceeding and say that the party producing them was not bound to give some evidence of their having been signed by the person by whom they purport to have been granted. This does not appear to have been done. There seems to have been no proper enquiry with reference to those dakhilas. It seems to have been assumed that they were genuine. The plaintiff has a right to have that question determined by the Appellate Court, as he, in his grounds of appeal, alleged that the dakhilas were false.

The case, therefore, must be remanded; but each party must be at liberty to give evidence in regard to these dakhilas, so that any defect in proof may be supplied, if the parties think fit to supply it. The costs of this appeal must follow the final result of the case.

The 8th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Arbitration-award—Appointment of arbitrators.

Case No. 679 of 1870.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 24th February 1870, affirming a decision of the Moonsiff of that District, dated the 4th October 1869.

Rash Beharee Roy and others (Defendants), *Appellants*,

versus

Doorgabur Roy and others (Plaintiffs), *Respondents*.

Baboo Mohinee Mohun Roy for Appellant.

Baboos Grija Sunkur Mojoomdar and *Issur Chunder Chuckerbutty* for Respondents.

Where parties do not give their consent to the appointment of arbitrators and the judgment proceeds on the arbitration-award, the decree is not binding on those parties.

Where four arbitrators had been appointed, and only two acted, the award was held to be invalid.

Couch, C. J.—THE decision of the first Court is obviously founded on the award of the arbitrators. It seems that the Moonsiff heard the matter argued by the pleader of each party, and came to the conclusion that the award was correct, and he gave a judgment in accordance with it. As he examined no witnesses, he cannot be said to have given an *ex-parte* decree which would bind the parties who did not appear.

As the judgment of the Lower Appellate Court proceeded on the award, the decree cannot be binding on the parties who did not give their consent to the appointment of the arbitrators, and the proceedings are invalid, not only against those two defendants, but also against the other defendants, because of the four arbitrators who were appointed, only two acted, and therefore there is not a valid award. The whole of the proceedings seem to be irregular and illegal, and the decrees of both the Lower Courts must be reversed, and the case remanded to the Court of first instance for re-trial.

Costs will follow the final result.

The 9th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Section 15, Act XIV. 1859—High Court's powers of superintendence.

In the Matter of

Doorga Soonduree Debia, *Petitioner,*

versus

Kashee Kant Chuckerbutty and another, *Opposite Party.*

Mr. G. C. Paul and *Baboo Mohinee Mohun Roy* for Petitioner.

Mr. J. T. Woodroffe and *Baboos Romesh Chunder Mitter* and *Rash Beharee Ghose* for Opposite Party.

A party dissatisfied with a legitimate finding under Section 15, Act XIV. of 1859, has a special remedy by a suit in a Civil Court, and cannot claim the High Court's interference under Section 15, 24 and 25 Vic., Cap. 104, except where the Judge has exercised a jurisdiction which he has not, or has refused to exercise a jurisdiction which he has.

Loch, J.—AN application on the part of Doorga Soonduree Debia was presented to this Court on the 7th July 1870, objecting to the proceedings of the Subordinate Judge of Rajshahye in a case brought by her under the provisions of Section 15, Act XIV. of 1859. The objection taken to the proceeding of the Subordinate Judge, which bears date the 26th May 1870, is that the Judge has, instead of confining his attention, simply to the question of possession and dispossession, entered into and decided matters quite extraneous to that point, which ought never to have been decided in a case brought under that Section; and it is urged before us that the Subordinate Judge has not tried the real issue between the parties, namely, whether the lady, Doorga Soonduree Debia, was dispossessed of the property without her own consent; and otherwise than by due course of law.

Doorga Soonduree appears to have been the guardian of Chunder Nath Moitre. It appears that Doorga Soonduree was in possession of the property in dispute as guardian of her adopted minor son, Chunder Nath Moitre, and she alleges that she held possession of the property under the terms of the will executed by her husband, bearing date the 17th Jeit 1260. She alleges further that the minor son, Chunder Nath, in collusion with others, ousted her from possession, and she, therefore, prayed to be put in possession as before.

The defendant, as far as we can gather from the judgment and what is stated to us, alleged that he had attained majority, and that he merely assumed the charge of the property which really belonged to him, and his mother's guardianship ceased on his attaining majority.

Three issues were fixed by the Subordinate Judge—the first on the point of limitation; the second with regard to possession; and the third with regard to adoption. The first was given in favor of the plaintiff. With regard to the third, the Subordinate Judge very properly refused to enter into it. With regard to the second, which was the real question, we find, no doubt, that the Subordinate Judge has entered into various matters, and has included various points in that issue which were quite unnecessary, and he has entered into various subjects which he should not have touched upon in disposing of a case like the one before us. On the main point, however,

viz., was the lady in possession and was she dispossessed—he, after giving various reasons not much to the purpose, comes to the conclusion that the lady was never dispossessed. Now, that is a legitimate finding under the provisions of Section 15, Act XIV. of 1859; and if Doorga Soonduree is dissatisfied with that finding, she has a remedy by a suit in the Civil Court which the law has provided, but not the remedy which she has now sought. She has asked us to interfere under the provisions of Section 15 of the 24 and 25 Victoria, Cap. 104, and to exercise the special powers that are given to us by that Act. Now, it has been held by a Full Bench of this Court, in a case reported in 7 Weekly Reporter, page 520, that where a Court having jurisdiction refuses to exercise that jurisdiction, the High Court may, under the powers given to it by that law, require the subordinate Court to exercise its proper jurisdiction. It has also been held on more occasions than one, for instance, in the case reported in 13 Weekly Reporter, page 439, that the Court may interfere when a Lower Court has exercised a jurisdiction which it has not. Mr. Justice Bayley in that case says: "It has been held "by almost concurrent decisions of this "Court that ordinarily cases under Section "15 of the Charter Act should only be ad-"mitted when the Judge has refused a juris-"diction which he has, or exercised a juris-"diction which he has not."

Now, in this case, it is clear that the Judge exercised the jurisdiction which he had, though he may have come to a wrong conclusion, and may have given wrong and absurd reasons for coming to the conclusion which he has done; still we cannot say that he has refused to exercise a jurisdiction which he has, or that he has exercised the jurisdiction which he has not. He has gone into the case, and for reasons which he has given he has come to the conclusion that the plaintiff was not dispossessed; and such being the case, we think we are precluded from interfering with the proceeding of the Court below, and must leave the petitioner to seek the proper remedy, which is to institute a suit in the Civil Court, if so advised, that being the remedy prescribed by the provisions of Section 15, Act XIV. of 1859. We think, therefore, that this rule must be discharged with costs—one hundred rupees being allowed for costs.

Hobhouse, J.—I think the learned Counsel, Mr. Woodroffe, has taken the right legal view of this case. The question which the Judge had to find under the provisions of Section 15, Act XIV. of 1859, was whether the plaintiff in this case had been dispossessed of the property in dispute against her consent and otherwise than by due course of law. Now, what the Judge seems to me to have found, absurdly enough it may be upon the reasons which he assigns, was this, *viz.*, that in the view in which the case had been put before him by the vakeel for the plaintiff, *i. e.*, in the view that the plaintiff was in possession of the property as of her own right, the plaintiff had not been dispossessed at all. Having found, therefore, that the plaintiff had not been dispossessed at all, the Court seems to me to have exercised the jurisdiction which it had, and in exercising it, dismissed the plaintiff's suit.

Then, the question is what is the plaintiff's remedy? Can she ask us to interfere under the provisions of Section 15 of the Charter Act; or has she any other remedy which prevents us from interfering under the provisions of that Section? I think the Judges are right in the case reported in 12 Weekly Reporter, page 104, when they say that in such a case, that is, as I understand it, where the Judge has exercised his jurisdiction, and come to a decision upon the point on which he had decided, that in such a case we have no jurisdiction to interfere under the provisions of Section 15 of the Charter. By Section 26, Act XXIII. of 1861, it is provided that: "No appeal "shall lie from any order or decision pass-"ed in any suit instituted under Section "15, Act XIV. of 1859 (*to provide for the* "*limitation of suits*), nor shall any review "of any such order or decision be allowed."

So that here there can be no appeal, nor can there be any review nor any procedure in that way. Then what is the procedure? Section 15, Act XIV. of 1859, distinctly states what that procedure is. It says: "Nothing in the Section shall bar the "person from whom such possession shall "have been so recovered, or any other per-"son, instituting a suit to establish his "title to such property, and to recover pos-"session thereof within the period limited "by this Act." So that the remedy by way of appeal or by way of review is barred, and a special remedy is declared. How then can it be said that under Section 15, except it may be where the Judge has exercised a jurisdiction which he has not, or he has refused to exercise a jurisdiction

which he has, how can it be said that we can interfere under Section 15 of the Charter?

I have only one other remark to make, and that is this—that this case is distinguishable from the case to be found in 11 Weekly Reporter, page 229. In that case, as the very wording of the Judge's decision shows, the Judge had not, in reality, determined the point before him, but here in so many words the Judge has determined that point. He may have given a wrong decision on the point in law, but he has not the less determined that point.

I agree that the rule must be discharged, and the petitioner must pay the costs of this rule, costs being assessed at one hundred rupees.

The 10th August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Bond—Mortgage—Jurisdiction—Small Cause Court.

Reference to the High Court by the Ex-Officio Judge of the Small Cause Court at Darjeeling, dated the 15th June 1870.

Webb on the part of Lloyd's Bank, *Plaintiff,*

versus

Rinchiden, *Defendant.*

A lent money to *B* on a mortgage-bond in which it was stipulated that if the amount lent was not re-paid on a date specified, the lender was to cause the mortgaged land to be sold, and to pay himself out of the proceeds accounting for any difference to the borrower, who was responsible for any portion of the debt not covered by the proceeds.

HELD that the right which accrued to the lender under that contract was to have his mortgage lien on the land declared, and to have the property sold in satisfaction; and, if after sale the debt was not satisfied, to proceed against the debtor for the balance.

HELD accordingly that a suit to recover on the bond in question was not cognizable by the Small Cause Court, which could not give plaintiff such a decree as the above, or the remedy to which alone he was entitled.

Reference.—THE point which I wish referred is—Is the case cognizable by the Small Cause Court?

The facts of the case are these: The plaintiff sued before me, in my capacity of Small Cause Court Judge, on a bond specially registered, copy of which I annex. It occurred to me, for the reasons which I shall presently give, that the case was not cognizable by me in such capacity. I told the plaintiff so, and as I also hold the powers of a Moonsiff in the District, I directed with the concurrence of the plaintiff that the case should be registered as one submitted to me in my capacity of Moonsiff.

I then learnt for the first time that the case had been already taken before Mr. W. C. Muller, who also exercises the powers of a Moonsiff in the District, who had rejected it on the ground that it was cognizable by the Small Cause Court only.

I am of opinion that the case is not cognizable by the Court of Small Causes, and I have, as Small Cause Court Judge, rejected it. I have in my capacity of Moonsiff disposed of it subject to this reference which I make in my capacity of Small Cause Court Judge.

My reasons are as follows: I admit that the case is to be disposed of as one involving a claim for money, and that so far it is cognizable by a Court of Small Causes. My difficulty lies in the execution of decree.

As a Judge of the Court of Small Causes, I am bound to see that my decree is satisfied so far as possible from the moveable property of the debtor.

Now, if one thing is clearer to my mind than another in regard to the bond it is this—that the parties when they entered into the contract fully intended that the debt, if not re-paid, should be satisfied from the immoveable property of the debtor *in the first instance.*

I believe that the Court decreeing the amount should specially say, "This decree "will be satisfied, in the first instance, by "the sale of the immoveable property pledged "as security," and that any decree wanting, this specification will be incomplete.

A decree with such a specification, in my opinion, a Court of Small Causes cannot pass.

The judgment of the High Court was delivered as follows by

Jackson, J.—In this case we are of opinion that the Judge of the Small Cause

Court has taken a correct view of the question of jurisdiction, although we do not concur in the precise reason or mode of statement on which that decision is founded.

The plaintiff lent money to the defendant upon a mortgage-bond, in which it was expressly stipulated that, if the defendant should fail to pay the amount lent to him on a date specified, the lender was to cause the land to which the mortgage related to be sold, and pay himself out of the proceeds thereof, accounting to the borrower for any difference, and the borrower holding himself responsible for the payment of any portion of the debt which should not be met by the sale-proceeds.

It seems to be clear that, under this contract, the lender, who was the plaintiff, was not at liberty to bring his suit in the first instance for the recovery of the money and obtain a money-decree. The right which accrued to him on that contract was to have his mortgage-lien upon the land declared, and to have the property sold in satisfaction of the debt; and if after sale the debt should not be satisfied by the proceeds, he would be at liberty to proceed against the debtor for any balance of the claim.

The reason, therefore, for which the suit was not cognizable by the Court of Small Causes, in our opinion, was that the plaintiff would not be entitled to the decree which he asked for; and that the remedy which alone he could be entitled to was one which the Small Cause Court could not give him.

A doubt was in the first instance occasioned by the statement contained in the Judge's referring letter and also in the plaint, that the bond on which the suit proceeded had been specially registered; but it now appears not to have been registered in the form prescribed by Section 52 of the Registration Act, XX. of 1866, in the ordinary way by the borrower acknowledging personally his signature to it before the Registrar. If there had been special registration as alleged, it is possible we might have come to the conclusion that, notwithstanding the peculiar wording of the mortgage-bond, it was in the contemplation of the parties that the vendor might proceed in the mode stated in Section 53 of the Registration Act, and obtain an order for execution against the moveable property of the debtor. For that supposition, however, there appears to be no foundation.

Mitter, J.—I concur.

The 10th August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Decree under Act X.—Assignment.

In the Matter of

Junmejoy Mookerjee, *Petitioner.*

Baboo Molee Lall Mookerjee for Petitioner.

There is no prohibition or rule of law forbidding the assignment of a decree under Act X. of 1859, any more than another decree.

Jackson, J.—We are asked to exercise the extraordinary powers of this Court for the purpose of setting aside an order made by a Collector, reversing the order of the Deputy Collector which directed execution to issue in an Act X. suit.

The application to execute was made by a party who had taken an assignment of the decree, and the Deputy Collector was of opinion that Act X. did not authorize the assignment of decrees made under it, and that consequently the applicant was not entitled to execute. Against this order, the applicant appealed to the Collector, and the Collector reversed the order and directed execution to proceed.

The judgment-debtor now comes up to us, and contends that in the first place the order of the Deputy Collector being an order made after decree was, by virtue of Section 151, Act X. of 1859, not open to appeal; and secondly, he contends that the order of the Deputy Collector was right, and refers us to a case to be found in 11 Sevestre's Reports, page 138, in which that view of the case certainly appears to be taken.

I observe that that was an application very similar to this, in which the decree-holder by assignment applied to the Court to order the Deputy Collector to execute a decree which he had purchased. The Court in that case were of opinion that Act X. of 1859 contained no legislative provision by which such proceedings are allowed, and therefore refused to make the order.

For the purposes of the present application, I think it sufficient to say that I am not aware of any prohibition or any rule of law which forbids the assignment of a decree under Act X. any more than another decree;

and that I do not think the point sufficiently clear to enable us to interfere under the extraordinary powers of the Court for the purpose of setting aside the order as being contrary to law

On the order point that the Collector had no jurisdiction to interfere with the order of the Deputy Collector by way of appeal, I think that, if we were of opinion that the Collector quashed a proper order and made an improper order himself, we should be bound to interfere; but as it seems to me that the Collector had made a right order in the case, and that the judgment-debtor seems simply desirous of evading satisfaction of the decree under which he is liable, I do not think we ought to interfere. The application is rejected.

Mitter, J.—I concur.

The 10th August 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Usufructuary mortgage—Suit by heirs—Division of liability.

Case No. 1084 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 10th February 1870, affirming a decision of the Subordinate Judge of that District, dated the 29th June 1868.

Mussamut Mujeedoonissa (Defendant), *Appellant,*

versus

Syud Dildar Hossein and others (Plaintiffs), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

No one for Respondents.

In a suit between Mahomedans by the heirs of a zur-i-peshgee mortgagee to recover the amount advanced, all the heirs of the mortgagee must be represented either as plaintiffs or defendants, or those who sue must claim in proportion to what they are entitled to under the Mahomedan Law.

Where money is advanced on a mortgage, the liability cannot be divided.

Kemp, J.—* * * * *

* * * * * * *

In this case, the plaintiffs are mortgagees. For the better understanding of the case, it is necessary to state that the zur-i-peshgee was originally granted to two parties, Ahmed Ali and Seebun Sahoo.

It is alleged that Ahmed Ali advanced Rupees 300 and Seebun Sahoo Rupees 100 of the zur-i-peshgee money. The plaintiffs, who allege themselves to be some of the heirs of Ahmed Ali, further set up a purchase of the rights and interests of Seebun Sahoo, and sue to recover the whole of the zur-i-peshgee money from the mortgagor, special appellant. It is further averred that the defendant, mortgagor, dispossessed the plaintiffs, mortgagees, of 20 beegahs covered by the mortgage in execution of a decree held in a suit for setting aside the alleged sale of the whole 16 dams share of the property of the mortgagor.

The defendant, mortgagor, denied the sale by Seebun Sahoo to Ahmed Ali, and objected that all the heirs of Ahmed Ali not having joined the suit, the plaintiffs should have sued only for the proportionate share of the zur-i-peshgee to which they were entitled under the Mahomedan Law; and on the merits stated that the zur-i-peshgee had been realized from the usufruct.

The first Court held that the sale by Seebun Sahoo to Ahmed Ali was *not* proved; that there was no defect of parties; and on the merits that the accounts had been taken, not of the whole 20 beegahs mortgaged, but of the 3-4ths area representing the share of Ahmed Ali; and taking those accounts, found that the plaintiffs were entitled to Rupees 300, and gave them a decree accordingly.

This decree has been affirmed by the Lower Appellate Court.

We think the judgments of the Lower Courts are wrong; *firstly*, because in a suit to recover the amount of zur-i-peshgee advanced by Ahmed Ali, all his heirs must be represented either as plaintiffs or defendants, or those who sue must claim in proportion to what they are entitled to under the Mahomedan Law; *secondly*, we think that both the Courts below have erred in law in dividing the zur-i-peshgee debt. The money was advanced on a mortgage, and the liability could not be divided.

The judgments of both the Lower Courts are reversed, and this appeal decreed with costs and interest at 6 rupees per cent. per annum.

The 10th August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Pleader of the High Court—Act XX. of 1865.

Reference to the High Court from the Additional Judge of Nuddea.

In the Matter of

Baboo Kishoree Lall Sircar, *a Pleader of the High Court, suspended by the Additional Judge of Nuddea from practising in his Court.*

Mr. J. W. B Money and *Mr. Mun Mohun Ghose* for the said Pleader.

A Zillah Judge has no power under Act XX. of 1865 to suspend a pleader of the High Court from practising in the Courts of his district on the ground of incompetency. His proper course is to make a representation to the High Court.

Jackson, J.—THE matter comes before us in the shape of a reference from the Additional Judge of Nuddea, who, for the reasons stated in his order made on the 28th July last, suspended from practising in his Court, pending a reference to the High Court, Baboo Kishoree Lall Sircar, who is a vakeel, as I understand, enrolled in this Court under the Letters Patent of this Court, and who, by virtue of that qualification and under the authority of Section 45 of the Pleaders Act (XX. of 1865), usually practises in the local Courts of the Nuddea District.

The causes which the Additional Judge alleges for having made this order are stated to be a general and habitual ignorance on the part of this vakeel of his clients' cases, wasting of the Court's time, using frivolous arguments, and making careless statements; and in particular, in a certain appeal case No. 277 of 1869, in which Baboo Kishoree Lall Sircar was pleader for the respondent, and in which case those faults were committed by him according to the Additional Judge's statement in a conspicuous way. The Additional Judge further states that, as a sequel of this conduct on the part of the pleader, he quitted the Judge's Court in a rude unceremonious manner, abandoning the case of his client, which was afterwards taken up by another pleader on the same side, who, as the Judge says, conducted it to a satisfactory result.

It must be remarked in the first place that these allegations of the Judge are not precise in their character, because the statements, the arguments, the answers to questions to which the Judge refers, and of which he makes complaint, are not specifically stated; nor is the letter accompanied by any documents or any materials from which the Court could ascertain for itself how far those complaints were well-founded.

But the Additional Judge's statement is answered by an affidavit put in by the vakeel himself, and also by another affidavit made by a pleader named Juloo Nauth Chatterjee, who, in the case referred to, appeared for the appellant—Kishoree Lall Sircar being for the respondent.

I feel bound to say that, if the allegations contained in those two affidavits are in any degree true, not only has grievous injustice been done to the pleader before us, Baboo Kishoree Lall Sircar, but in all probability the interests of a great number of persons, appellants and respondents in appeal cases before Mr. P.. as Additional Judge of Nuddea, have been most seriously prejudiced. These, however, are in one sense *ex-parte* statements, and I should be sorry to express any final opinion in the matter. But one thing I do feel bound to say. The Additional Judge in his letter not merely charges the particular vakeel before us with the sort of misconduct ascribed, but he appears to involve in that charge the whole body of the pleaders, or at least a great number of them, practising in the Nuddea Court. It is just nine years ago since I assumed charge of the office of Judge of Nuddea. I held that office for about eight months; and I think it right to say that, during my experience of the business of that Court, the conduct of the local bar was, in general, extremely creditable, and marked both by good conduct on the part of the pleaders and by general capacity and intelligence.

The first order which we have to make in this case is one which, we think, we must make without hesitation, and without hearing further argument on the subject, and that is that the order of the Judge suspending from practising in his Court a pleader of this Court is one made without warrant of law, and must be absolutely set aside.

Section 44, Act XX. of 1865, expressly provides that none of the foregoing provisions of the Act, except Section 39, shall apply to advocates, vakeels, and attorneys-at-

law, admitted and enrolled by any High Court under the Letters Patent by which such Court is constituted, nor to mookhtears practising in such Courts.

Of course, it is evident that every Court must possess the power of repressing conduct committed in its presence or towards it, which, by a contempt of the authority of the Court or by interruption of public business, calls for instant and summary action; and if any practitioner in such Courts, whether a vakeel of the High Court or any one else, committed an offence which comes under the denomination of contempt, or otherwise requires to be summarily dealt with, he must, of course, be so dealt with; and no vakeel of this Court, no more than the vakeels of any other Court, will enjoy any privilege which will exempt him from the just consequences of such misconduct. But if the conduct imputed be not conduct of that description, but merely affecting his professional reputation and character, the course which ought to be taken in the case of vakeels of this Court practising in any Court subordinate to the High Court is to make a representation of such conduct to the High Court, which, if it thinks fit, will call upon the vakeel to answer the allegations made, and will thereupon make such order as the case may require.

But, unfortunately, our notice of this case cannot, I think, end here. The allegations in the pleaders' affidavits (for I must refer to both of them) disclose, not only in this case, but in the course of dealing with appeals generally on the part of the Additional Judge, a mode and habit of proceeding, which, if it be borne out, is not only objectionable, but I should say intolerable. If these statements be true, and if pleaders are to be restrained and checked in stating their clients' cases, and confined to answering merely such questions as the Court, in its often imperfect comprehension of the matter before it, may think fit to put, not only would it be impossible to discharge the pleader's duty with comfort to themselves, but the cause of justice would almost certainly be seriously prejudiced.

It is within my knowledge that the statements made before us on two affidavits under the sanction of solemn affirmation have also been made in the shape of a general representation by the pleaders of the Nuddea Courts; and I am bound to say, with great regret, that those statements appear to me to receive confirmation from the tenor of the Judge's own letter. I think, therefore, it is necessary, and I shall recommend to the Judges of the Court, that the Additional Judge of Nuddea be called upon to answer the matters contained in this affidavit, both in regard to the particular case before us and also in regard to his conduct in hearing appeals generally; and after receiving the Judge's answer, and after making such further enquiries as may appear necessary, such order will be passed by the Court, or such communication will be made to Government, as the Court may think necessary.

The 10th August 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Confiscation by Independent Chief—Cognizance by English Courts—Evidence.

Reference to the High Court by the Recorder of Moulmein, dated the 30th June 1870.

Shoay Att, *Plaintiff,*

versus

Shoay Doang, *Defendant.*

Where the Chief of an Independent State, exercising the sovereign power of that state within its territories, confiscates property within those territories, the confiscation must be respected by English Courts of Justice. The fact of such confiscation, if disputed, must be ascertained by the Court in the same manner as are all other facts which are in issue between the parties.

Reference.—THE question I am desirous of submitting for their Lordships' opinion in this case is one which has of late been frequently before this Court in foreign-grown timber cases, and one to which, owing to the conditions under which the timber trade of Moulmein is at present carried on, I have felt it at times extremely difficult to give a satisfactory answer.

The suit is for the recovery of four logs of teak timber bearing the marks Atlay, Shawa, Tithuit, and Tithong, the plaintiff's registered marks; and Dawayzoo, Kopaga, and Winkyan, the defendant's registered marks.

The facts of the case, as set out by the plaintiff, are that, somewhere between June

1868 and June 1869, he purchased 360 logs of teak in Karennee (country of the Red Karens) and marked them with his above-mentioned marks; that he worked (*i. e.*, dragged or pushed) the timber to a place called Lamonagyee at the mouth of the Htoo Choung, to await the rise of the waters to float the timber to Kadoe; that the defendant illegally marked four logs of the said timber with his (defendant's) marks, and having entered it at Kadoe (the Revenue Station of Moulmein) refused to give it up.

The defendant has set out his case in a written statement, which, however objectionable on the ground of argumentativeness, contains a fair summary of the contention ordinarily raised by parties who occupy his position in contested cases. The written statement is as follows :—

"On the 1st June 1869, His Royal Highness Prince Koontee, the recognized Ruler of the Western Karennee, made and published in the *Moulmein Advertiser* a notification of which the following is a translation :—

"'*Notification.*

"'Prince Koontee, the Royal son and heir of the late Chief of the Western Karennee, Pappada Dowahrajah Kyetphogyee, proclaims for general information that, within three months from the date of this notification, all persons who have purchased timber at Shoochoung within Kyetphogyee's jurisdiction, *viz.*, those that have already paid duty on timber or not, as well as those who have paid full value on timber, or those that have yet to pay the balance money, are hereby required to come up in person or by their agent to remove and take away their timber bearing their own marks from the said Choung. Should they fail to come up or give any satisfactory explanation, with reference to this notification, within the time specified, their timber will be confiscated and sold by the said Prince of Western Karennee.

"'(Mark of Prince Koontee.)'

"On the strength of the above notification, the defendant proceeded to Western Karennee, and after the expiry of the period of three months allowed in the proclamation, *viz.*, on the 10th October 1869, entered into a contract with Prince Koontee aforesaid for the purchase of 3,000 logs of teak timber in the following terms:—

"'On the 5th day of increase of Thadingzoot in the year 1231 (corresponding with the English 10th October 1869), Pappadah Daywah Rajah Tsawbwah Koontee who has authority over the territory of Western Karennee (stating) that within his own jurisdiction of Shaogyoung all timbers remaining and left floated and got on rocks, burnt by fire and marks defaced, and timbers bearing all kinds of marks that had been there for more than three years and nearly four years, the revenue and duty for which have not been paid or tendered; and also as they are obstructing and shutting up the creek. The said circumstances, as well as to clear away all timber that are in Shaogyoung, have been promulgated in the Deputy Commissioner's Court of the town of Moulmein, and published also in the newspaper. According to the date so written and fixed in the said promulgation and the newspaper, the purchaser of timber, and the owner of timber who purchased and kept the timbers, have not come to 'oung' (push by elephant), put down, take out, and receive them; and as the day and date had exceeded and passed, therefore all timbers that came out of the Shaogyoung above Lamahgyee ought to be sold after supermarking of the said timbers with his right of jurisdiction marks (Kyetphogyee-Koontee), the name of confiscation-mark. With regard to the said timbers that ought to be sold to be of 3 cubits and 2 mike in girth and 20 cubits in length as the lowest limits; and fixing the price at the market-rate of 13 rupees per log, and on account of the price of the said timbers. If the earnest rupees ten thousand could now be paid by Kyoungtagah Oo Shoay Doung, resident of Tavoyzoo district of the town of Moulmein, the said timbers will be one and all sold to Kyoungtagah Oo Shoay Doung, and with regard to the balance moneys for the price of timber, they are to be paid in full when the month of Pyatho arrives in the year 1231 Afterwards, at the expiration of the date so fixed and stipulated, if the balance moneys for the price of timber be not paid in full and remain so, then with regard to the balance moneys, fixing the double amount as damages, must be paid and forfeited by Kyoungtagah Oo Shoay Doung; and according to the Iswabwah Koontee's statement, Kyoungtagah Oo Shoay Doung, resident of Tavoyzoo district of the town of Moulmein, according to the statements and words so contained and written above; and the said timbers to be 3 cubits and 2 mikes in girth and 20 cubits in length as

the lowest limits, and at the market-rate of 13 rupees, the price per log; and on account of the price of all timbers that come out of the Shaogyoung above Lamagzee by paying the earnest (Rupees 10,000), and after striking and impressing with his marks (Tavoyzoo) (Pagah) and Winkyan has absolutely purchased them. With regard to the said timbers commencing from the day of agreement, when the month of Tazoungmoung arrives, so that not a single log may remain, they will be 'ounged,' put down, and put out into the Toochoung creek—afterwards at the expiration of the date fixed and stipulated. If the whole of the said timbers be not 'ounged,' not put down, and not put out, then on account of all remaining timbers fixing double the amount as damages must be paid and forfeited by Iswabwah Koontee. According to the statements of the two parties, they equally agreed and in the presence of witnesses affixed their signature.

(Sd.) Isawbwah Koontee's signature.
Ko Shoay Doung.
Moung Oo.
Moung Oung, witness.
Ko Shoay Nee, ditto.
Nga Boe, ditto.
Moung Shoay Nay, ditto.

Seal.

"'As written above, Kyoungtagah Oo Shoay Doung and Isawbwah Koontee, the two parties, agreed and affixed their signatures. Accordingly, the eldest son of Kyeiphogyee Koonshah, Lahsah, and grandson Khoonpho have agreed and also affixed their signatures.

(Sd.) Moung Oung, witness.
Ko Shoay Nee, ditto.
Nga Boe, ditto.
Moung Shoay Nay, ditto.'

"The defendant paid Rupees 20,000 of the Rs. 39,000 due under the contract.

"That in pursuance of the said contract, the defendant marked about 1,050 of the 3,000 logs so purchased with the marks (Tavoyzoo), (Kopoga), (Winkyan).

"That the 4 logs now sued for form part of the 1,050 logs sold and delivered to the defendant.

"That on the execution of the contract, Prince Koontee, in whose territory the timber was lying, and who had custody and control of the said timber by his officers and servants made delivery of the timber to the defendant, and further with his elephants dragged and worked the said timber, so as eventually to float out of the smaller creeks into the Salween and thence to Kadoe.

"That, during the period these operations were being carried on in Western Karennee, no opposition was made by the plaintiff or any person or persons on his behalf, neither was there then any litigation in Karennee aforesaid in respect of the said logs.

"That, in respect of the notification of the 1st June 1869, no opposition or protest was made in Karennee or elsewhere.

"That it is competent to Prince Koontee as an independent sovereign to regulate and administer the affairs of his own State, even should his administration and government be not in harmony with the policy of Western nations.

"That in the present matter Prince Koontee has but followed the example of the British Government in its Forest Administration in Burmah, where confiscation and sale for the benefit of Government attaches in cases where marks on logs are defaced (even by third parties), when drift timber is seized and sold, when timber is unclaimed, or when timber is allowed to be at Kadoe for a period of two years without being as it is termed '*cleared*' from the Kadoe Depôt, and also under a variety of other contingencies.

"That it is as competent to Prince Koontee in the exercise of his sovereign and independent power to confiscate and sell timber as it is for the British Government.

"That, after the confiscation by Prince Koontee, the timber so confiscated should not have been the subject of litigation in the British Courts. Aggrieved parties might and ought to have sought the action of the British Government for redress against the wrongful acts (real or supposed) of Prince Koontee.

"That this is the view taken by the British Government is evidenced by the frequent intervention of Her Majesty's Consul at Bankok in all cases of oppression or extortion on the part of the Chief of Zimmay where British subjects are the complainants.

"That this would also appear to be the procedure adopted in reference to Prince Koontee, between whom and the British Government the most friendly relations have hitherto been sustained.

"That Prince Koontee, from time to time, kept the British Government informed of his proceedings, and on the occasion of the confiscation resulting from the notification of the 1st June 1869, communicated the same to the Commissioner of the Tenasserim Division in the following terms:—

"'The Prince Koontee of the Western Karennee informs the Commissioner of the Tenasserim Division that since the death of his father Kyetphogyee, he has continued to rule over the country of Western Karennee, believing, with full confidence, that he will be advised and protected by the Commissioner of Moulmein.

"'States of his having sent a friendly letter to the Chief Commissioner requesting his protection and support to the Karennee country, and that he was glad of having received a favorable reply from the Chief Commissioner. The Prince also informs the Commissioner of Moulmein that he has given to all timber merchants permission to carry on trade as they wished. That the Thitgoungs from Moulmein have purchased large quantity of timber on payment of small advances. The owners believing that the Thitgoungs are honest in their dealings, sold and made over their timber to them, and when the time of payment arrives the Thitgoungs have failed to pay up the balance of money due to them, they are obliged to follow the Thitgoungs to Moulmein; but instead of getting payment they had to go to Court; and not knowing how to act and conduct their cases, they are obliged to return to Karennee. That these Thitgoungs have not come up to take their timber away, and consequently the creeks have been blocked up and thereby prevents other poor people from working and sending out their timber; besides which the duty or revenue of both countries have been stopped. As the creeks in forests are required to be cleared and opened for passage, the Chief has issued a notification for the information of the Thitgoungs; and that he has also appointed Mr. C. T. Warwick as his agent to appear on his behalf and conduct all timber cases in any Court as well as to seize and salve all timber lying along the banks of the Salween river and bearing the Chief's mark (Koontee); a general power signed and sealed by the Chief has also been granted to Mr. C. T. Warwick accordingly. The Chief sends this friendly letter, and trusts the Commissioner of Moulmein will protect and assist him as well as his agent Mr. C. T. Warwick.'

"The defendant denies that the timber sued for belongs to the plaintiff, or that he purchased the same from any person whomsoever in the Karennee estates, or that he obtained delivery of the same, and puts the plaintiff to the proof of each and every averment in his plaint.

"The defendant submits that the present suit should be dismissed; but in view of the complicated questions which have arisen in the litigation connected with the last season's Karennee timber, prays that before passing any final order herein, the Court will be pleased to make a reference to the High Court under Section 22, Act XXI. of 1863, on such points as to the Court may seem necessary."

A great difficulty is, as I have more than once brought to their Lordships' notice, introduced into cases in which the subject of dispute is Salween-borne foreign-grown timber by the absence of any effective or comprehensive principle in marking the timber in the forest with a view of identifying it when it reaches Moulmein. The practice now obtaining in trade (I am speaking of timber grown on the Salween and its tributaries beyond British territory) is this—After a tree has been cut, lopped, and made ready for floating (in which condition it is termed a log), it is impressed with the owner's device (which is for this purpose cut on a steel-faced hammer) and left in a convenient creek or nullah to await the rising of the waters, which carry it down the particular stream to which it has been dragged. It finally floats into the Salween, where, after passing over a number of falls which prevent its being watched or rafted during its progress, it arrives at the Kyoden or Rope Station some 80 miles above Moulmein.

Below the falls of the Kyoden (in British territory) are a class of men named "salvors" engaged by the owners of the timber. These men catch and form into rafts all timber bearing the marks of their employers, no matter what other mark there may be upon the logs. On the rafts reaching the revenue station at Kadoe, the parties whose salvors have brought down the timber are treated as the owners by the revenue authorities, who issue to such parties as owners *tinezas* or certificates that such and such timber has been entered by them at the revenue station as theirs. The timber is detained seven days at Kadoe from the date of its being

brought in to enable claimants to come forward. In the absence of any claim being made to the timber, the party who has entered is allowed, at the expiration of the seven days, to take it away, and dispose of it as he will. If the timber has not been honestly come by, the party clearing it, as may be supposed, at once "converts it," that is saws it up, and so puts an end to all possibility of further identification.

The mere statement of this primitive mode of identifying timber which comes from distant localities, and which has sometimes been years upon the way, suggests a variety of difficulties which may arise in deciding cases of disputed ownership in such timber. I need hardly say that it opens a wide field for the exercise of fraud. In the present case, the difficulty is rendered greater from the circumstance that even the marks are, on the contention of the defendant, to mean nothing, if the Chief within whose territory the timber has been grown, and where the marker's rights have arisen, think fit for any reason to annihilate those rights. We have here a Forest Chief, in whose territory the timber is grown, claiming the right almost arbitrarily (for in some cases he has, by his own admission, received his royalties in full) of confiscating and re-selling the timber he has already sold.

In what light is an English Court to regard such a decision in cases in which British subjects are concerned? Is it to treat the Chief's proceeding as though it were a foreign judgment, or is it to recognize the principle contended for by the defendant, *viz.*, that the Chief of every savage tribe has, by virtue of his absolute independence from any control, the power of creating and destroying rights of property within his own jurisdiction as he will? In the former case, the question is complicated by the difficulty of fixing on some standard of right and wrong which shall be applicable to contracts of this particular kind. In the latter, it is of course impossible to apply any principle at all. It is a question of international law raised under circumstances in which we have not the benefit of international relations.

In this latter respect, I think Eastern Burmah stands alone among the dependencies of the Crown. In every English Colony elsewhere, there is some recognition, however vague, by the Government of the persons actually in power in the neighbouring states.

In Eastern Burmah this exceptional state of affairs has existed ever since our first occupation of the country, the British Government never having been brought into diplomatic contact with, and consequently never having had occasion to recognize any contiguous state except that of the King of Siam. From the absence of such official intercourse with the persons who claim to be sovereign rulers of the various forest tribes, the Court has no means of testing the validity of the pretensions of any one assuming the title of an independent Forest Chief.

I have already on several occasions taken the opportunity of bringing to the notice of the Government of India, the great difficulties that arise out of such a state of circumstances in the administration of the law in this Court, and the expediency of an official recognition in some way or other of the various Border Chiefs north of Tenasserim. The difficulty has been recognized, and the mode in which it may be most effectually removed is still, I believe, under the consideration of the Indian Government, his late Excellency Lord Lawrence having been pleased to give instructions to the local Government for the preparation of a draft Bill which should secure the interests of British subjects trading in the forests by the intervention of British Agents on the spot.

In the case now before me, I have, upon the whole, thought it best, under the circumstances of the case, to consider the fairness and reasonableness of the Chief's confiscation-order as the criteria of its validity. To this I think the less exception can be taken inasmuch as Koontee is in the present case, and the Chiefs are generally, if not always, directly interested in the confiscations, and because they have it at all times in their power to sue in this Court for the balance of any purchase-money due to them, and provided they can excite the suspicion of the Court as to the intentions of the debtor to secure their debt by an injunction against its clearance of the timber at Kadoe.

Defendant has selected the most objectionable portion of the "Rules and Regulations" in force at Kadoe, and argued that because these rules, framed by the British Government, operate unjustly towards traders, a Forest Chief is exempt from all

necessity to base his rules of conduct on sounder principle. I can hardly consider such an argument as intended to be put forward seriously.

The Government has, as I have said, admitted that the law as now obtaining in foreign-grown timber cases is not defensible in point of principle, and steps are actually being taken to remedy the injustice complained of. In respect of these particular rules, I may observe the Tenasserim Provinces of British Burmah have been exceptionally unfortunate. The rules now in operation (and which by Act VII. of 1869 are now law) were originally drafted by an officer in the Forest Department, under the impression that Act VII. of 1865 had empowered the Governor-General in Council to make such rules, in respect of foreign-grown as well as Government forest timber. The rules were forwarded to India, passed the ordeal of inspection by the advisers of the Crown in Calcutta, and eventually they received His Excellency's approval. From the date of their receiving such approval, they were acted on by the Revenue Authorities at Kadoe as valid rules, until, on the argument of a case (124 of 1868) in this Court, it was discovered that the sanction of the Governor-General was *extra vires*, and Act VII. of 1869 was at once passed as an Act of Indemnity for what had been done under the rules, and as providing for the practice until other legislative arrangements could be made.

That the notification on which the confiscation in the present case is rested by the defendant is a most unreasonable one will, I think, hardly be disputed by any one that reads it; inasmuch as simply on the ground that the timber has not been removed, the Chief professes to confiscate and re-sell that on which he has received the full royalty. It is not alleged that there is any special difficulty in pushing the logs along the water-course so as to clear the Toogyoung creek; and I cannot see why, if the simple neglect to remove was the Chief's *gravamen* against the plaintiff, he could not have had this removal effected at any time. That the Chief, after taking the purchase-money of the timber, should rescind the contract without even a tender of the purchase-money, is a proceeding which *ex aquo et bono* no Court could, I think, permit to stand.

I, accordingly, give a decree for the plaintiff for the timber claimed, or its value as stated in the plaint, with costs, subject to their Lordships' opinion on the two following questions:—

1. Can a Forest Chief, who acknowledges no superior, confiscate timber lawfully acquired by a British subject within his territory, in such manner as to vest the property in such timber in another person?

2. In what manner is the fact of such confiscation to be made public, in order that it may be recognized as a fact by this Court?

The judgment of the High Court was delivered as follows by—

Phear, J.—The first question proposed to us by the learned Recorder seems to be unnecessarily general in its terms, and the statement of the case, which has been sent up to us under Section 22 of Act XXI. of 1863, does not so precisely state the facts which have been found by the learned Recorder, as to enable us to confine the question to its proper limits. Under these circumstances, we think the question can only be answered hypothetically.

If Prince Koontee is the Chief of an independent State, exercising the sovereign power of that State within its territories, then, we think, the confiscation of property alleged to have been made by him within those territories as such Chief must be respected by English Courts of Justice. In the case of Wright *versus* Nutt (1 Henry Blackstone, 149) the Lord Chancellor said: "It may be a question for private speculation "whether such a law made in Georgia was "a wise or an improvident one—whether "a barbarous or civilized institution; but "here we must take it as the law of an independent country, and the laws of every "country must be equally regarded in "Courts of Justice here, whether in private "speculation they are wise or foolish." And the law of which the Lord Chancellor was speaking, was an enactment passed by the Legislature of the province of Georgia in 1782, whereby all the estates real and personal of Sir James Wright and others, with all debts, dues, and demands whatsoever due to them, were confiscated to the use and benefit of the state of Georgia.

For answer to the second question, we think the learned Recorder must be referred to the ordinary rules of evidence. The fact of confiscation, if disputed, must be ascertained by the Court in the same manner as are all

other facts which are in issue between the parties.

The 10th August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Loans—English Common Law doctrine—Cause of action—Limitation.

Case No. 115 of 1870.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 8th December 1869, reversing a decision of the Subordinate Judge of that District, dated the 29th January 1869.

Tarinee Pershad Ghose (one of the Defendants), *Appellant,*

versus

Pran Kishen Banerjee (Plaintiff), and another (Defendant), *Respondents.*

Baboos Hem Chunder Banerjee and *Tarucknath Dutt* for Appellant.

Baboos Rash Beharee Ghose, Grish Chunder Mookerjee and *Bipro Doss Mookerjee* for Respondents.

The doctrine of the Common Law Courts in England under which the cause of action in respect to money lent, with or without interest, accrues the moment the money is lent, does not apply to suits in the Mofussil Courts in this country.

When money is lent re-payable on demand, with interest payable at a certain rate, so long as the borrower observes his part of the contract by paying interest, and so long as he is not apprised of the lender's desire to have back his principal sum, there is no cause of action, and limitation does not begin to run.

Jackson, J.—THIS case has been argued with much ability for the appellant by Baboo Hem Chunder Banerjee, and I have had the advantage on a previous occasion of hearing the same argument that he has addressed to us; but neither on the previous occasion nor now have they so commended themselves to my judgment, as to incline me to disturb the judgment of the Lower Appellate Court.

Four grounds of objection have been raised to the decision of that Court. The first is on the point of limitation. The suit as framed was a suit for money borrowed upon a *hath-chitta.* It is alleged that the defendants, being then associated in trading business, had borrowed by one of them, the defendant Ram Ruttun, a sum of money for the use of that business, which was to be re-paid upon demand; and it was further agreed that the defendants were to pay interest at the rate of 24 per cent. per annum.

It is contended that the claim was barred by limitation, inasmuch as the suit being commenced after the lapse of three years from the date of the loan, limitation arose under the 9th Clause of Section 1, Act XIV. of 1859; in other words, we are asked to sanction, in regard to transactions and suits for money lent in this country, the doctrine of the Common Law Courts in England, under which the cause of action in respect of money lent with or without interest accrues the moment the money is lent, and limitation begins to run from that time.

I need not give any other answer to this contention than that which is to be found in a passage from Mr. Austin's work on "Jurisprudence," to which the pleader of the respondent called the attention of the Court on the occasion when this case was first argued, and which is to be found at page 485 of the first Volume, 3rd edition, of Mr. Austin's Lectures. The passage runs thus:—

"In cases of obligation arising directly "from contract, it frequently happens that "the performance of the obligation is due "from the very instant at which the obliga-"tion arises. Or (speaking more accurately) "the time for performance is not deter-"mined by the contract, and performance "is due so soon as the obligee shall desire "it.

"For example:

"If a moveable be deposited with me in "order that I may keep it in safety, I am "bound, from the moment of the deposit, "to restore it to the bailor.

"If I buy goods and no time be fixed "for the payment of the price, I am bound "from the moment of the delivery to pay "the price to the seller.

"Now, in these and in similar cases, it "is impossible that the obligation should be "broken through intention or inadvertence, "until the obligee desire performance, and "until the obligor be informed of the desire. "For, strictly speaking, he is bound to per-

"form the given act, so soon as the obligee "shall wish the performance, and so soon "as he himself shall be duly apprised of "the wish. But according to the rule "which obtains in the Courts of Common "Law, the creditor may sue the debtor as "for a breach of the obligation without a "previous demand; the debtor being liable "in the action for damages and costs just "as he would be liable if performance "had been required, and the obligation "had then been broken through his own "intention or negligence."

"Now, as every right of action is founded "on an injury, here is a case of injury "without intention or inadvertence. For, "without a previous demand, or without "some notice or intimation that the creditor "desires performance, the debtor cannot "know that he is breaking his obligation "by not performing the act to which he is "obliged.

"This monstrous rule of the Common Law "Courts is justified by a reason which is not "less monstrous. For it is said that a previous demand were superfluous and needless, "inasmuch as the action is itself a demand. "The reason forgets that a right of action "is founded on an injury; that unlawful "intention or inadvertence is of the essence "of injury; and that, in all the cases which "I am now considering, there is no room for "unlawful intention or inadvertence until "the creditor desire performance, and until "the debtor be apprised of the desire."

It is admitted that there is no authority for applying the doctrine in question to suits in the Mofussil Courts in this country; and I should certainly not be the first to introduce it.

It seems to me that, in a case of this description, when *A* lends money to *B*, re-payable on demand with interest payable at a certain rate, and *B*, in pursuance of that agreement, pays interest to *A*, *A* making no demand for re-payment, no cause of action accrues to *A*, so that he becomes entitled to bring a suit. So long as the borrower observes his part of the contract by paying interest, and so long as he is not apprised of the lender's desire to have back his principal sum, I think there is no cause of action; the principal money has not become due, and the statute does not begin to run. I think, therefore, that the suit was not barred by limitation.

It is next contended that, as this suit was based on a *hath-chitta*, and in the judgment of the Lower Appellate Court that instrument was not found to be completely proved, the suit ought to have been dismissed; and we are referred to several cases in the 1st Volume of Hay's Reports. It seems to me that those cases are distinguishable from the present. In this case, the *hath-chitta* was merely part of the evidence by which the plaintiff's case was to be proved; and that, on failure to prove that particular document, he was not debarred from proving his claim by other evidence.

Then it was alleged that there was no other evidence on which the amount of the loan and the conditions of the loan could be found. But it seems to me that there was evidence. On that point, the judgment of the Lower Appellate Court is satisfactory.

It is stated also that the plaintiff's case failed as to proof of authorization from the defendant Tarinee to Ram Ruttun to borrow the money, or that the loan was incurred for the purposes of the joint business. It seems to me that upon that point there is sufficient evidence; and if it had not been for the judgment of the Court below, I should say that the *hath-chitta* had been proved.

I think plaintiff's case was clearly made out taking the whole of it together, and that we are not called upon to reverse the judgment.

I am reminded by my learned colleague that a strong point in plaintiff's favor, and one remarked upon by the Judge, is the persistent refusal by the defendants to produce their accounts.

The special appeal must be dismissed with costs.

Mitter, J.—I concur.

The 11th August 1870.

Present :

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Suit by lessee—Title—Onus probandi.

Case No. 272 of 1869.

Regular Appeal from a decision passed by the Officiating Judge of Tipperah, dated the 16th August 1869.

Dewan Shumdan Ali and another (two of the Defendants), *Appellants,*

versus

Mothooranath Dutt (Plaintiff), *Respondent.*

Baboo Rajendronath Bose for Appellants.

Baboos Sreenath Dass and *Nuleet Chunder Sein* for Respondent.

In a suit by the lessee of the purchaser of the rights and interests of the first defendant to obtain possession of some portions of land alleged to fall within the share of the zemindary so purchased, defendants contended that the plots which were the subject of suit, although falling within the ambit of the zemindary, did not, in fact, form a portion of it, but were lakheraj lands belonging to themselves by a title independent of the title to the zemindary. The evidence showed the principal defendant to have been in receipt of the rents and profits of the land in suit, as well as of his share of the zemindary.

HELD that the onus lay upon the defendants to show the alleged independent title: failing to do so, the *primâ-facie* title made out by the plaintiff ought to prevail.

Phear, J.—THE plaintiff in this case is the lessee of the representatives of one Moonshee Mahomed Nusseerooddeen, who in Aughran 1263 purchased the rights and interests of Sumdool Meah, the first defendant, in a certain share of the zemindary of Pergunnah Serail; and the plaintiff, as such lessee, seeks to obtain possession, as against the defendants, of some portions of land, which, he alleges, fall within the share of the zemindary so purchased by his lessor's predecessor.

The defendants admit the purchase of the zemindary by Moonshee Mahomed Nusseerooddeen; they also admit that the plaintiff's lessors are the representatives of Moonshee Mahomed Nusseerooddeen. But they say that the plots of land which are the subject of suit, although they fall within the ambit of the zemindary which was sold in 1263, do not, in fact, form a portion of it. And they further say they are, on the contrary, lakheraj lands belonging part to Sumdool Meah and part to other defendants, by a title entirely independent of the title to the zemindary.

The case appears to us to have been placed before the Lower Court very imperfectly by both sides. The evidence which we find on the record of the particular case before us is really so meagre and so unsatisfactory on the one side and the other, that it is exceedingly difficult to say whether either party has made out any rights by its aid.

It is, however, conceded by the pleaders both of the appellants and the respondent in this Court that the case was, with consent of parties, tried by the Judge, not only on the evidence which we may call the evidence proper to this case, but also upon the evidence which was given in another suit between Rowshun Bibee and others against the same defendants as those of the present case—a suit which was pending before the Judge on regular appeal at the time when this suit was being heard by him as a Court of first instance.

Upon reference to the record of this second case, there appears to be evidence which does, so far as it goes, show that the principal defendant, Sumdool Meah, had been in the enjoyment of the land which is now in suit, as well as of the rents and profits of the land which was admitted to belong to his share of the zemindary.

This being so, we think that, having regard to the fact that these portions of land lie within the ambit of the zemindary, the burden of proof is shifted from the plaintiff to the defendants; for this evidence makes out that the same person who is zemindar is also proprietor of them to the extent certainly of receiving the rents and profits. As they lie within the zeminhary, if he is proprietor of them by a title different from that by which he held the zemindary, we think that, at this part of the case, it lies upon him to show that title. Well, this burden is endeavoured to be discharged in more than one way.

For convenience' sake, the Judge has divided the lands, which are the subject of suit, into five different groups, designated by the letters A, B, C, D, and E.

With regard to the lands of Group A, the defence is that they were acquired by

a lady, Meher Jahn, the mother of Sumdool Meah, the principal defendant, by certain purchases, the deeds of which in two out of three instances are produced. The Judge is of opinion that these deeds are not genuine.

We have looked at them, and it certainly appears to us that these documents are very suspicious indeed in the features which they present; and when we enquire what is the evidence by which the defendants consider that they have proved them to be genuine, we find that there is none. The deeds have simply been filed. No witness speaks to the circumstance of their execution; no one even says anything about the custody in which they have been and from which they come. Under these circumstances, we think with the Judge that they are not proved to be genuine. We may add that these deeds are in the record of the second case to which we have referred, and it is some satisfaction to know that the Court of first instance in that case also came to the conclusion that they were fabrications.

The other portion of this Group A is said to be covered by two sunnuds, and to have been inherited by Meher Jahn. But the sunnuds are not produced, and as far as we can see there is no distinct evidence of this property ever having been separately enjoyed either by Meher Jahn's predecessor or by Meher Jahn after she had inherited it.

The second Group B is also property said to have belonged to Meher Jahn, a portion of it under two deeds dated respectively the 23rd Cheyt and 10th Bhadro 1246. These two deeds do not purport to convey the property to Meher Jahn. They are conveyances to Sham Ram and another person, and we do not find, we think we may say, evidence which can be called in any way specific, to show that although the persons in whose names the property was conveyed were Sham Ram and another, yet that Meher Jahn enjoyed the rents and profits.

On the other hand, there *is* evidence that the rents were paid to Sham Ram.

The second portion of Group B is said by the defendants to have been acquired by Meher Jahn from her father Kyanooddeen, who held it under a sunnud. That sunnud is not produced; and here again there is an absence of distinct evidence of separate enjoyment of this property, either by the father of Meher Jahn, or by Meher Jahn herself after the death of her father.

The Judge thought that the allegations of title made by the defendants in respect of this Group are not made out, and we concur with him in this respect also.

The third Group C and fourth Group D comprised property in Choteeparah.

The Judge arrived at the conclusion in reference to the lands classed in these Groups, as well as the others, that the defendants had failed to make out the title which they alleged; but he thought, on the whole of the evidence, that the plaintiff had not shown any enjoyment of this property by the person through whom he claimed within the period of 12 years before suit, and accordingly the Judge held, as regards this portion of the property, that the plaintiff's suit was barred.

We observe that the same conclusion was reached by the first Court in the other suit, which is not before us, upon substantially the same evidence as that which we are called upon now to consider.

In view of the opinion upon this point of adverse possession expressed by the Judge, we are not prepared to say that the evidence does, in fact, bring the plaintiff's cause of action within the period of limitation. The evidence as to this part of the case is pretty nearly as vague as that which bears upon the remainder; but we cannot say that the Judge was wrong in his estimate of its (as we may say) negative value, when he expresses the opinion that it does not save the plaintiff's suit from the operation of the statute.

With respect to the remaining Group E, the defendants simply said that they had nothing to do with it; but the Lower Court has, notwithstanding, given a decree against the defendants.

No specific appeal has been raised against this part of the decree, and we, therefore, find it unnecessary to interfere with it. Thus excluding that portion of the land in respect of which the plaintiff's suit has been held to be barred by lapse of time, it seems to us that the Judge below was right in his conclusion that the material allegations of title made by the defendants are not established.

If they are not, then the *primâ-facie* title, of which we have already spoken as having been made out by the plaintiff, ought to prevail. Therefore, we think,

on the whole, that we ought not to disturb the decree of the Lower Court in any respect, and that this appeal must be dismissed with costs.

There is a short cross-appeal in this case against the judgment of the Lower Court in reference to the lands of Choteeparah. But what we have already said disposes of that appeal. It must be dismissed.

Having regard to the fact that the land which is the subject of this cross-appeal, is very small, comparatively, and as this cross-appeal has not in any way increased the appellant's costs in this appeal, we make no difference in our order as to costs.

The 12th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Joint property—Limitation.

Case No. 937 of 1877.

Special Appeal from a decision passed by the Judge of Jessore, dated the 26th April 1870, affirming a decision of the Moonsiff of that District, dated the 30th November 1869.

Sookh Lall Bhoojwalla (Defendant), *Appellant*,

versus

Goolzar Bhoojwalla (Plaintiff), *Respondent*.

Baboo Khetter Mohun Mookerjee for Appellant.

Baboo Ramanath Bose for Respondent.

Where members of a joint family reside on different portions of the family property, one taking charge of one shop and another of another, one member cannot be allowed to set up the law of limitation, and exclude his brother from participation of profits.

Couch, C. J.—A GREAT misapprehension seems to me frequently to exist about this law of limitation. This is a case in which we must consider upon the findings of the Lower Courts, that there were two shops which were the joint family property of two brothers. One brother had charge of one shop, and the other brother had charge of the other; and it is admitted that the plaintiff had been in possession of one of them. That is such an enjoyment of a portion of the family property as would prevent the law of limitation from applying. If, from motives of convenience, the members of a joint family reside on different portions of the family property, one of the members taking charge of one shop to carry on trade there, and another taking charge of another shop to carry on trade there, the member of the family who has the more valuable shop cannot be allowed to set up at the end of 12 years the law of limitation, and exclude his brother from participating in the profits of that shop. It would be most unjust if the law of limitation could be made to operate in that way.

I think there is no ground for saying that the issue of limitation has been improperly tried by the Lower Courts. The appeal must be dismissed with costs.

Jackson, J.—I am of the same opinion.

The 12th August 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Jurisdiction—Objection.

Cases Nos. 600 and 657 of 1870.

Special Appeal from a decision passed by the Judge of Patna, dated the 2nd March 1870, affirming a decision of the Moonsiff of Behar, dated the 25th April 1868.

Naunhoo Singh and another (Defendants), *Appellants*,

versus

Tofan Singh (Plaintiff), *Respondent*.

Mr. C. Gregory, *Baboos Hem Chunder Banerjee* and *Bhowanee Churn Dutt* and *Moonshee Mahomed Yusuf* for Appellants.

Messrs. R. T. Allan and *R. E. Twidale* and *Baboo Mohesh Chunder Chowdhry* for Respondent.

In a suit in a Moonsiff's Court on a right of pre-emption, in which plaintiff under-valued his claim, the defendant, without objecting to the jurisdiction, allowed the case to go to trial, and, after passing through the subordinate Courts, to come up to the High Court in special appeal. It was remanded on a question of fact, and came up again in special appeal when the point was raised for the first time (though not taken in the petition of appeal) that the suit was not cognizable by the Moonsiff, and therefore that all that had been done had been done without jurisdiction.

HELD that the defendant was not at liberty to waive jurisdiction, and that the objection must be allowed to be taken even at this late stage.

HELD that the suit having been beyond the Moonsiff's jurisdiction, his judgment was not legal, and his decree, in the eye of the law, no decree at all and of no legal effect.

Kemp, J.—UPON these appeals coming on for hearing, Mr. Gregory, the pleader for the special appellant, applied to the Court for permission under Section 374, Act VIII. of 1859, to be heard in support of an objection not taken in the petition of special appeal. The Court, after hearing the very full and able arguments on both sides, took time to consider its judgment. Looking to the importance of the point, and more particularly to the circumstance of the very late stage at which the objection was raised, the Court thought it proper to consult the learned Chief Justice. Having done so, the learned Chief Justice called the attention of the Court to Mitford's Chancery Pleadings, page 175, which lays down certain rules with reference to the jurisdiction of the Courts of England. Page 176 states: "Demurrers "of this kind (that is, as to jurisdiction) "are very rare; for the want of jurisdiction can hardly appear "on face of the bill,* "at least so conclusively as is necessary to deprive the Chancery, a Court of general "jurisdiction, of cognizance of the suit; "and a demurrer for want of jurisdiction "founded on locality of the subject of the "suit, which alone can exclude the jurisdiction of the Chancery in a matter cognizable in a Court of equity, has ever been "treated as informal and improper.

* In the case before the Court, the want of jurisdiction appears on the face of the plaint.

"This, however, can only be considered "as referring to cases where *circumstances* "*may* give the Chancery jurisdiction, and "not to cases where *no circumstances can* "have that effect. Thus, the counties palatine having their peculiar and exclusive "Courts of Equity under certain circumstances, which will be more fully considered in another place, the Court of Chancery will not interfere when all those "circumstances attend the case, and they "are shown to the Court; though, if those "circumstances are not shown, or if they "are not shown in proper time, and the "defendant, instead of resting upon them "and declining the jurisdiction, enters into "the defence at large, the Court, having "general jurisdiction, will exercise it."

Now, in this case the plaintiff sued on his right of pre-emption. He sued in the Moonsiff's Court—a Court of limited and not of general jurisdiction, valuing his suit at Rupees 200, the said sum being ten times the sudder jumma of the estate which is permanently settled. The defendant, without taking objection to the jurisdiction of the Moonsiff, allowed the case to go to trial, and after passing through the subordinate Courts, the case came up to this Court in special appeal. It was remanded to try a question of fact as to the character of the possession of the vendor. The Court below has found on this issue, and the case has again come up in special appeal, and the point is taken for the first time by Mr. Gregory, the pleader for the special appellant, that this suit was not cognizable by the Moonsiff, and therefore all that has been done in the case has been done without jurisdiction.

In the course of the argument a number of decisions of different Benches of this Court have been quoted. We think the decision at page 490, Volume VII., Weekly Reporter, disposes of this plea of non-jurisdiction most conclusively. In that decision, passed by Justices Bayley and Markby, the learned Judges laid down that the plea of non-jurisdiction can be taken at any stage, and in that view they reversed the decision of the Court below. The judgment was given by Mr. Justice Bayley and concurred in by Mr. Justice Markby. There is also a decision to be found at page 15, Special Number of the Weekly Reporter, in which the late Chief Justice, Mr. Justice Bayley, and Mr. Justice Kemp were present, holding very clearly that "acts done without jurisdiction "are acts of no legal effect at all, and must "be set aside."

In the passage which has been already quoted from Mitford's Chancery Pleadings, it is clearly laid down that, "where no circumstance can give the Chancery jurisdiction, it will not entertain the suit even though the defendant does not object to its deciding on the subject." It is clear that a defendant is not at liberty to waive jurisdiction.

In the case before us, it has been further argued that, under the Stamp Act, Act XXVI. of 1867, all suits for the recovery of immoveable property, whether paying revenue to Government or not paying revenue to Government, are to be valued

according to the market-value of the property in suit. Further, it is laid down that in permanently settled estates, ten times the sudder jumma shall be taken to be the market-value of the estate, unless and until the contrary shall be proved. It is, therefore, clear that this is a question of fact which has to be proved. In this case, the defendant not having objected to the valuation put upon the property in dispute by the plaintiff as representing the market-value thereof, no evidence was gone into, and therefore there has been no decision on the point whether the market-value had been correctly estimated; but in this case it is manifest that any further inquiry on the point is wholly unnecessary. The plaintiff in his plaint clearly states that the property has been sold for Rupees 2,000—that that is the consideration-money; and that he is ready and willing to deposit that sum in Court as representing the value of the property respecting which he claims the right of pre-emption. The plaintiff has, therefore, placed his own valuation on the property, and it is obvious that Rupees 200, which represents ten times the sudder jumma of the estate, is not the market-value thereof. There is a decision on this point which is precisely on all fours with the present case, to be found at Volume III., Bengal Law Reports, page 143, Appendix, decided by Justices Glover and Mitter.* The learned Judges held that, according to plaintiff's own showing in that case, the value of the property was Rupees 2,200, and not Rupees 250 which represented ten times the sudder jumma. They added that "the very best proof that the value of the property was Rupees 2,200 consisted in the fact that the plaintiff himself offered to pay that sum," just as the plaintiff does in this case—the only difference being that the plaintiff in this case asks to pay Rupees 2,000 instead of Rupees 2,200, the sum offered by the plaintiff in the other case. Taking this view of the case, we hold that, by the plaintiff's own admission, the market-value of the property claimed is Rupees 2,000, and not Rupees 200, and therefore the Moonsiff had no jurisdiction to try the suit. If we uphold the decision of the Moonsiff, we shall be upholding an act done without jurisdiction, and therefore an act of no legal effect at all. Under these circumstances, we hold, however reluctantly, that this objection as to jurisdiction must be allowed to be taken even at this late stage of the case.

The decision of the Moonsiff is accordingly reversed as passed without jurisdiction, and the plaintiff's suit dismissed.

Bayley, J.—I have a few words to add in regard to this case.

It is certainly unusual and extremely undesirable, especially in a special appeal where the object of the law is, as expressed in the Code of Civil Procedure, that the objections to the judgments of the Lower Courts should be specifically and distinctly recorded in the petition of special appeal, that this point of non-jurisdiction should be admitted after no

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* The 14th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Case No. 700 of 1869.

Special Appeal from the decision of the Subordinate Judge of Gya, dated the 29th December 1868, affirming a decision of the Moonsiff of that District, dated 27th March 1868.

Aujud Singh and another (Plaintiffs), *Appellants,*

versus

Depun Singh and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for the Appellants.

Baboo Hem Chunder Banerjee for the Respondents.

Glover, J.—THE only point taken in this special appeal is that the Judge has erroneously dismissed the claim on the ground of under-valuation. The plaintiff, who is the special appellant, contends that he has fulfilled the requirements of the law by valuing his suit, which is for an estate paying revenue to Government, at ten times the sudder jumma, *i. e.*, the sudder jumma being 25 rupees, his valuation of the suit at 250 rupees is correct and proper.

It appears to me that this contention fails on the plaintiff's own statement of his case. The note of the Stamp Act which the special appellant refers to, after laying down the amount of stamp-duty to be paid when the property is an estate paying revenue to Government, where the settlement is temporary, and where it is permanent, goes on to say that such and such amount shall be taken to be the market-value of such property, unless and until the contrary be proved. This case is a suit for pre-emption, and the plaintiff claims the right of prior purchase over this property at the price of 2,200 rupees. According to his own showing, therefore, the value of the property is not 250, but 2,200 rupees. The very best proof that this is the value of the property is that he is asking to pay that sum for it. It appears to me that this case comes exactly under the words of the law; and that, although 250 rupees may represent ten times the sudder jumma of the estate, it has most certainly been proved by the plaintiff's own admission that the value is very much higher. The decision of the Court below is therefore affirmed; but considering that this objection was not taken in the Court of first instance, each party must pay his own costs.

Mitter, J.—I concur. The suit was clearly under-valued and brought in the wrong Court. It ought to have been brought in the Court of the Subordinate Judge.

less than five adjudications in the Courts without any objection whatever being pressed in any Court on that point. Another difficulty is that under Section 374 permission must be obtained from the Court to add a ground not taken in the petition of special appeal, but there is a peculiarity in the present case. The jurisdiction of the Moonsiff extends to cases of 1,000 rupees. His decision in a case of Rupees 1,001 is ordinarily no legal judgment at all.

Then comes the question whether, according to the words of Note A, Section 6, Act XXVI. of 1867, the value of the property is proved to be Rupees 2,000. The plaint leaves no doubt on this point. The market-value of the property, even at the price at which the plaintiff has chosen to calculate it, is stated to be Rupees 2,000, and he himself has offered in his plaint to pay that sum, although for some reasons of his own he has chosen to value the suit at Rupees 200, being 10 times the sudder jumma of the property. I think, therefore, that we can only take the property as representing a market-value of Rupees 2,000. This being clearly beyond the jurisdiction of the Moonsiff, we should not be justified in affirming a decree which, in the eye of the law, is no decree at all, and is of no legal effect. On the authorities, therefore, quoted by Mr. Justice Kemp, I think the plea of non-jurisdiction in the Moonsiff is a good plea.

The only point that remains is whether, under Section 374, Act VIII. of 1859, we should give permission to allow this objection at this late stage, after five judgments have been recorded on the whole case, this point of jurisdiction not having been once raised on those five occasions. I have always held that both in justice to the suitors and in duty of the Court, we should, before we decline to allow any such additional objection under Section 374, know what that objection is. Thus, having heard the character of the objection, and seeing from the record the fact that the Moonsiff has really tried and decided a case he could not legally decide, and that to ignore the fact would involve the difficulty that we should be upholding a judgment as legal which is of no legal effect at all, there is no avoiding finding that the Moonsiff acted without jurisdiction, and his judgment is no judgment at all in law.

I agree, therefore with Mr. Justice Kemp in reversing the judgments of the Lower Courts as passed without jurisdiction, but under the circumstances, considering that this point of non-jurisdiction was not taken by the special appellants until at this very last stage of the case, I think the special appellants should pay to the respondents all costs.

Kemp, J.—I agree with Mr. Justice Bayley in the order as to all costs being made payable by the special appellants.

The 13th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Jurisdiction—Non-commissioned officer in Civil employ—Execution.

Reference to the High Court by the Judge of the Small Cause Court at Bhaugulpore, dated the 30th June 1870.

Mr. M. A. Cohen, *Plaintiff*,

versus

Mr. McCarthy, *Defendant*.

A non-commissioned officer or soldier not serving in the army, but employed in the Civil Department, and residing beyond Military Cantonments, is amenable to the jurisdiction of the Civil Court, even in cases below thirty pounds.

Execution of a decree against the civil pay of such non-commissioned officer is entirely in conformity with law.

Reference.—THE state of the case referred to is as follows:—

There is one Mr. McCarthy at Bhaugulpore working as overseer in the Public Works Department under Captain Hills, Executive Engineer, against whom several cases instituted by Mr. M. A. Cohen, Mr. Nelson, and others, have been decided by this Court without any objection by the said Mr. McCarthy regarding the want of jurisdiction of this Court; but, however, Captain Hills has written two letters to this Court, alleging that Mr. McCarthy being a serjeant—non-commissioned officer of the army—was amenable only to the Court of Requests, and not to any Civil Courts, in cases below £30 according to the Mutiny Act, as stated in his letter dated 22nd instant; but in my opinion any soldier or non-commissioned officer, so long as he is not serving in the army, but has

a civil employment, and resides beyond Military Cantonments, is within the jurisdiction of Civil Courts even in cases below £30, as I have stated it fully in my letter No. 52, dated 27th instant, to Captain Hills. Copies of above letters are herewith enclosed.

Further, Captain Hills, in his second letter No. 1483, dated 28th instant, says that Mr. McCarthy's case must have been disposed of by the Court of Requests; but I cannot understand that, when Mr. McCarthy is dealing with the people at Bhaugulpore, a Civil station, how can a Court of Requests be held in a Civil station.

Captain Hills, in his second letter No. 1483 of the 28th instant, has added one objection more—that the subsistence-allowance of the Military Department of Mr. McCarthy could not be deducted in satisfaction of a Civil Court's decree; in reply to which, and upon Mr. McCarthy's request, I have written yesterday two letters to Captain Hills to let me know the amount of money which might have been deducted from his subsistence-allowance in order to make it refunded to Mr. McCarthy, as I think the subsistence-allowance is a thing merely as a pension to subsist upon. So on this point I agree with Captain Hills.

In order to clear up the matter in the above two points, I have the honor to frame the following two questions for reference:—

Whether a non-commissioned officer or soldier originally belonging to Her Majesty's Army, but now not serving in the army, but employed in the Civil Department, and residing beyond Military Cantonments, is amenable to the jurisdiction of Civil Courts, even in cases below thirty pounds or not.

If he be considered within the jurisdiction of Civil Courts as long as he is employed in the Civil Department, and resides in a Civil station, can a deduction be made from his subsistence-allowance or whatever he receives from his Military Department?

The judgment of the High Court was delivered as follows by—

Jackson, J.—We consider that the proceedings of the Small Cause Court in this case in no way contravene the provisions of Section 40 of the Military Act. Whether Sergeant McCarthy be a soldier or person within the meaning of that Clause or not, it is clear that the Court was acting within its competency.

The Section only provides that no such soldier or other person shall be liable to be taken out of Her Majesty's service by any writ, &c.; and provides that any plaintiff, upon notice, may proceed in any action or suit to judgment, and have execution other than against the body or military necessaries or equipments of such soldier.

In this case, execution has been directed only against the civil pay of Sergeant McCarthy, and such execution seems to be entirely in conformity with law.

There seems to be also no reason to doubt that the defendant was personally subject to the jurisdiction of the Small Cause Court.

The 15th August 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Clause 6, Section 23, Act X., 1859—Jurisdiction.

Case No. 450 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 17th January 1870, affirming a decision of the Deputy Collector of that District, dated the 29th September 1869.

Ram Dehul Pandey and another (Defendants), *Appellants,*

versus

Kashee Rawut (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sein for Appellants.

Baboo Huree Mohun Chuckerbutty for Respondent.

A suit brought under Clause 6, Section 23, Act X. of 1859, to recover possession of land where, although the servants of the zemindar were made nominal defendants, the real defendants were parties who were not shown to have been in receipt of the rent, and who set up an entirely different and independent right, was held not to be cognizable by the Collector, but by the Civil Court.

Kemp, J.—THIS was a suit under Clause 6, Section 23, Act X. of 1859, to recover possession of land from which the plaintiff had been illegally ejected by the person entitled to receive rent for the same.

The plaintiff made Ram Dehul Pandey, a gomashta, and Jhoomuck Singh, a peon, defendants; because he alleged they were acting as servants of Choonee Singh and Baboo Soorjo Pershad, the maliks. It is alleged that, as regards Soorjo Pershad, he is not the malik at all, that he is the purchaser of the *birt* rights of Radha Geer. The plaintiff claims under a pottah from Heera Geer.

It appears that the original mohunt was one Jumna Geer; and on his death there was a contention between Heera Geer and Radha Geer with regard to the *birt* lands. A suit was brought by Heera Geer against Radha Geer for the *guddee* of the *muth;* but there was no decision whatever as to whether Soorjo Pershad's title, as derived from Radha Geer, or the plaintiff's title as derived from Heera Geer, was to prevail. Moreover, the suit abated on the death of Heera Geer. The Judge has found that, because Soorjo Pershad is *the son* of the malik, the suit will, therefore, lie under Clause 6, Section 23, Act X. of 1859. There are many questions which have to be decided in this suit, which the Civil Court alone can take cognizance of. The mere fact of Soorjo Pershad being the son of the malik will not make him a party legally entitled to receive rent from the plaintiff—and that is the only party contemplated by Clause 6, Section 23, Act X. of 1859. It will also have to be decided as to whether the title of the plaintiff under the pottah from Heera Geer is a better title than that of Soorjo Pershad derived from Radha Geer. This is a question which the Civil Court alone can decide.

In Volume III., Weekly Reporter, page 8, Act X. Rulings, there is a decision by Bayley and Phear, JJ., holding that Clause 6, Section 23, Act X. of 1859, "is confined in its application strictly to "cases where the ejectment complained of "is effected solely by the person to whom "plaintiff's rent is payable." There are also decisions in Volume VI., page 19, and Volume X., page 49, concurring in that view.

Now, it is clear in this case that, beyond the fact that Soorjo Pershad is the son of the malik, it is not shown that the rents of the plaintiff were paid to him. The decisions quoted by the pleader for the special respondent at Volume VI., Weekly Reporter, page 291, and Gap Number, Weekly Reporter, page 10, have nothing whatever to do with the question before the Court. In those cases, it was held, and properly held, that, if the ejectment be the substantial act of the zemindar, the party in receipt of the rent, it matters not whether the parties actually dispossessing the tenant are his servants or not. In this case, although the servants of the zemindar were made nominal defendants, the real defendants were parties not shown to have been in receipt of the rent, and who set up an entirely different and independent right. The suit was not cognizable by the Collector, but by the Civil Court. The judgments of the Lower Courts are reversed, and the appeal decreed with all costs.

The 16th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Mortgage—Execution—Equity of redemption.

Case No. 62 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Cuttack, dated the 29th December 1869.

Narain Sahoo and another (Defendants), *Appellants,*

versus

Ochoot Sahoo and another (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboos Onookool Chunder Mookerjee, Nil Madhub Sein,* and *Ram Chunder Mitter* for Appellants.

Baboos Unnoda Pershad Banerjee and *Obhoy Churn Bose* for Respondents.

G borrowed money from *S*. He then borrowed money from *D* mortgaging as security the property in suit. After that he borrowed from plaintiffs, executing a bond by which he again mortgaged the same property. Subsequently plaintiffs obtained a decree by which the mortgaged property was declared liable to sale for the amount decreed, sold the property in execution, and purchased it themselves.

They were disturbed from possession by defendants in execution of a rent-decree under which they ousted plaintiffs, and got their own names registered as proprietors. Plaintiffs now sue for declaration and enforcement of their rights as purchasers at the above sale.

Defendants claimed as purchasers in execution of a money-decree obtained against *G* by the first creditor *S*, alleging that they paid off the money due to the second creditor *D*, and were entitled to hold possession, their purchase having been previous to that of the plaintiffs.

HELD that, in purchasing the rights and interests of *G*, defendants purchased his right to redeem property already subject to two mortgages, and as they purchased with full notice, they could only retain possession by paying off both mortgages.

HELD that plaintiff purchased, not merely the equity of redemption, but *G's* rights and interests as they were when the mortgage was created subject to the mortgage held by *D*, but free from subsequent encumbrances.

Loch, J.—IT appears that one Gobind Pershad Roy borrowed money on various occasions, of which we need only mention three. The first loan apparently was from one Sookdeb Lall somewhere about the year 1865. He also borrowed from one Dinonath Sircar on the 25th May 1866, and as security for that loan mortgaged the property now in suit; and on the 25th February 1867, he borrowed 5,000 rupees from the plaintiffs in this case, and executed a bond by which he again mortgaged the same property. On the 10th August 1867, the plaintiffs obtained a decree by which this mortgaged property was declared liable to sale for the amount of the decree; and, on the 17th January 1868, the plaintiffs, in execution of their decree, put up this property for sale, and purchased it themselves; and on the 8th April of the same year, after obtaining a sale-certificate, they entered upon possession, and were disturbed from that possession by the defendants, who obtained a decree for rent against one of their ryots, and so they ousted them, the plaintiffs, and also got their own names registered in the Collector's book as proprietors of this property. The plaintiffs, therefore, sue for declaration and enforcement of their rights by purchase made at the sale held under the mortgage in question. They also sue for a reversal of the summary and mutation order referred to in their plaint, and they sue for possession of the mortgaged property, *viz.*, 5 annas and 4 pie of the zemindary, and for the removal of the names of the defendants Nos. 2 and 3 from the Collector's register and for the registration of their own names in their stead.

The defendants allege that Sookdeb Lall, from whom Gobind Pershad Roy borrowed money, obtained a money-decree against him on the 3rd April 1866; that, in execution of that decree, the rights and interests of the judgment-debtor were put up for sale, and purchased by the defendants on the 14th August 1867; that being aware of the existence of the mortgage held by Dinonath Sircar upon this property, they, on the 8th February 1868, paid off the money due to him, and are entitled to hold the property, they having purchased it previous to the purchase made by the plaintiffs.

The Lower Court has given a decree to the plaintiffs, and an appeal has been filed by the defendants against that decision.

Three issues were fixed by the Lower Court. The first and the second are not now contended for, and the third is the only one which we have to consider in the form in which it was put before us.

The questions raised by the appellant before us are—first, whether the plaintiffs are entitled to preference on account of the mortgage which they held; and secondly, if they are, whether, as the defendants have paid off the mortgage of Dinonath Sircar which is of a prior date to that of the plaintiffs, the defendants may not be considered to stand in the shoes of that mortgagee, and as between the rival mortgagees, are not entitled to priority?

We may observe, before going further, that when the defendants purchased the rights and interests of the judgment-debtor Gobind Pershad on the 14th August 1867, the plaintiffs came into Court, and there made known that the property was mortgaged to them, and was made liable to sale under their previous decree, so that, when that property was sold in execution of the decree held by Sookdeb Lall, it was sold with a notice to defendants, the purchasers of the mortgage and lien held by the plaintiffs. We may observe, further, that, when the plaintiffs put up this property for sale in execution of their own decree, the defendants intervened, and so at that time became acquainted with the fact that the property was then to be sold in satisfaction of that mortgage.

With regard to the first point raised by the appellant, it has been contended before us that the decree held by the plaintiffs was one obtained under the provisions of Sections 52 and 53 of Act XX. of 1866; that a decree obtained under those Sections of that law cannot be framed in the way that this decree has been framed, because a decree under those special Sections can be passed only for the amount of the money claimed, and the Judge passing the decree has no authority to make any particular property liable for the liquidation of the amount of the decree; and in support of this proposition

a case is quoted from 11 Weekly Reporter, page 222.

Now, in the first place, the Court are not at this time sitting in appeal upon that decree, nor can it in any way alter the terms of the decree; it is a decree, and as it stands we must accept it. We have no authority, in the suit now brought before us, in any way to pronounce whether that decree was properly or improperly drawn up. But, further, on looking into the record of the former litigation, we find that the procedure taken in litigation was not the procedure that is prescribed by Sections 52 and 53. In this case the Court and the parties proceeded as in a suit brought under the provisions of Act VIII. of 1859. Summons was served upon the defendant, who made his appearance in Court, and confessed judgment, and consented that a decree should be entered up against him in the shape in which the decree is drawn up for the amount. So that the objection now raised as to the form of the decree falls to the ground, for here was a decree that was passed in the presence of both parties, and passed by a Court that had jurisdiction to make the decree.

It is then urged that, as the defendants purchased on the 14th August 1867 the rights and interests of the judgment-debtor, Gobind Pershad Roy, there really remained nothing for the plaintiffs to purchase in 1868. But what was it that the defendants purchased on that occasion? They purchased what is called the rights and interests of the debtor, *viz.*, the equity of redemption; for that was all that he had at that time; and they, therefore, purchased his right to redeem this property which was subject to two mortgages, namely, the mortgage of Dinonath Sircar and the mortgage of the plaintiffs, and as observed before, they purchased it with full notice of the existence of the plaintiffs' mortgage; and therefore, if they hoped to retain possession of the property, they could do so only by paying off these mortgages. They did pay off the mortgage due to Dinonath Sircar, and they had opportunity given them to pay off the mortgage due to the plaintiffs, for they were apprised of the existence of that mortgage when they purchased, and also when the property was put up for sale by the plaintiffs.

On the other hand, what was it that the plaintiff purchased? According to his certificate of sale, he purchased the rights and interests of the debtor. Now, what were those? As the decree declared the lands which had been mortgaged liable for the liquidation of that decree, he purchased the rights and interests of the debtor as they were when the mortgage was created. He did not merely purchase the equity of redemption, but he purchased what the debtor had when he made that mortgage to him; and this view is supported by a case reported in I. Bengal Law Reports, page 200.* The plaintiff then purchased the property as it stood when it was mortgaged to him, and that was subject to the mortgage held by Dinonath Sircar, but, of course, free from all incumbrances created subsequent to the date of that mortgage.

But it is urged that the defendants were no party to the suit brought by the plaintiff against Gobind Pershad. This is true; but we think it will avail the defendants nothing in this case, for this simple reason that, when they purchased, they purchased with notice, and when the estate was sold, it was sold with notice to them; and we think, therefore, that, under the decree which they obtained, and under which this property was sold, the plaintiff is entitled to have the preference.

Then comes the second question: as the defendants have paid off the mortgage held by Dinonath Sircar, which was prior in date to the mortgage of the plaintiff, whether, in equity, they are not entitled to priority. We do not think that they are. But we think that there is this equity between them and the plaintiff, and it is admitted by plaintiff, the respondent in this case, that it is so, *viz.*, that the defendant should be recouped the sum which he had paid on account of the mortgage of Dinonath Sircar. We, therefore, think that the decree of the Lower Court must be modified to this extent, that the plaintiff will obtain possession of the property, but that he must first make payment to the defendants of the principal sum of Rupees 3,380, with interest at the rate of 6 per cent. per annum from the 8th February 1868 up to the date of payment.

Looking at all the circumstances of the case, we think that the parties should bear their own costs in both the Courts.

* 10 W. R., p. 291.

The 16th August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Review — Grounds of admission — Error— Additional evidence.

Case No. 816 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 8th February 1870, reversing a decision of the Moonsiff of Russoolgunge, dated the 8th April 1869.

Gunesh Ram Surmah (one of the Defendants), *Appellant,*

versus

Rohinee Dassee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Nuleet Chunder Sein for Respondent.

Where a Subordinate Judge admitted a review on the representation of plaintiff that he (the Judge) had made a mistake as to the subject of a certain dagh in a Government Halabadee chitta, the applicant filing with his petition for review another chitta and other evidence for the purpose of convincing the Court that it had made an error:

HELD that an error of this kind was sufficient to found the jurisdiction of the Court to entertain the review.

HELD that the plaintiff was not in fault for not having produced previously the additional evidence which was not originally necessary to the proof of his claim.

Phear, J.—IN this case, the Lower Appellate Court at first dismissed the plaintiff's suit, but afterwards, on a representation made by the plaintiff, admitted a review, and, on review, gave the plaintiff a partial decree. The Subordinate Judge states how this came about in the following words:—

"I affirmed in this suit the Moonsiff's "decision on the 19th August 1869. The "plaintiff, having shown on the 16th of "November of the said year that I had com-"mitted an error in the trial, applied for a "review of judgment. I served the defend-"ants with notice, and proceeded to try the "case in their presence. I found that I had, "in fact, fallen into a grievous error. As "my judgment was incorrect and erroneous, "I reversed my decree of the said 19th "August. I have undertaken to re-try this "case, and considered most attentively the "oral pleadings of the vakeels."

It is now objected on special appeal that the Subordinate Judge had not sufficient ground in law to admit a review; also that, if the review was regularly admitted, he afterwards decided the case on additional evidence which was improperly received by him, and was not legally proved.

As to the first objection, it seems that the review was admitted simply on a representation made by the plaintiff that the Subordinate Judge had mistaken the subject of a certain dagh 1742 in the Government Halabadee chittas.

In order to show that the Subordinate Judge had made this mistake, the plaintiff filed with his petition for review another Halabadee chitta covering the ground which was next adjoining the dagh 1742, and also some other documentary evidence.

It is now said that no reason has been given by the plaintiff why he did not produce this additional evidence previously to the application for review; and two decisions of this Court have been relied upon to make out that, if a review is granted for the purpose of receiving fresh evidence in a suit, it must be strictly shown that the applicant was not able to produce that evidence in Court at the first trial.

The two decisions thus referred to apply to an entirely different case from the present. They apply to a case where the applicant for review asks the Court to alter its judgment simply on account of this additional evidence; and when that is the case, the application can only be brought within the terms of Act VIII. of 1859 by making out that this additional evidence was not available to the party desirous of producing it at the first trial.

Here the ground of review is not that the Court ought to pass a different order in consequence of the additional evidence, but that it ought to pass a different decision on the very evidence which was before it in the first instance, by reason of its having made a mistake and given a meaning to that evidence which it did not intrinsically bear. The additional evidence which is produced by the applicant for review is produced simply for the purpose of convincing the Court that it *had* made the error to which I have referred. But an error of this kind is amply sufficient to found the jurisdiction of the Court to entertain the review. It seems to me, therefore, that the special appellant's first objection is not valid.

The second objection is that, the review having been granted, the Court improperly took evidence at the re-hearing of the case without assigning a sufficient reason for so doing; and it is said on the authority of a case reported at page 370, X. Weekly Reporter, that evidence received by an Appellate Court without that Court's recording its reason for receiving it is, according to the provisions of Act VIII. of 1859, not legal evidence to justify the Court in founding a decree upon it.

That decision does not go to that length, and it was not, I think, intended by the Judges who determined that case to say that evidence received by the Appellate Court without recording its reasons was not legal evidence.

The Court there thought that the course which the Lower Appellate Court had taken, entirely unexplained as it was, was such as to invalidate the judgment. The High Court was of opinion that there had not been a proper trial by the Lower Appellate Court, and remanded the case to that Court for re-trial. Clearly, if the Lower Appellate Court, without good reason and improperly, takes or procures evidence additional to that which the parties themselves adduced in the Court of first instance, this would constitute an error in the investigation which this Court ought, on special appeal, to correct, if the decision on the merits of the case was affected thereby.

In another decision reported, I think, in the same volume, though I am unable to refer to it at this moment, it was held that, if the Lower Appellate Court recorded that it had reason for sending for fresh evidence, although it did not state what that reason was, there was a sufficient adjudication of the contingency which justified an Appellate Court in sending for evidence to make the evidence so sent for proper material upon which to determine the matter in question between the parties.

Now, here it is clear enough what the reason was which caused the Lower Appellate Court to receive this new evidence. The reason was that the Court was convinced, it had fallen into error with regard to the construction of a Halabadee chitta, and the additional evidence was most important to establish the fact of that error having been committed; and also, I may say, it is quite obvious that the plaintiff could not have been in fault for not having produced this evidence before, because it was not evidence which was originally necessary to the proof of the claim which he set up in his plaint.

The last objection is that this evidence is not properly proved. But this objection does not appear in so many words in the written grounds of appeal, neither was it made, so far as I can discover, before the Lower Appellate Court, and yet that Court says distinctly that it served the defendants with notice, and proceeded to try the case in the presence of both parties. It seems, therefore, that there is no room for speculation on this point, as there might be in many cases of special appeal which come into this Court, for the Lower Appellate Court has distinctly recorded in the words quoted in the earlier part of my judgment that the defendants were present on the re-discussion of the case consequent on this fresh evidence, and had full opportunity to object to it, if advised so to do.

In addition to the three objections to which I have specifically referred, the special appellant also urges that there is not sufficient legal evidence on the record, even with that produced on the review, to support the judgment which the Lower Appellate Court has given.

No doubt, it is a matter of remark that this additional evidence, slight as it is, leading the Court to put a new construction upon one chitta only, should have sufficed to change its conclusions as to a considerable portion of the plaintiff's case. It would seem from the discussion of the evidence which has been effected by the special appellant's Counsel that the Lower Appellate Court now believes witnesses whom on the first occasion it disbelieved. If this be so, it is a singular change no doubt, but I am bound to say that—having regard only to the analysis of the case which the Subordinate Judge has sent up to us in his judgment on review—it appears to me that his present conclusions are justified by the evidence to which he refers. I cannot possibly say in the face of this evidence, and the apparently reasonable conclusions which the Subordinate Judge draws from it, that his decree is so wrong in law that we ought here, on special appeal, to set it aside.

On the whole, then, it appears to me that the appellant has failed to make out sufficient grounds to induce us to interfere

with the decision of the Lower Appellate Court, and his appeal should be dismissed with costs.

Jackson, J.—I quite concur.

On the point of the review, I only wish to state that the review seems to have been admitted to allow the applicant for review to show what he said he could show by the additional evidence which he put in, namely, that there was a mistake in certain evidence which had been put in at the first hearing of the case.

He founded his claim on certain Government Halabadee chittas, on which his case could not be proved. But on finding that there was a mistake in those chittas, the complexion of his case was quite altered.

Under these circumstances, I think the Court was quite justified in admitting the review.

Upon the merits, I think there is no ground whatever for this special appeal, and I, therefore, concur in the order dismissing the appeal with costs.

The 16th August 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Mortgage—Money-decree—Equity of redemption.

Case No. 96 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 24th September 1869, reversing a decision of the Moonsiff of Nowabad, dated the 25th February 1869.

Deo Chand Sahoo (Plaintiff), *Appellant,*

versus

Teeluck Singh and others (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Kishen Succa Mookerjee* for Appellant.

Mr. R. E. Twidale and *Baboo Debendronath Bose* for Respondents.

Plaintiff and defendant No. 5 had mortgages over the same property, the mortgage of the latter being prior to that of the former.

Defendant sued for the money covered by the kistbundee, and obtained a money-decree, in execution of which the rights and interests of the mortgagor were purchased, after notice of plaintiff's lien, by defendant No. 5, who entered into possession.

HELD that, under the circumstances, the mortgagor's rights and interests, sold as above, amounted only to the equity of redemption, and the sale did not extinguish plaintiff's right under the subsequent mortgage, and that the purchaser could be entitled to retain possession only in case of his paying off plaintiff's lien.

Kemp, J.—THE plaintiff is the special appellant before us.

It appears that the plaintiff and the defendant No. 5 had mortgages over one and the same property, the mortgage of the defendant being prior in date to the mortgage of the plaintiff.

The defendant, instead of instituting a suit for the purpose of bringing about the sale of the property pledged, sued his debtor for the money covered by the kistbundee, and obtained a simple money-decree. In execution of that decree, the rights and interests of the mortgagor were put up for sale and purchased by defendant No. 5, the first mortgagee. We are told that the debt of the defendant has been thus satisfied, and he is now in possession of the mortgaged premises.

At the time of the sale, notice of the lien of the plaintiff was given in the usual way. The plaintiff, the second mortgagee, now sues to make the property pledged under his burnanamah, dated the 25th Kartick 1268, liable for his claim.

The decisions of both the Courts below amount to this—that because there has been a sale of the property in execution of the money-decree of the defendant No. 5, no re-sale of the same property in satisfaction of the plaintiff's lien can be made.

An issue was raised by the first Court as to the *bona fides* of the plaintiff's mortgages. That was found in favor of the plaintiff, and no appeal was made to the Lower Appellate Court on that point. We have, therefore, a pure point of law before us to decide.

We are of opinion that, when the defendant, instead of pursuing the course open to him, *viz.*, to sue to make the property pledged liable to satisfy his debt, chose to sue for the money due to him and to be content with a simple money-decree, and in execution of that simple money-decree, to sell the

rights and interests of the judgment-debtor, the mortgagor, and to purchase those rights and interests himself, those rights and interests amounting only to the equity of redemption, such a purchase would not extinguish the right of the plaintiff under the subsequent mortgage. The plaintiff's lien, under such circumstances, would still remain unaffected by the sale. If the defendant had proceeded in the proper manner, he would have sold, not the rights and interests of the judgment-debtor, but the whole property pledged; and by so doing, he would have been entitled, *firstly*, to pay himself; *secondly*, to pay the lien of the plaintiff; and *lastly*, if any balance remained, to pay it to the judgment-debtor. Not having done so, as already observed, he purchased nothing but the rights and interests of the judgment-debtor which amounted only to the equity of redemption. If, therefore, the defendant wishes to retain possession of the property, he must pay off the mortgage of the plaintiff.

In the course of the argument, the pleader for the respondent, Mr. Twidale, referred to page 93, Macpherson on Mortgages, 5th Edition. The passage referred to is to this effect: "That if a first mortgagee "obtains a decree against the mortgagor, "*and the lands are sold in execution of that* "*decree*, but do not realize more than enough "to pay off the first mortgage, the auction-"purchaser has a title to the lands free from "all incumbrances subsequent in date to the "first mortgage."

In the present case, the first mortgagee did *not* sell the land mortgaged in execution of his decree, but merely the rights and interests of the mortgagor. Clearly, therefore, the defendant stands in the shoes of the mortgagor. He has purchased the equity of redemption, and it is only in case he pays off the plaintiff's lien that he is entitled to retain possession, and in no other case.

As the first Court found the lien to be a *bonâ-fide* one, and no objection was taken to that point on appeal, we reverse the decision of the Lower Courts, and decree this appeal with all costs.

The 16th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Mahomedan Law—Dower—Purchaser from heirs.

Case No. 892 of 1870.

Special Appeal from a decision passed by the Judge of Patna, dated the 18th February 1870, reversing a decision of the Subordinate Judge of that District, dated the 17th July 1869.

Mussamut Wahidoonissa and others (Plaintiffs), *Appellants,*

versus

Mussamut Subrattun and others (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry, Sreenath Dass, and *Boodh Sein Singh* for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Yusuf* for Respondents.

A Mahomedan widow *in possession of her husband's property* must be treated in the light of a mortgagee or pawnee so far as her dower is concerned, and cannot be deprived of possession till her claim for dower is satisfied.

A claim for dower is not a lien on the property such as is obtained by a mortgage which enables the creditor to follow the property wherever it goes. The Mahomedan Law has nowhere placed a claim for dower as high as a mortgage, but has ranked it on a par with other debts.

A purchaser from the heirs of a deceased Mahomedan is not bound, as if he were dealing with a Hindoo widow, to inquire into the existence of a legal necessity; and even when the property is sold in execution of a decree, he is not bound to ascertain whether it is sold for the private debts of the judgment-debtors or for ancestral debts.

Hobhouse, J.—THE facts of this case are very simple. The plaintiff is the widow of one Mahomed Mehdee. He died in 1861, leaving the plaintiff and two sisters, defendants in this cause, his heirs. In the year 1862, the present plaintiff sued the sisters as well for dower as for her, the widow's,

share of the inheritance. In 1864 she got a decree for dower, and in 1865 a decree for possession of her share of the inheritance. The sisters, from the time of the death of Mahomed Mehdee in 1861 up to 1868, remained in possession of their share of the inheritance, less, of course, the widow's share decreed to her in 1865. Thereafter, the sisters incurred debts, and a decree was obtained against them for the amount of those debts, and in execution of that decree the defendant in this suit purchased the rights and interests of the sisters in the property in suit.

That property, it is admitted, formed a part of Mahomed Mehdee's estate at the time of his decease; and it is also admitted that the defendant is a *bond-fide* purchaser for a valuable consideration and without notice of any claims against the estate of the deceased. He is also in possession of the property. The decree of 1864 was virtually, and for the purposes of this suit, it is admitted, against the sisters as representatives of the estate of Mahomed Mehdee, and to the extent only that they had taken any part of that estate.

The present suit is on behalf of the widow to have it declared that the property of which the defendant became the purchaser in 1868 is liable to be sold in execution of her decree against the sisters for dower obtained, as I have said before, in the year 1864. The Lower Appellate Court has held that the estate in the hands of the purchaser is not so liable, and has dismissed the plaintiff's suit. The plaintiff appeals, and the substance of the argument on which the pleader on her behalf supports the contention that the property in question is liable for the dower-decree is this:—

The dower, it is argued, is a debt; a claim for dower takes precedence of a claim for inheritance; the plaintiff is a creditor against her husband's estate for dower, and as such her right takes precedence of the right of the heirs of her husband, and so of the right of any creditor of those heirs, and of any purchaser in execution of a decree of such creditor. In short, it is averred that dower especially, and in fact any debt, constitutes under the Mahomedan Law a lien upon the estate of the debtor.

On the other hand, it is contended that there is no difference, and indeed it is not disputed that there is any difference, between a debt for dower and any other debt, and that, therefore, a debt for dower does not constitute a lien upon any particular property which, at the time of his decease, may have made up the estate of the debtor, but is simply, like any other debt, a something which the creditor can claim from the heirs of the debtor to the extent that those heirs have received, and are not able satisfactorily to account for, any assets of the estate of the debtor.

It seems to me very questionable, in the first instance, whether we are bound to apply the Mahomedan Law at all to the case before us. It is not, I may observe, a case of succession, inheritance, marriage, caste, or religious usage, that is, a case of the description to which we are bound by the provisions of Regulation VII. of 1832 to apply the Mahomedan Law. It is, as it seems to me, as it seemed also to the Judges in the case to be found in page 509 of Marshall's Reports, a case simply of contract; and in such a case, it seems to me, as it seemed to Mr. Justice Campbell, that it can only be by a side wind that a question of inheritance under the Mahomedan Law can at all be brought in. If the case is, as I think it is, a simple case of contract, then we should not deal with it under the provisions of Mahomedan Law, but simply as a case of contract to which we are to apply the principles of justice, equity, and good conscience.

However, I will assume it to be a case of Mahomedan Law, and I still do not think that, under the strictest interpretation of the Mahomedan Law, dower, any more than any other debt, can be held to constitute, under the facts of the case before us, a lien upon any particular item of the estate of a deceased Mahomedan debtor. The text, and in fact the sole text, relied upon is that to be found in page 1, Chapter I., Section I. of Macnaghten's Principles of Mahomedan Law. The text is this: "Debts are claim-" able before legacies, and legacies (which, " however, cannot exceed one-third of the " testator's estate) must be paid before the " inheritance is distributed."

It is argued from this that, as this debt had not been paid, therefore there could not have been any legal distribution of the estate of the deceased Mahomed Mehdee; and that, if there was no legal distribution, then the sisters, who were in this instance the heirs, had not, in reality, any estate which they could dispose of; and so that the defendant,

who has bought only the rights and interests which the sisters had, has taken with them the liability of the sisters, namely, the liability to pay the debts of the deceased. It is not disputed for a moment that the liquidation of debts should precede the distribution of property amongst the heirs. That is laid down clearly in the paragraph of the law on which the plaintiff relies, and again in the case No. 16, pages 94 and 95 of the same authority, Macnaghten. It is further laid down in the case No. 10, page 356, that the claim for dower is a claim prior to that of inheritance on the property of the husband; and in case No. 56, page 126, that a claim for inheritance cannot be maintained till the debt for dower has been satisfied.

But here, in the first place, it cannot be urged that there can be no distribution, for, as a matter of fact, such distribution has actually been made, and that, by reason of action taken on the part of the plaintiff herself, who, in that suit, which was terminated by the decree of 1865, prayed for and actually obtained distribution of the estate, namely, herself taking her one-fourth of that estate, and the rest of it being left in possession of the two sisters, the remaining heirs of the deceased Mahomed Mehdee.

But even had there been no distribution, still the question seems to me to be what under the Mahomedan Law is meant by the estate of the deceased, when it is said that that estate is liable for the debts of the deceased? Is it meant to be exactly that property, be it in land or be it in money, or whatever may be its nature of which the deceased was seized when he died; or is it meant to be anything which adequately represents that estate? I think, on a proper interpretation of the text of the Mahomedan Law, it is not meant to be the *exact* estate as it stood at the time of the husband's death, but anything which adequately and truly represents that estate at the particular time at which a claim is made upon it. I find, for instance, under the law of sale, Chapter III., page 42, that "a sale is defined to be a mutual and voluntary exchange of property for property." So that, if a person under this definition of sale, as in this case, parted with property in the shape of land, and got property in return in the shape of money, or money's worth, then the property which he got in return adequately and fully represents the property with which he parted. And again I find in Section 1, Chapter XI., page 72, and in the case No. 8 at page 88, that the "heirs are answerable for the debts of their ancestors, as far as there are assets."

So that, it seems to me, it is not the estate as it stood, be it, as I have said before, in land or in money, or what not, which in itself is answerable for the debts of the deceased, but it is the heirs themselves who are answerable, and that to the extent of any assets which they may have received and in whatever shape they may have received them from the estate of the deceased.

In this respect the Mahomedan Law seems to me to be curiously and almost exactly in accord with our own written law to be found in the provisions of Section 203, Act VIII. of 1859. Speaking of representatives, that Section declares that, "if the decree be "against a party as the representative of a "deceased man, and such decree be for "money to be paid out of the property of "the deceased person, it may be executed "by the attachment and sale of any such "property, or, if no such property can be "found, and the defendant fail to satisfy the "Court that he has duly applied such pro-"perty of the deceased as shall be proved "to have come into his possession, the de-"cree may be executed against the defend-"ant to the extent of the property not "duly applied by him, in the same manner "as if it had been against the defendant "personally."

So that, where, as in the case described, there was a decree by which a lien was actually created on the property of a deceased person, still the law does not declare that that property may be followed into the hands of the purchaser for the purpose of satisfying the decree, but it does declare that the decree-holder may execute his decree against the heir of the deceased to the extent of the property not duly applied by him, that is, to the extent of the assets that he may have received from the estate of the deceased, and may not be able otherwise duly to account for. I do not think, therefore, that, even under the Mahomedan Law, it can be said that a debt against a deceased person may be followed against the property of the deceased when that property shall cease to be in the possession and power of the heir-at-law, but that rather the remedy is to claim the debt from the heirs of the deceased to the extent that they may have received, and may not be able properly to account for,

any assets which they may have received from the deceased proprietor's estate.

This view of the law seems to me to have been followed by a Division Bench of this Court in the case to be found in page 212, XI. Weekly Reporter; and again more decidedly still, in the case No. 195 of 1869, Regular Appeal, Mussamut Bibee Meherun, plaintiff, appellant, dated the 12th January 1870; and also in the case to which I have already referred in page 509 of Marshall's Reports.

It is, however, contended that there are cases against this contention to be found in various precedents, which I shall now quote.

The first is that to be found in page 890 of the Sudder Dewanny Decisions of 1852. That was a case of a widow in possession, apparently by consent of the heirs of the whole of her deceased husband's property. In that case, when the heir or rather the purchaser from him sought to obtain possession from the widow, it was held that he could not do so, until he had first satisfied the widow's dower. Mr. Mytton, one of the Judges in that case, dissented from the other two Judges, holding that dower was only a liability for which the person who took the husband's estate was answerable, and not the estate itself. But the majority held the contrary doctrine, the ground on which they seemed to have held it being that, inasmuch as dower took precedence of all claims by inheritance, so the heir could not sell, and the purchaser who stood in the shoes of the heir could not obtain possession of the estate until he had first paid off the widow's dower, a debt due upon the estate.

The next case is one to be found in 9 Weekly Reporter, page 318. In that case also, the widow, on the death of her husband, had held his estates, apparently by consent of the heirs, in lieu of her dower, and had subsequently been ousted by the heirs under circumstances which do not apply to the case before us. She sued for dower out of the estate, and the learned Judges seem to have given her a decree on the following considerations. They seem to have held that dower was like any other debt, that the liquidation of debts preceded any distribution of inheritance, and if the heirs did not pay the dower that the widow had a prior claim on the property, real or personal, of the husband, the heirs, until the dower was paid, having no legal claim on the estate adverse to the widow, the creditor in possession. And they summed up their decision in these words, laying down at page 320 this proposition: "These texts "and cases seem to us to establish the "position that the widow of a Mussulman in "possession of her husband's estate under "a claim of dower has a lien upon it as "against those entitled as heirs, and is "entitled to possession of it as against them "till her claim of dower is satisfied." And again, page 321: "However that may be, "we think we may hold that, when a "Mahomedan widow, who has actually "obtained possession of the estate of the "deceased husband, has been deprived of "possession by a decree in favor of heirs "who take with notice of the existence of "her claim to dower, and more particularly, "where her right to sue to establish her "claim to dower has been expressly reserved, "we may treat the heirs as taking the pro-"perty subject to a lien which is not "divested by the decree."

Those were the findings of the Court in that instance.

The next case is to be found in 10 Weekly Reporter, page 369. There are two decisions given by the learned Chief Justice and two other Judges of this Court, to be found quoted in this case, and in both of those cases the widow was in possession, and was holding over by reason of the debts due to her for her dower, and the heir sued to recover possession. The learned Judges said: "What the plaintiff really wanted to "try in this suit was whether he was "entitled to succeed to a 12-annas share of "the property of the late Moulvie Mahomed "Ibrahim, and to recover from the widows "the possession of that portion of the pro-"perty." And again: "Another of the "issues raised by the Subordinate Judge "was whether, according to the Mahomedan "Law, the plaintiff was entitled by right "of inheritance to 12 annas out of the "whole estate of Mahomed Ibrahim, or "whether the widows of the said Mahomed "Ibrahim on account of dower due to them "were entitled to retain possession of the "whole estate." Then they go on to say that in the case which they quoted it had been held that "the widow of a Mahome-"dan in possession of her husband's estate "under a claim of dower has a lien upon it "as against those entitled as heirs, and is "entitled to possession as against them till "her claim to dower is satisfied."

And again, according to the decisions to which they had already referred, they thought that the widow "was entitled to a lien upon "her husband's estate for the amount of "any dower which remained due to her."

And again: "Assuming, then, that the "plaintiff as the heir of the deceased Moulvie "was entitled to a 12-annas share of the "whole of his estate, he was not, according "to the decisions to which I have referred "entitled to recover possession of that "estate from the widows so long as any "portion of the dower remained unsatisfied, "nor could he be entitled to mesne-profits."

And finally, they were of opinion that "the decision of the Subordinate Judge as "regards the widow Khodejah's lien on the "estate for her unpaid dower ought to be "affirmed." It was further pointed out that "the plaintiff ought to have sued "for an account of the dower due to the "widow and to be let into possession upon "payment of that amount."

The next case relied on is to be found in pages 219 and 220, 6 Moore's Privy Council Reports. That case is quoted at length in the decision to which I have just referred in 10 Weekly Reporter, and that was also a case in which the widow was in possession of her husband's estate. Their Lordships in the Privy Council seem to have held that a creditor in the position of a widow might take so much of the debtor's property as would cover the debt; and that the widow was in possession much as an executrix in English Law might be in possession, and so was entitled to hold over for dower as a debt, subject to a suit for an account.

Now, I think that when all these cases are considered carefully, they are, in fact, what they have been described to be by the learned Judges of this Court who passed the decision to which I have referred above, of the 12th January 1870. They are, I think, all of them cases in which dower being admitted to be due, the widow was or had been in possession of the whole estate, and in which the heirs sought to oust the widow without having previously paid the amount of the dower or debt. Now, it seems to me that in such a case, under the Mahomedan Law, had it not been the case of a widow especially but that of any other creditor, such creditor equally with the widow would have been entitled to hold over the estate of which he was in possession until the debt had been paid off. "Hypothecation," it is said in Section 15, Chapter 11, page 74, Macnaghten's Mahomedan Law, that is, an ordinary lien, as I understand it, "is "unknown to the Mahomedan Law;" and there cannot ever be any mortgage unless there be seizing. And in Section 20 of the same Chapter, it is further laid down that a creditor seized of the property may satisfy his own debt to the exclusion of the other creditors.

And in the case No. 3, page 347, Macnaghten, the following doctrine is laid down:—

"All debts (contracted in health) are of "equal validity, except those of mortgagees "and pawnees, that is to say, persons with "whom the property of the deceased may "have been deposited in mortgage or pledge. "The claim of such persons are entitled to "priority, *and they are authorised to satis-* "*fy their own demands out of the property* "*in their possession:* after which the sur-"plus (if any should remain) will be divi-"ded among the other claimants."

It seems to me that, under this doctrine, any creditor, be it the widow or any other creditor, who was either by consent of the debtor when living, or by consent of the heirs of the debtor after the debtor's death, in possession of the debtor's estate for the satisfaction of his debt, would be entitled to remain in such possession until the amount of his debt had been paid off. I think it is upon this doctrine of the Mahomedan Law that the learned Judges in the cases on which the plaintiff's pleader relies, came to the conclusion that the widow in possession of her husband's estate and holding over until payment of her dower against the heirs, was entitled to hold over until her dower was paid.

But here, as I have said before, the case is entirely different. The widow is not in possession. On the contrary, at her suit, distribution was made so far back as five years before the institution of this suit of her husband's property. By that distribution, the sisters, so far as they were heirs, were put in possession of the property they inherited. They dealt with it and incurred debts of their own. The property was sold, and the defendant paid a just and proper equivalent for it. That equivalent was then really paid to the heirs, and the

property which it represented ceased from that time to represent the estate of the deceased. The equivalent paid for the property did instead represent that estate, and was, in reality, assets of the estates paid into the hands of the heirs to be by them accounted for.

The plaintiff, therefore, if she have any debts due to her from the husband's estate for her dower, must, I think, in satisfaction of that debt, follow the assets which have been duly made over to the heirs of the husband. She must follow those assets and cannot follow the particular property itself, for that, in reality, no longer exists as an asset of the estate but has been properly and fairly exchanged for assets of a different description.

In this view of the case. I would uphold the judgment of the Court below, and dismiss this appeal with costs.

Loch, J.—I prefer looking at this case from the Mahomedan point of view in which it has been placed before us, and looking at it from this point I concur in the conclusion come to by my colleague.

Looking to the principles of Mahomedan Law, we find first that debts are claimable before legacies, and legacies must be paid before the inheritance is distributed. Macnaghten, Chapter I., Rule 5.

Again, all the debts due by the testator must be liquidated before the legacies can be claimed. Macnaghten, Chapter VI., on Wills, Rule 6.

Thirdly, heirs are answerable for the debts of their ancestor as far as there are assets. Macnaghten, Chapter XI., on Debts, Rule 1.

Rule 20 of the same Chapter lays down as follows: "If a person die leaving many "creditors, and he may have pawned or mortgaged some property to one of them, such "creditor is at liberty to satisfy his own "debt out of the property of the deceased "debtor, which is in his own possession, to "the exclusion of all other creditors."

It may be here remarked that the decisions of this Court appear almost invariably to have treated the widow *in possession of her husband's property* in the light of a mortgagee or pawnee, so far as her dower is concerned, and have held that she could not be deprived of possession till her claim for dower is satisfied.

The law makes no distinction between a claim of dower and other debts, and case XXIII., Macnaghten's Precedents of Marriage Dower, &c., shows the course which should be pursued by the heirs or executors of a deceased person, and is in the following terms: "The claim of the widow for "dower is just, and the claims of the other "creditors for the payment of their debts "out of the estate are also just. Under "these circumstances, after the ascertainment of the amount of the dower and "of the sum due to the creditors of the "deceased, the whole property, moveable and "immoveable, must be collected, and it "must be examined with a view to find out "whether or not it is sufficient to satisfy all "the claims. If so, it must be appropriated "in that manner; and, if not, each person "must get a proportional share." The law makes no distinction between a claim for dower and other debts. No preference is given to one description of claim over another, and a *pro rata* distribution must be made with respect to all.

In case XXIV. of the same Chapter, a distinction is drawn between money and other property in cases of dower, *viz.*, that "the "widow is at liberty to take the former description of property over which she has "absolute power, but as to other property "she is entitled to a lien on it as security "for the debt, and it does not become her "property absolutely without the consent "of the heirs or a judicial decree. Where "the debt is large and the estate small, the "former necessarily absorbs the latter in "spite of any objection urged by the heirs, "who, until they pay the debt, have no "legal claim against the creditor in possession to deliver up the estate." This evidently contemplates the case of a widow in possession.

In case X., Macnaghten's Precedents of Debts, the question asked is: "Whether a "widow has a lien on the *personal* property of her husband in satisfaction of "her dower in preference to the other "heirs?" And the answer is: "If the "other heirs pay the widow the amount of "her dower, she has no claim to the property left by her husband, except for her "legal share of the inheritance; and if "they do not pay her the amount of her "dower, she has, in the first instance, a "prior claim on account of her dower on "the property left by her husband, whether "real or personal. The residue, after her

"claim of dower is satisfied, will be divided "between her and the other heirs according "to their respective shares of inheritance."

It is clear, therefore, and is indeed admitted by the parties before us, that a claim for dower is on the same footing as any other debt due by the deceased; but while the appellant contends that all debts are a lien on the estate of the deceased, and that creditors can follow the property of the deceased into whosoever's hands it goes, the respondent contends that debts of a deceased Mahomedan are in no higher a position than the debts of any other person, that though the heirs are liable to the extent of the assets which came into their hands, the creditors cannot follow property of the deceased which has been sold by the heirs or representatives of the deceased to a *bond-fide* purchaser, without notice, for a valuable consideration.

It is admitted by the appellant's pleader that, if the property were sold by the heirs to liquidate the debts of the deceased, the purchaser would secure a good title; but how is the purchaser to know for what purpose the property is offered for sale? A purchaser from the heirs of a deceased Mahomedan is not bound, as if he were dealing with a Hindoo widow, to enquire into the existence of a legal necessity, and even when the property is sold in execution of a decree, as in the present instance, he is not bound to ascertain whether it is sold for the private debts of the judgment-debtors or for ancestral debts.

But the cases in Macnaghten referred to above contemplate a state of things different from that in the present case. They contemplate the state of the property before partition, and point out the course which should be followed by the heirs or executor of the deceased before partition of the inheritance. But a case of this kind might happen. The heirs, with every intention of paying off the debts of their ancestor, might not know who his creditors were, and after a time might, in perfect good faith, partition the property. If one of the heirs, after such partition, were to sell his share of such property to a stranger for any cause, say, to raise money to pay the Government revenue or discharge his own debts or to meet family-expenses, could a creditor, on obtaining a decree for the amount of a debt due by the ancestor, come down upon the property in the hands of a *bond-fide* purchaser without notice? It appears to me that he could not; and if an ordinary creditor could not, could a creditor having a claim for dower seize the property? I think not, for the Mahomedan Law does not rank dower in a higher position than other debts, and therefore what the ordinary creditor could not do, the dower-creditor would have no power to do, merely from the circumstance of his being a dower-creditor. A creditor could go against the heirs, who would be responsible to the extent of the property of the deceased which came into their hands, and would be liable to account to him for the assets, which, if not properly applied to the discharge of the ancestor's debts, would make them personally responsible. As they had received from the purchaser an equivalent for the property, they would have to account for its expenditure, but the purchaser could not be required to give up the property, nor can the creditor look both to the money and to the property for the payment of his debt.

But it may be urged that in the present case the heirs, who were in possession of the property of the deceased, were aware of the existence of the debt claimed by the appellant on account of dower, and in fact she had got a decree against them in their presence for the amount, so that they had no right to sell the property without payment of her claim or for the purpose of liquidating the debt due to her. But even if this be admitted, does the appellant stand in a better position than any other creditor? Suppose that the heirs had sold the property with the view of evading payment to her, though in the present case such is not the fact, would such conduct on their part render a *bond-fide* purchaser, without notice, liable to be deprived of the property which he has purchased in good faith for a valuable consideration? The heirs may have acted improperly, but in the absence of collusion on the part of the purchaser who has paid his money for the property, their misconduct cannot make his purchase void and render the property liable to seizure and sale by the creditor. A claim for dower is not a lien on the property, such as is obtained by a mortgage which enables the creditor to follow the property wherever it goes. The Mahomedan Law has nowhere placed a claim for dower as high as a mortgage, but has ranked it on a par with ordinary debts. It is true that our Courts have looked with favor on this class of

debts, and, where the widow is in possession, have not allowed her possession to be disturbed until the dower is paid, and indeed, where the widow has been put out of possession, they have declared her right to have her dower paid out of the property; but it has never been held that a claim for dower is of the nature of a mortgage, and that a dower-creditor, not having had possession, may follow the property into the hands of a third party who has purchased in good faith without notice. If there has been no collusion on the part of the purchaser, the misconduct of the vendors cannot affect the title of the purchaser, and the creditor must still look to the vendors as heirs of the deceased owner of the property for the payment of their debts, for the heirs would have to account to him for the money which they received as the price and equivalent of the estate which should have been sued for the payment of the debts of the deceased.

The appeal is dismissed with costs.

The 18th August 1870.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Rent-suit—Jurisdiction.

Case No. 151 of 1870.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 18th May 1869, affirming a decision of the Subordinate Judge of that District, dated the 11th December 1868.

Maharaja Dheraj Mahtab Chand Bahadoor (Plaintiff), *Appellant,*

versus

Mokoond Bullub Bose and others (Defendants), *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Mohendro Lall Seal for Respondents.

A suit for rent due not solely for land, but also for buildings, is not cognizable by the Revenue Courts.

Jackson, J.—THIS was a suit for arrears of rent. The question before both the Lower Courts seems to have be a whether the jurisdiction to try the suit as in the Civil Court or was in the Revenue Court. Both the Lower Courts have come to the conclusion that the jurisdiction was with the Revenue Court, and have dismissed the suit of the plaintiff from hearing in the Civil Court.

On special appeal to us it is argued that this decision is wrong, and that the jurisdiction at the time this plaint was preferred was in the Civil Court.

It would not have been necessary to try this point now, as, whether the jurisdiction was in the one Court or the other, the jurisdiction is now in the Civil Court; but, as the question has been pressed upon us in connection with the matter of costs, it becomes necessary to decide whether, at the time this plaint was put in, it was entertainable in the Civil Court or not.

The mehals leased appear to consist of two large bazaars in the town of Burdwan. One of them is the Chandnee bazaar close to the Maharajah's palace. The kubooleut is put in. From this kubooleut, it is quite clear that, not only is the land leased, but also the buildings in the bazaar are leased. The rent which is assessed does not issue only out of the land, but also out of the buildings; and, in fact, in the case of a bazaar like this, it must issue principally out of the buildings.

One case which was quoted by the respondent's vakeel before us in order to fortify his argument is directly against him, namely, the decision reported at page 9, Volume II., Weekly Reporter. That was a case in which the land had been leased for certain indigo manufacturing purposes. Factories had subsequently been built upon the land, and a suit regarding rent had been brought, and it was attempted to be contended that, as factories were situated upon the land, the suit could not be brought in the Revenue Courts; but it was held that, as the lease was not for the factory, but only for the land, the suit would lie in the Revenue Courts. Had, however, the lease been for the factory as well as the land, the suit could not have been preferred in the Revenue Court. The decision is directly against the argument of the respondent's pleader. I quite concur in that decision, and I understand that that decision has been followed generally in this Court for some years past.

The rent which is demanded in this case, not being solely for the land, but also for

the buildings, it appears to me that the suit does not lie in the Revenue Courts, and that the Lower Courts are wrong in deciding to that effect. The decision of the Lower Courts must be set aside, and the case must be remanded to the first Court for trial. The respondent must pay the costs of all the Courts.

Mitter, J.—I concur.

The 23rd August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Arbitration-award.

Case No. 231 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 10th January 1870, reversing a decision of the Moonsiff of Kulna, dated the 23rd August 1869.

Raj Narain Roy (one of the Defendants), *Appellant,*

versus

Juggessur Mookerjee and others (Plaintiffs), *Respondents.*

Baboo Kalee Prosunno Dutt for Appellant.

Baboo Mohendro Lall Seal for Respondents.

Where matters in dispute are referred to arbitration, and it is found that one question at issue is omitted from the reference, and that the award returned by the arbitrators contains no decision thereon, the party interested should bring the omission to the notice of the Court. If he fails to do so, the Court is not wrong in not passing any order or coming to any decision on that point.

Jackson, J.—THIS case was brought for possession of 5 plots of land stated to belong to a mokurruree jumma, and also for a 6th plot of lakheraj, with wassilat.

I fore the issues were framed, the plaintiff's vakeel on being examined stated that he did not wish to sue to recover possession of the 5 plots of mokurruree land, but only for a declaration of his right to that land; and that, instead of the mesne-profits of that land, he sought to recover damages for the crops which had been, from time to time, carried away by the defendant from that land.

Issues were framed and proceedings had gone on for some time when the matters in dispute between the parties were referred to arbitration. The Court, in referring the matters in dispute to arbitration, apparently omitted from its reference the question as to whether the plaintiff was entitled to obtain damages for the alleged carrying off of his crops growing on the mokurruree land. The consequence of this omission was that in the award of the arbitrators no decision was arrived at upon this point.

When the award was filed, objections were raised to it on the part of the defendant whose interests were affected by it; but those objections were overruled. The plaintiff did not then bring to the notice of the Court that there had been an omission in the reference to the arbitrators, or that any point still remained to be tried; and the Court consequently recorded a decree in accordance strictly with the award.

The plaintiff thereupon appealed, not against the award, but on the point that there had been an omission to try the question of his right to obtain damages for the carrying off of his crops. The Subordinate Judge, in deciding that appeal, passed an order remanding the case for trial of the point which had been omitted, at the same time reversing the decree of the Moonsiff. In consequence of this, the Moonsiff re-tried the whole case. There was a second appeal to the Subordinate Judge, and he has now stated that what he intended was not to reverse the decree passed on the award, but only to remand the case for a decision of the point which had been omitted in the first trial.

The defendant now appeals to this Court. The grounds of his appeal refer to the point that the Subordinate Judge should have interfered with the decree passed upon the award; but in the course of the argument it was admitted that none of those grounds could be sustained; and it has been argued before us that, as the plaintiff had, in the first instance, agreed that the question of his right to damages should be referred to arbitrators, and as, when the reference was made, and the award was returned, and before decree was passed upon it, he made no further objection on the question of those damages, and did not then and there bring to the notice of the Court that this was a matter which had been omitted both from the reference and the award, he is not entitled, after decree had

debts, and, where the widow is in possession, have not allowed her possession to be disturbed until the dower is paid, and indeed, where the widow has been put out of possession, they have declared her right to have her dower paid out of the property; but it has never been held that a claim for dower is of the nature of a mortgage, and that a dower-creditor, not having had possession, may follow the property into the hands of a third party who has purchased in good faith without notice. If there has been no collusion on the part of the purchaser, the misconduct of the vendors cannot affect the title of the purchaser, and the creditor must still look to the vendors as heirs of the deceased owner of the property for the payment of their debts, for the heirs would have to account to him for the money which they received as the price and equivalent of the estate which should have been sued for the payment of the debts of the deceased.

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versus

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Jackson, J.—THIS was a suit for arrears of rent. The question before both the Lower Courts seems to have been whether the jurisdiction to try the suit was in the Civil Court or was in the Revenue Court. Both the Lower Courts have come to the conclusion that the jurisdiction was with the Revenue Court, and have dismissed the suit of the plaintiff from hearing in the Civil Court.

On special appeal to us it is argued that this decision is wrong, and that the jurisdiction at the time this plaint was preferred was in the Civil Court.

It would not have been necessary to try this point now, as, whether the jurisdiction was in the one Court or the other, the jurisdiction is now in the Civil Court; but, as the question has been pressed upon us in connection with the matter of costs, it becomes necessary to decide whether, at the time this plaint was put in, it was entertainable in the Civil Court or not.

The mehals leased appear to consist of two large bazaars in the town of Burdwan. One of them is the Chandnee bazaar close to the Maharajah's palace. The kubooleut is put in. From this kubooleut, it is quite clear that, not only is the land leased, but also the buildings in the bazaar are leased. The rent which is assessed does not issue only out of the land, but also out of the buildings; and, in fact, in the case of a bazaar like this, it must issue principally out of the buildings.

One case which was quoted by the respondent's vakeel before us in order to fortify his argument is directly against him, namely, the decision reported at page 9, Volume II., Weekly Reporter. That was a case in which the land had been leased for certain indigo manufacturing purposes. Factories had subsequently been built upon the land, and a suit regarding rent had been brought, and it was attempted to be contended that, as factories were situated upon the land, the suit could not be brought in the Revenue Courts; but it was held that, as the lease was not for the factory, but only for the land, the suit would lie in the Revenue Courts. Had, however, the lease been for the factory as well as the land, the suit could not have been preferred in the Revenue Court. The decision is directly against the argument of the respondent's pleader. I quite concur in that decision, and I understand that that decision has been followed generally in this Court for some years past.

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Mitter, J.—I concur.

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It would not have been necessary to try this point now, as, whether the jurisdiction was in the one Court or the other, the jurisdiction is now in the Civil Court; but, as the question has been pressed upon us in connection with the matter of costs, it becomes necessary to decide whether, at the time this plaint was put in, it was entertainable in the Civil Court or not.

The mehals leased appear to consist of two large bazaars in the town of Burdwan. One of them is the Chandnee bazaar close to the Maharajah's palace. The kubooleut is put in. From this kubooleut, it is quite clear that, not only is the land leased, but also the buildings in the bazaar are leased. The rent which is assessed does not issue only out of the land, but also out of the buildings; and, in fact, in the case of a bazaar like this, it must issue principally out of the buildings.

One case which was quoted by the respondent's vakeel before us in order to fortify his argument is directly against him, namely, the decision reported at page 9, Volume II., Weekly Reporter. That was a case in which the land had been leased for certain indigo manufacturing purposes. Factories had subsequently been built upon the land, and a suit regarding rent had been brought, and it was attempted to be contended that, as factories were situated upon the land, the suit could not be brought in the Revenue Courts; but it was held that, as the lease was not for the factory, but only for the land, the suit would lie in the Revenue Courts. Had, however, the lease been for the factory as well as the land, the suit could not have been preferred in the Revenue Court. The decision is directly against the argument of the respondent's pleader. I quite concur in that decision, and I understand that that decision has been followed generally in this Court for some years past.

The rent which is demanded in this case, not being solely for the land, but also for

the buildings, it appears to me that the suit does not lie in the Revenue Courts, and that the Lower Courts are wrong in deciding to that effect. The decision of the Lower Courts must be set aside, and the case must be remanded to the first Court for trial. The respondent must pay the costs of all the Courts.

Mitter, J.—I concur.

The 23rd August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Arbitration-award.

Case No. 231 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 10th January 1870, reversing a decision of the Moonsiff of Kulna, dated the 23rd August 1869.

Raj Narain Roy (one of the Defendants), *Appellant,*

versus

Juggessur Mookerjee and others (Plaintiffs), *Respondents.*

Baboo Kalee Prosunno Dutt for Appellant.

Baboo Mohendro Lall Seal for Respondents.

Where matters in dispute are referred to arbitration, and it is found that one question at issue is omitted from the reference, and that the award returned by the arbitrators contains no decision thereon, the party interested should bring the omission to the notice of the Court. If he fails to do so, the Court is not wrong in not passing any order or coming to any decision on that point.

Jackson, J.—THIS case was brought for possession of 5 plots of land stated to belong to a mokurruree jumma, and also for a 6th plot of lakheraj, with wassilat.

Before the issues were framed, the plaintiff's vakeel on being examined stated that he did not wish to sue to recover possession of the 5 plots of mokurruree land, but only for a declaration of his right to that land; and that, instead of the mesne-profits of that land, he sought to recover damages for the crops which had been, from time to time, carried away by the defendant from that land.

Issues were framed and proceedings had gone on for some time when the matters in dispute between the parties were referred to arbitration. The Court, in referring the matters in dispute to arbitration, apparently omitted from its reference the question as to whether the plaintiff was entitled to obtain damages for the alleged carrying off of his crops growing on the mokurruree land. The consequence of this omission was that in the award of the arbitrators no decision was arrived at upon this point.

When the award was filed, objections were raised to it on the part of the defendant whose interests were affected by it; but those objections were overruled. The plaintiff did not then bring to the notice of the Court that there had been an omission in the reference to the arbitrators, or that any point still remained to be tried; and the Court consequently recorded a decree in accordance strictly with the award.

The plaintiff thereupon appealed, not against the award, but on the point that there had been an omission to try the question of his right to obtain damages for the carrying off of his crops. The Subordinate Judge, in deciding that appeal, passed an order remanding the case for trial of the point which had been omitted, at the same time reversing the decree of the Moonsiff. In consequence of this, the Moonsiff re-tried the whole case. There was a second appeal to the Subordinate Judge, and he has now stated that what he intended was not to reverse the decree passed on the award, but only to remand the case for a decision of the point which had been omitted in the first trial.

The defendant now appeals to this Court. The grounds of his appeal refer to the point that the Subordinate Judge should have interfered with the decree passed upon the award; but in the course of the argument it was admitted that none of those grounds could be sustained; and it has been argued before us that, as the plaintiff had, in the first instance, agreed that the question of his right to damages should be referred to arbitrators, and as, when the reference was made, and the award was returned, and before decree was passed upon it, he made no further objection on the question of those damages, and did not then and there bring to the notice of the Court that this was a matter which had been omitted both from the reference and the award, he is not entitled, after decree had

90 days of the date of decree is required to be filed on stamp only of half the value of the plaint. Rule VIII. or the precedent quoted before does not define the amount of stamp which the new plaint in such cases should bear, but simply ordains that a new plaint may be filed. Hence, and as the practice of this Court in this respect appears not to have been uniform, I beg the Court will be pleased to give me clear instructions on the point for my guidance.

The judgment of the High Court was delivered as follows by—

Jackson, J.—In this case, we must return the same answer as that which has been given to a similar question put by the Officiating Judge of the Small Cause Court at Kishnaghur to the effect that an application for review of judgment alluded to in Articles 4 and 5, Schedule I. of the Court Fees Act (VII. of 1870) does not include an application for a new trial in the Small Cause Court in the mofussil.

The 24th August 1870.

Present:

The Hon'ble L. S Jackson and Dwarkanath Mitter, *Judges.*

Section 48, Act XX. of 1866—Possession under unregistered lease.

Case No. 262 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 8th December 1869, affirming a decision of the Moonsiff of that District, dated the 29th April 1869.

Nursingh Poorkaet and others (Defendants), *Appellants,*

versus

Bikrum Majee (Plaintiff), *Respondent.*

Baboo Umbika Churn Banerjee for Appellants.

Baboo Jadub Chunder Seal for Respondent.

In a suit to recover possession of land under a registered pottah granted by the widow of the landlord, where the defendant set up an unregistered lease granted by the landlord himself in his lifetime, and pleaded that, under that lease, possession had been made over to him and rent received by the landlord: HELD that if effect had been given to the unregistered lease by the transfer of the land, and such lease were dealt with merely in the view of a parol contract, the lease granted to the plaintiff, though registered, could not prevail against it.

Jackson, J.—THE judgment of the Lower Appellate Court in this case is insufficient.

The plaintiff sued to recover possession of this land from the defendant upon the strength of a pottah granted by the widow who was in the enjoyment of the estate of her late husband. The defendant alleged that he was in possession under a lease granted to him by the husband himself in his lifetime.

That lease, it appears, was one which, under the provisions of the Registration Act, should have been registered, but it was not so registered. It was, notwithstanding, received in evidence by the Moonsiff. The Subordinate Judge, on appeal, thought that the Moonsiff was wrong in admitting this unregistered pottah, but agreeing with the Court below, apparently, in thinking that the plaintiff had made out his pottah, gave judgment for him, allowing his cross-appeal and dismissing the appeal of the defendant.

It is alleged by the defendant that he not only had a lease of this land, but that in pursuance of the lease possession had been made over to him, and rent received by the landlord. It was not, therefore, necessary for him to be made to prove the execution. If the case made by him were true, the other facts would give him a sufficient title to invalidate the claim of the plaintiff.

It has been held in a judgment to which I was a party, although the judgment was written by my learned brother Markby, which is to be found in III. Bengal Law Reports, page 312,* that where possession has been given, that is, where effect has been given to a document by the transfer of immoveable property, the provisions of Section 48, Act XX. of 1866 will not apply. And, therefore, if the lease to the defendant in this case be dealt with merely in the view of a parol verbal contract, the lease granted to the plaintiff subsequently, though registered, will not prevail.

We think, therefore, that the case must go back to the Lower Appellate Court in order that it may find upon the evidence whether the defendant had, in fact, got a pottah from the husband of the widow, and

* 12, W. R., p. 217.

whether under that lease the defendant had got into possession of the land, and paid rent.

The 24th August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Tullubee Brihmottur—Resumption—Intermediate tenure—Section 51, Regulation VIII., 1793.

Case No. 560 of 1870.

Special Appeal from a decision passed by the Officiating Judicial Commissioner of Chota Nagpore, dated the 15th January 1870, affirming a decision of the Officiating Deputy Commissioner of that District, dated the 20th August 1869.

Rajah Nilmonee Singh Deo Bahadoor (Plaintiff), *Appellant,*

versus

Chunder Kant Banerjee (Defendant), *Respondent.*

Mr. G. C. Paul for Appellant.

Baboo Kalee Mohun Doss for Respondent.

A *tullubee brihmottur* tenure is not a lakheraj tenure, and it is not necessary for a landlord to bring a suit for its resumption before he can sue for enhancement of its rent.

A person holding a tenure of an intermediate character is entitled to a notice under Section 51, Regulation VIII. of 1793, before his rent can be enhanced.

Jackson, J.—THIS was a suit to enhance the rent of a tenure called *tullubee brihmottur* held under the Rajah of Punchayet, whose suit has been dismissed by the Judicial Commissioner of Chota Nagpore, affirming a decision of the Deputy Commissioner, on the ground that, in regard to such tenures, it is necessary for the landlord to bring a suit for resumption. Exception was also taken to the form of the notice served upon the defendant.

In respect of the first ground, namely, that a suit for enhancement was not the proper form of suit in this case, that opinion appears to rest upon a decision of the late Sudder Court in a case which will be found in the Sudder Dewanny Adawlut Reports of the year 1853, page 392. That was a case heard partly before four Judges, and, as to the circumstances of the particular case, before three of those Judges. The senior of the three Judges who heard the case upon the merits was Mr. Welby Jackson, and he decided in favor of the defendant upon the plain ground that the tenure which it was sought to enhance was one which was recorded in the settlement-proceedings as being a tenure held at a quit-rent, and that no evidence had been given to show that the tenure so recorded was liable to enhancement. The two other Judges concurred in dismissing the suit on that ground, but at the same time they made some observations which appear to be in the nature of *dicta*, to the effect that the proper mode of proceeding was by a suit for resumption.

With great respect, it appears to us that that opinion can hardly be supported. A *tullubee brihmottur* tenure is not a lakheraj tenure, because payment of rent, however small, is an acknowledgment of the landlord's right to rent. But, even if it were, we are unable to see the necessity of resorting to two suits to do that which can be effected in one.

It is also to be borne in mind that since that time the law on the subject has been very greatly modified by the passing of Act X. of 1859. Under these circumstances, we do not feel at all bound by the authority of that decision, and we think that a suit to assess an adequate rent on this tenure might be very well brought as a suit for enhancement.

On the other hand, the respondent shows that the form of notice served upon the defendant in this case is not one upon which he would be entitled to succeed in a suit for enhancement. He is found to be not an ordinary ryot, but a person holding a tenure of an intermediate character, and he seems to be entitled to a notice under Section 51, Regulation VIII. of 1793. The notice served upon him in this case is altogether of too vague a character. It alleges that the tenant is holding land at a rate of rent below that paid by ryots of other villages. If such a notice were held to be sufficient, no tenant would be safe. We think, therefore, that on this ground the present suit must be dismissed, and therefore the special appeal will be dismissed with costs.

The 24th August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Rent-suits—Jurisdiction—Act X. of 1859.

In the Matter of

Brohmo Moyee Bewah, *Petitioner.*

Baboo Kashee Kant Sein for Petitioner.

HELD (by L. S. Jackson, J., whose opinion prevailed) that the provisions of Act X. of 1859 do not apply to a suit for arrears of rent where the land is occupied for the purposes of building, and not agriculturally, or is not in the neighbourhood of lands occupied agriculturally.

HELD (by Mitter, J.) that there is nothing in Act X. of 1859 to justify any distinction between suits for arrears of rent on account of land used for *agricultural purposes* and suits for arrears on account of land used for other purposes.

Jackson, J.—THIS is an application to quash the decision of the Small Cause Court on the ground that the subject is one not within the jurisdiction of such Court.

The suit was one for arrears of rent upon a small piece of land at Kalighat, on part of which is a house. It is contended that this falls within the meaning of Clause 4, Section 23, Act X. of 1859, and that it was, therefore, a claim in respect of which, at the time of the passing of the Mofussil Small Cause Courts Act (XI. of 1865), a suit might be brought before a Revenue Court.

Another ground on which we are asked to interfere is that the suit was improperly framed, the plaintiff being one of several co-sharers.

As to the first ground, speaking for myself, I have frequently held that the provisions of Act X. of 1859 did not apply to suits of that description, the land being occupied for the purposes of building, and not agriculturally or in the neighbourhood of lands occupied agriculturally. I have repeatedly decided cases in appeal upon that principle. Even if the point was one which admitted of doubt, whatever course I should be inclined to take if the case arose in special appeal or in appeal regularly, I do not think it is a point on which the decision of the Court below ought to be called in question by way of exercising the extraordinary powers of this Court, and quashing a judgment regularly arrived at. I do not think, therefore, that this rule ought to be granted.

As to the second point raised, it is a point of form which does not affect the decision on the merits.

Mitter, J.—I am of opinion that this suit was not cognizable by the Small Cause Court of Sealdah. The plaint shows clearly and distinctly that the subject of the lease is a piece of land, and that the rent sued for is rent issuing out of that land, and payable on account and for the use of it. That there are certain buildings standing on the land does not, in my opinion, make any difference. Those buildings have been erected by the defendant, and it is quite clear from the plaint itself that they were not included in the lease, nor is the rent claimed on account thereof.

This being so, the question arises whether this suit could have been instituted in the Revenue Courts under the provisions of Clause 4, Section 23, Act X. of 1859, if those Courts had been in existence on the date when the plaint was filed.

I am of opinion that the Revenue Courts alone could have entertained a suit of this description. The words of Clause 4 appear to me to be quite clear and positive on the point. That Clause says: "All suits for "arrears of rent due on account of land "either kherajee or lakheraj or on account "of any rights of pasturage, forest-rights, "fisheries, or the like," shall be brought in the Revenue Courts, and in none other. It is impossible to say that this suit is not a suit for arrears of *rent on account of land*, and therefore the Small Cause Court of Sealdah had no jurisdiction to try it, the jurisdiction of Small Cause Courts in respect of such suits being barred by the express provisions of Clause 4, Section 6, Act XI. of 1865.

I am aware that there are some decisions of this Court opposed to my view, but there are also several decisions the other way; and if the decision of this case had rested with me, I would have referred the question to a Full Bench of this Court for an authoritative ruling.

Whether the defendant in this case is a "*ryot*," within the meaning of that word as used in Act X. of 1859, is a question upon which I do not wish to express any opinion, but it is quite clear that, under the provisions of Clause 4, Section 23 of that Act, this suit, being a suit for arrears of rent *on account of land*, could have been brought

in the Revenue Courts only if those Courts had been in existence at the date when the plaint was filed. I see nothing in the Act to justify any distinction between suits for arrears of rent on account of land used for *agricultural purposes* and suits for arrears of rent on account of lands used for other purposes. It has been already held by the Privy Council that a suit for arrears of rent against a tenant who is not a cultivating ryot was cognizable by the Revenue Courts.

I concur in the view which my learned colleague has taken on the second point raised in this application.

The 25th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Demurrage—Res judicata—Section 7, Act VIII., 1859.

Case No. 103 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Dinagepore, dated the 17th January 1870.

Munghroo Manjhee (Plaintiff), *Appellant,*

versus

Gyaram Nundee and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Umbika Churn Banerjee for Respondents.

In a suit for demurrage, the cause of action being the detention of a boat, plaintiff is bound to sue for the whole of the demurrage due: failing to claim a portion, he is barred by Section 7, Act VIII. of 1859, from suing subsequently for such portion.

Hobhouse, J.—THE plaintiff in this case sued for a sum in excess of 5,000 rupees on account of demurrage for the use of his boat at the rate of Rupees 7-8 a day, from Bhadro 1272 to Bhadro 1273, and for the value of the boat. The Lower Court dismissed the suit. Mr. Twidale for the appellant, plaintiff, admits that there was no claim to which we can give effect for anything except the demurrage from the month of Bhadro to the end of Pous 1272, or for a period of 5 months. He also admits that upon the record there is no evidence that he can submit to us to show that any demurrage was due for any time subsequent to the 4th Assin 1272, but he says that, upon the defendant's own statement, demurrage is due from the 1st Bhadro to the 4th Assin 1272.

The answer on the part of the defendant is that so much of the claim as has reference to any period previous to the 1st Assin 1272 is barred by the provisions of Section 7, Act VIII. of 1859. The meaning of this contention is that on a previous occasion the same plaintiff sued the same defendant upon a similar cause of action for demurrage due, and instituted his suit on the 1st Assin 1272, and the defendant contends that, when that suit was instituted, the plaintiff should have asked for the whole of the demurrage then due, that is, not only that for which he did ask, *viz.*, the demurrage up to the 30th Srabun 1272, but also that due up to the 1st Assin 1272.

We think this contention is good in law. By the provisions of Section 7, Act VIII. of 1859, it is declared that "every suit shall include the whole of the claim arising out of the cause of action." The cause of action in the former case was the detention of the boat, and when the plaintiff sued upon this cause of action on the 1st Assin 1272, the whole of his claim which was then due was for demurrage up to the 1st Assin 1272. He should, therefore, we think, have sued for such demurrage, and he cannot do so now.

It remains, then, to be seen whether there is any claim for demurrage from the 1st Assin to the 3rd Assin. We think upon the evidence that there is such claim, and we, therefore, give a decree to the plaintiff for a sum of Rupees 22-8, being the amount of demurrage for three days.

With respect to costs, we think the plaintiff is entitled to his costs in proportion to the amount decreed to him, but he will pay to the respondent costs in proportion to the amount dismissed. But as the costs due to the respondent is much larger than the amount decreed to the plaintiff, appellant, we think that the sum so decreed to the plaintiff should be deducted from the costs due to the respondent, and that respondent should be allowed to execute his decree for the balance of such costs.

The 25th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

High Court's powers—Section 15 of the Charter Act.

In the Matter of

Rooknee Roy, *Petitioner,*

versus

Amrith Lall, *Opposite Party.*

Baboo Roopnath Banerjee for Petitioner.

Baboos Kishen Succa Mookerjee and *Mohesh Chunder Chowdhry* for Opposite Party.

A suit to recover Rupees 254 as arrears of rent having been decreed by the Deputy Collector for Rupees 49, the defendant appealed to the Judge, but plaintiff appealed to the Collector. The Judge dismissed the defendant's appeal, and the Collector gave plaintiff a decree for the full amount originally claimed. The High Court, under Section 15 of the Charter Act, set aside the Collector's decree as made without jurisdiction.

Loch, J.—THE plaintiff in this case sued to recover the sum of 254 rupees and odd as arrears of rent. The Deputy Collector gave him a decree for 49 rupees. Against this decision, the defendant appealed to the Judge, but the plaintiff appealed to the Collector. The Judge dismissed the appeal before him, but the Collector gave the plaintiff a decree for Rupees 155-6-6. The defendant has now come up before this Court, urging that the Collector, in receiving and disposing of the appeal made by the plaintiff, has acted without jurisdiction, the suit having been for a sum above 100 rupees.

A rule to show cause was issued on the opposite party on the 1st July 1870; and the pleader for the opposite party admits that the Collector had no jurisdiction, but he urges that the Court, looking to the conduct of the parties, should not exercise the extraordinary power that it has under the Charter; and in support of this view the pleader has quoted a case reported in 10 Weekly Reporter, page 6. With that judgment we perfectly agree; but the facts of that case are not similar to the facts of the present case, *viz.*, in this respect—that in that case there was only one judgment of the Collector's Court which had been passed without jurisdiction. In the present case, there are two judgments, one passed by the Judge, who had jurisdiction to hear the appeal, and the other passed by the Collector, who had no jurisdiction at all. Under such circumstances, we think the rule must be made absolute, and the decree of the Collector set aside.

The parties will bear their own costs.

The 25th August 1870.

Present:

The Hon'ble L. S. Jackson and J. B. Phear, *Judges.*

Accretions—Alluvion—Section 4, Regulation XI. of 1825.

Cases Nos. 711 and 712 of 1870.

Special Appeals from a decision passed by the Judge of Cuttack, dated the 17th November 1869, reversing a decision of the Moonsiff of that District, dated the 31st July 1869.

Unnopoorna Debia (Defendant), *Appellant,*

versus

Sreemutty Dossee (Plaintiff), *Respondent.*

Baboo Umurnath Bose for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

In a suit for possession where certain lands were decreed to plaintiff on the ground that, having formed opposite to his villages, they subsequently became contiguous thereto by the gradual silting up of the bed of the river which had previously flowed between:

HELD that the decision was not in conformity with Clause 1 or Clause 3, Section 4, Regulation XI. of 1825, and that it was necessary to determine how the land formed, whether it was thrown up as an island in the bed of the river, or was formed by gradual accretion to an estate; and, if by gradual accretion, to what lands it so accreted.

Jackson, J.—THESE two appeals, Nos. 711 and 712, are both appeals by the defendant in the same suit which was decided originally by the Moonsiff, and decree was given in part for plaintiff and in part for the defendant. Separate appeals were preferred, and the Judge recorded separate judgments, from which the defendant has preferred two separate appeals to this Court.

Both appeals relate to the decision upon the plaintiff's claim to certain chur lands marked up a rough map which accom-

panies the paper book as included within the letters A, D, E, G, H, B, C, and F. That land is divided into two parts by dotted lines, apparently representing a water-course, one portion of the land lying to the west and another to the east thereof.

The Moonsiff gave the plaintiff a decree for the portion lying to the east, but refused him a decree for the other portion.

The ground on which the Judge appears to have based his judgment is this: "That "the entire land from the line A, D, E, G, "H, up to the northern bank of the "Brahminee is dry in the cold season, and "that land, being land formed by gradual "accretion, must by law belong to the "villages on the main bank opposite to "which it has accreted. The lands have "evidently accreted opposite to and are "joined on to the plaintiff's villages of "Burree and Ismailpore, and they can only "be held to belong to those villages."

That mode of laying down the law appears to be not exactly in conformity with the provisions either of Clause 1 or Clause 3, Section 4, Regulation XI. of 1825. Clause 1 provides: "When land may be "gained by gradual accession, whether from "the recess of a river or of the sea, it "shall be considered an increment to the "tenure of the person to whose land or "estate it is thus annexed;" and Clause 3, speaking of a chur or island thrown up in a large navigable river, the bed of which is not the property of an individual, says: "If the channel between such island and "the shore be fordable at any season of the "year, it shall be considered an accession "to the land or tenure of the person or "persons whose estate or estates may be most "contiguous to it;" and therefore, in order to determine the title to this land, it would have to be shown, first, whether it was formed by gradual accretion to an estate or land, or whether it was a chur or island thrown up in the bed of a river; and if it was a gradual accretion, then it would have to be shown to whose land it had so accreted.

Now, the Judge has only stated here that the land had formed by gradual accretion, and that it formed opposite to the villages on the main bank, and then joined on to the plaintiff's village. We do not understand this to mean, indeed we hardly think the Judge would have expressed himself in that way if he had meant, that the lands had formed by way of gradual accretion to the villages opposite to which they were situated, but rather that, having formed opposite to those villages, they subsequently became contiguous to them by the gradual silting up of the bed of the river which had previously flowed between them.

We think, consequently, that the case must go back. The case must be re-tried before the Judge, in order that he may determine upon the evidence how this land formed; and if it was the result of gradual accretion, to what lands it so accreted; and that he may determine the rights of the parties in precise conformity with the words of the Regulation; that is to say, he will find to whose land or tenure the formation is most contiguous.

This order appears to us to dispose of both appeals in this Court. We think they will most conveniently be dealt with by the Court below in a single judgment, so that the parties, if need be, may make a single appeal to this Court.

The defendants did in the appeal raise a further question of limitation, but it seems to us there is really nothing in that plea. The land was land of a description which, for some time, at any rate, after its formation, could not be occupied in any physical or tangible way; and it would only be necessary to call upon the plaintiff to prove specifically any actual possession of the land if the defendant should set up some *bond-fide* acts of adverse enjoyment and occupation. But we are inclined to think that in this case there was really no contest upon this point in the Lower Appellate Court, and therefore we do not think it necessary we should go into it further.

The 25th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Arbitration-award—Costs—Valuation.

Case No. 840 of 1870.

Special Appeal from a decision passed by the Judge of Patna, dated the 11th February 1870, modifying a decision of the Subordinate Judge of that District, dated the 17th July 1869.

Khoda Buksh (Plaintiff), *Appellant,*

versus

Mowla Buksh (Defendant), *Respondent.*

Moonshee Mahomed Yusuf for Appellant.

Mr. C. Gregory for Respondent.

HELD (by Loch, J.) with reference to the Full Bench Ruling reported in 6 Weekly Reporter, page 188, that an appeal lies on the point of costs from a decree enforcing an arbitration-award.

A Judge is not bound to give costs at a certain valuation; and a suit to carry out an arbitration-award need not be valued.

Loch, J.—IN this case, an arbitration to which Mowla Buksh and Khoda Buksh were parties was effected on the 8th December 1868. On the 13th May 1869, Khoda Buksh applied to the Court under the provisions of Section 327, Act VIII. of 1859, to enforce the award; and on the 27th of the same month Mowla Buksh also filed a similar application. After the usual proceedings, the Court, on the 17th July 1869, directed that the application of Khoda Buksh should be registered as a suit, and the award should be filed and enforced as a decree; and on the same day, the Court rejected the application of Mowla Buksh with costs.

An appeal was preferred by Mowla Buksh to the Judge, who reduced the costs awarded by the first Court; and a special appeal has now been made to us upon the ground that the Judge has acted without jurisdiction, as no appeal lay to him.

Now, the appeal to the Judge was not against the award, but simply upon the point of costs; and it appears to me that, under the ruling of the Full Bench, reported in 6 Weekly Reporter, page 188, an appeal upon the point of costs would lie to the Judge, though there might be no appeal on the merits It would be monstrous if, in a suit of this kind, the Lower Court were to award some exorbitant costs, and there should be no appeal from that order. But it is urged that, under the provisions of Section 327 read with Section 325, the order of the Lower Court is final. I believe it to be quite final as regards the award, but still, I think, looking at what is said in the judgment of the Full Bench, that, as regards costs, there would be an appeal.

The Chief Justice, in delivering judgment in that case, states that "the power given "to the Court to award and apportion costs "in such manner as it may deem proper "is a power to be exercised according to "law, and not according to mere caprice. "It is a power to be exercised subject to "all the provisions of this Code; and a de-"cree, so far as it relates to costs, is subject "to an appeal in the same manner as any "other part of the decree."

Then the Chief Justice refers to Sections 187, 193, and 196, the last two of which refer to interest, and then he says: "It "appears to me that the discretion vested "in the Court in all these Sections is subject "to the controlling power of appeal, whether "regular or special according to the nature "of the case."

Holding, therefore, as I do, that there is an appeal to the Judge upon the point of costs, I do not think that the Judge has acted without jurisdiction in disposing of this appeal.

It is further urged that the Judge was wrong in giving costs under Rule 8 (or as the Judge says Rule 15 erroneously, meaning Rule 8) of the Rules* regulating pleader's fees in Civil Courts subordinate to the High Court; and the reason assigned in support of this argument is that this application was, in fact, a suit, and that an appeal from it would be a regular appeal.

Even accepting the argument as put before us by the pleader, it appears to me that the Judge is not bound to give costs at a certain valuation. He may give whatever costs he thinks proper. In suits of this kind, there is no necessity whatever for valuing the property. The object of valuing the suit is to determine the proper amount of stamp-duty, and not for the object of assessing costs. The application to the first Court might have been made without any valuation at all of the suit. It might have been simply an application to the effect that an award has been made, and praying that the award might be carried out without any reference to the value of the property.

I think, therefore, that the Judge had authority to entertain the appeal, and exercised a proper discretion in giving costs as he has done, and I think that his order should not be interfered with, and that the special appeal should be dismissed with costs, sixteen rupees being allowed for pleader's fees.

Hobhouse, J.—I do not think it is necessary in this case to determine the question

* 5 W. R., Rules of Practice, p. 15.

as to whether or not an appeal did lie to the Judge from the order of the first Court giving costs in the matter of the arbitrator's award, and I do not wish to be understood as giving any opinion upon that point. It seems to me that, in whichever way we treat the case before us, we must dismiss the appeal. If the Judge had jurisdiction, and a special appeal lies, then it is only necessary to determine whether the Judge was right in law in awarding the costs he has awarded, or whether he was bound in law to award any higher costs.

The Rules on which the pleader for the special appellant relies are those to be found* in page 108, Appendix, Broughton, last edition, and he relies upon the first rule. That rule in so many terms refers only to "suits for the recovery of specific "property, or a share of specific property, "whether immoveable or moveable, or for "the breach of any contract or for da-"mages."

Admitting for the sake of the argument that the proceeding before us was of the nature of a suit, it certainly was not of the nature of that kind of suit to which this rule relates, and I do not think, therefore, that the Judge was bound to award costs according to the provisions of Section 1 of the rules. I think rather that he was right in applying Section 8. For this application was, in reality, in the nature of applications under Sections 53 and 54 of Act XX. of 1866, which are specifically declared to be governed by the provisions of Section 8 of the Pleader's Rules.

If, therefore, as I have said before, any special appeal lies, I do not think that we can say that the Judge was wrong in law in awarding the pleader's fees in question. But if no appeal lay to the Judge, and therefore no appeal lies to us, we are to consider this case as an application with which we have to deal either under the provisions of Section 35, Act XXIII. of 1861, or under Section 15 of the Charter Act, and in this case I do not think that it is a case in which we ought to interfere. Whether the Judge had jurisdiction or not, he has passed the order, and the order is a very proper one, and is not one with which we ought to interfere under the extraordinary power given to us. In this view of the case, I agree we ought to dismiss the appeal and with costs, sixteen rupees being allowed for pleader's fees.

* 5 W. R., Rules of Practice, p. 15.

The 29th August 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Suspension of a Pleader—Recorder's Court—Small Cause Court, Moulmein—High Court's powers—Section 15, Charter Act.

In the matter of

John Thompson, of Moulmein, some time an Advocate of the Small Cause Court of that place, *Petitioner.*

Mr. G. C. Paul for Petitioner.

To suspend from practice an advocate or pleader of any Court for misconduct is a proceeding of a penal character, and should not be adopted unless the specific offence charged against him be distinctly stated, and an opportunity of answering it be given him.

The Court of the Recorder of Moulmein is subject to the appellate jurisdiction of the High Court at Calcutta, and is consequently subject to the powers of superintendence vested in that Court by Section 15 of the 24 and 25 Vic., Cap. CIV.

The authority given to the Recorder of Moulmein to grant or withdraw a license to practise as a pleader in the Small Cause Court there is a part of his authority as Judge of the Recorder's Court, and is bestowed upon him simply with the view of enabling him the more effectively to administer justice. While the High Court cannot interfere with his discretion, where no appeal lies to it from the exercise of that discretion, it has power to take such measures as may be necessary for insuring the due observance by him of such proceedings as are essential to the right application of his discretion.

Phear, J.—In this case, upon the application of the petitioner, Mr. John Thompson, of Moulmein, a rule was issued by this Court to the Recorder of Moulmein requiring him to show cause why his order, dated the 16th of May 1870, made in the civil regular suit No. 67 of 1870, wherein Noor Mahomed is plaintiff and Nakoo is defendant, directing "that the said petitioner's license "as advocate of the Small Cause Courts of "Rangoon and Moulmein be withdrawn for "a period of six months;" should not be quashed on the ground that the petitioner had no opportunity of being heard with regard to the cause of his removal before the order was made.

Mr. Paul, on behalf of the petitioner, now asks that the rule be made absolute. No one appears to show cause on behalf of the Recorder.

It seems that the rule was not received by the Recorder until the 4th of August last, and therefore the full period of 30 days

allowed to him for showing cause has not yet elapsed. But that learned gentleman has rendered any further delay in the consideration of the subject of the petition unnecessary, inasmuch as he has forwarded to this Court the following curious minute.

"In the Court of the Recorder of Moulmein.

"Minute.

"5th August 1870.

"Received by the Calcutta Mail yesterday, "after the rising of the Court, an order of "the High Court of Judicature at Fort "William in Bengal, directed to the Court "of the Recorder of Moulmein.

"Order read at the sitting of the Court "this day.

"*Court.*—As I am not, as at present "advised, aware that this Court is under "the superintendence of the High Court "of Bengal as regards the matter referred "to (the suspension from practice of a "pleader of the Small Cause Court of Moul-"mein), I must decline to take the order of "the High Court into consideration.

"The Registrar will transmit a copy of "this minute to the Registrar of the High "Court of Bengal.

"(Signed) J. Coryton,

"*Recorder.*"

We have no doubt that the learned Recorder, in adopting the remarkable course which he has pursued in this matter, was rather actuated by over-solicitude for his own dignity and independence than animated with the deliberate intention to show disrespect to this Court. We will venture, however, to add that, in our opinion, he is not happy in the attitude which he has assumed, and that the dignity of the Recorder would, in truth, have been better discernible than it now is, if that learned Judge had manifested a demeanour of at least some courtesy towards the High Court. But, fortunately, the behaviour of the Recorder towards this Court is not an element in the question which we have now to determine; and his omission to show cause leaves our duty, I think, very plain; though, at the same time, we desire to express our regret that he has not thought proper to put us in possession of the grounds upon which he declines to acknowledge the jurisdiction of this Court.

We must, in the absence of any countervailing evidence to the contrary, take the facts as they are given by the petitioner in his affidavit to be correct; and on these facts, the petitioner is undoubtedly seriously aggrieved by the very irregular order of the Recorder.

The affidavit states as follows: "That "on the 20th day of August 1868, your pe-"titioner was duly admitted as an Advocate "of the Court of Small Causes at Rangoon, "and as such was, on the 11th day of June "1869, enrolled as an Advocate of the Small "Cause Court at Moulmein under Section "26, Act XXI. of 1863, and has from that "time regularly practised as such, and "gained his living thereby until the occur-"rence of the event hereinafter mentioned.

"That in delivering judgment in a cer-"tain case, in which one Noor Mahomed was "plaintiff and one Nakoo was defendant, the "Recorder of Moulmein ordered that your "petitioner's license as such Advocate should "be withdrawn for a period of six months. "A copy of the said judgment of the said "Recorder is hereunto annexed and marked "A.

"That your petitioner was not a party to "the said suit, nor had he any interest there-"in, nor was he conducting the said suit on "behalf of either of the parties thereto, "but was simply called as witness in the "same.

"That the Recorder did not call on your "petitioner to answer any charge, or give "your petitioner any opportunity of being "heard in his defence, nor was any charge, "in fact, made against your petitioner.

"That your petitioner's license was there-"upon withdrawn, and your petitioner has "thereby been prevented from practising his "said profession of Advocate, to his great "loss and detriment."

Then it appears from the alleged copy of the judgment, which is stated by the petitioner to have been delivered by the Recorder in the case referred to in the petition, that the Recorder, after discussing most of the evidence in the case, says:—

"I should dismiss the case here, were it "not that I wish to add an observation on "the conduct of Mr. Thompson in connection

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"with it. Notwithstanding his denial that "any compulsion, moral or physical, was used "to compel the defendant's signature, no one, "I think, could have heard the evidence "without a strong suspicion that the whole "matter was pre-arranged by him, and that "the Magistrate's summons applied for, could "it have been obtained, would have been "used merely as an amplification of Pitchay's "threat—that if he, defendant, would not "sign the note, he would be sent to Jail."

The learned Recorder then goes on to speak of the part which Mr. Thompson had played in the matter of the suit, as he understood it from the evidence given in the case. He refers at some length to the evidence of Mr. Thompson himself, and then he concludes in these words :—

"Stripped of its accessories, Mr. Thomp-"son's story is simply this: A man, who "from his ignorance of the Burmese lan-"guage and want of his acquaintance with "civilization must be regarded as a perfect "savage, is brought to him with a request "that he will prosecute him for a criminal "offence. Mr. Thompson, without even a "word of notice to the man, draws up a charge "against him, and endeavours to get the "Magistrate to issue a summons upon it. The "Magistrate refuses the summons, and Mr. "Thompson goes back to his office, where he "is quite astonished to find that the defend-"ant has consented to sign a note for Rupees "1,500. To avoid any confusion, Mr. Thomp-"son tells us he determined to write the "note himself, and he was satisfied with hav-"ing its contents explained to the defend-"ant by one of the party who had, according "to Mr. Thompson's statement, brought him "to the office with a view of prosecuting "him criminally.

"I cannot but think such conduct highly "censurable in a professional lawyer, and "this conviction leads me to make a further "observation in connection with the present "case. I have hitherto carefully abstained "from any observations on the arrangements "made among themselves by members of the "Bar, but I think it impossible to allow "the present case to pass by without point-"ing out the serious inconvenience of gentle-"men of the Recorder's Bar associating "themselves in business with persons who "are not members of that Bar. The Court's "confidence in the integrity and ability of "the members of the Recorder's Bar is to a "great extent indispensable in the transac-"tion of ordinary business. The admission "into partnership of persons who have not "been so admitted must necessarily lead to "a diminution of that confidence. In the "present case, the connection seems to me "specially open to objection.

"Mr. Law holds the office of public pro-"secutor, and as such stands at the head of "the Recorder's Bar. Mr. Thompson is a "pleader of the Small Cause Court, who has, "I am sorry to say, by no means given me "the impression, during his practice, of a "straightforward man of business. I hope "the time will never come when the Court "will have to regret reposing the fullest "confidence in the honor of the Bar, one "great safeguard of which is to be found "in a zealous adherence to the rules of "etiquette which have established them-"selves in both branches of the profession "at home. In no British possession, I may "observe, is it of more importance than in "this Province that the standard of the "Bar should be kept high; inasmuch as the "European community is so small that pub-"lic opinion can hardly be said to operate "at all, and the native population appears "to place an almost unreasoning confidence "in the probity and intelligence of those "whom they are accustomed to look upon as "representatives of a superior race.

"My finding in the case is that the note "sued on was obtained from the defendant "by intimidation, and I dismiss the suit "with costs.

"For the reason I have above given, I "direct Mr. Thompson's license to be with-"drawn for a period of six months."

So that, by the operation of the two last lines, added to a very lengthy judgment delivered in a case to which the petitioner was not a party, without any specific charge having been made against him, and without his having had the smallest opportunity of answering a charge, had any been made, the petitioner finds himself suspended for six months from the practice of his profession.

Now, we need hardly say that to suspend from practice an advocate or pleader of any Court for misconduct is a proceeding of a penal character, and we have the authority of the decision given by the Privy Council *in re* Pollard* (a case not very unlike the present in some of its features), if any authority be needed, for stating that no person should be punished for any criminal offence,

* 2 L. R., *Privy Council*, p. 106.

unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given him.

It appears to be clear, then, that the learned Recorder in this case has fallen into an unfortunate and grievous error, such an error as we certainly ought, on the application of the petitioner, to set right, if we have the power to do so.

The learned Recorder, by his "Minute," appears to assert very positively that we have no such power; and the respect which is due to the opinion of the Judge of such a Court as that over which he presides has led us to seek for sufficient grounds to support this opinion. We have failed to find any.

We think that the Legislature has distinctly made the Court of the Recorder of Moulmein subject to the superintendence of this Court, and so has rendered it incumbent on this Court, and given this Court power, to take care that all the acts of the Recorder of Moulmein done in his capacity of Recorder be done regularly and according to law.

Section 15 of the Charter Act, 24 and 25 Vic., Cap. CIV., passed on the 6th of August 1861, says: "Each of the High Courts es-"tablished under this Act shall have superin-"tendence over all Courts which may be "subject to its appellate jurisdiction." The first Letters Patent under this Act were issued in May 1862. At that time, the Recorder's Court at Moulmein did not exist. The Recorder's Court was afterwards established by the Governor-General under the powers given to him for that purpose by Act XXI. of 1863, and that Act, together with a subsequent Act, III. of 1866, is the source of the jurisdiction, powers, and privileges which the Court possesses. We are of opinion that the Act makes the Recorder's Court of Moulmein subject to the appellate jurisdiction of this Court.

It appears from Act XXI., in the first place, that for suits instituted in the Recorder's Court not exceeding in value Rupees 3,000 no right of appeal whatever exists. Then the 27th Section of that Act enacts that, "in all suits heard and determined by "a Recorder under this Act, in which the "amount or value of the suit shall exceed "Rupees 3,000 and be less than Rupees "10,000, *an appeal shall lie* to the High "Court of Judicature at Fort William in "Bengal, subject to the rules contained "in the Code of Civil Procedure regarding "regular appeals." It is true that the High Court is not the sole Court possessing immediate appellate jurisdiction over the Recorder's Court, for Section 39 enacts that, "in all suits heard and determined "by a Recorder under this Act, in which "the sum or matter at issue is Rupees "10,000 or upwards, or in which the "judgment, decree, or order shall involve, "directly or indirectly, any claim, demand, "or question, to or respecting property of "the value of 10,000 rupees or upwards, "an appeal shall lie to Her Majesty in "Council."

But again Section 22 says: "If in any "suit, any question of law or usage having "the force of law or the construction of a "document affecting the merits of the deci-"sion shall arise, on which the Recorder "shall entertain any doubt, the Recorder "may, either of his own motion or on the "application of either of the parties to the "suit, draw up a statement of the case, and "submit such statement, with his own opi-"nion, for the decision of the High Court "of Judicature at Fort William in Bengal."

If a reference of this kind is made, the decision thereon of the High Court is binding on the Recorder, for from the latter end of Section 25 we find that, when the High Court "has heard and considered the case, "it shall transmit a copy of its judgment, "under the seal of the Court and the sig-"nature of the proper officer of the Court, "to the Recorder, who shall, on the receipt "thereof, proceed to dispose of the case "conformably to the decision of the High "Court."

Thus, excepting cases of 10,000 rupees and upwards, which we suppose are comparatively rare, the only appeal which exists as of right lies to this Court; and in all cases, an appeal in the modified form of a reference under Section 22 lies also to this Court, and therefore it appears to us that the Act under which the Recorder's Court was established, unmistakeably made it subject to the appellate jurisdiction of this Court; and so, we think, brought it within the range of Section 15 of the Charter Act.

In our opinion, the fact that this Court does not possess appellate jurisdiction over all classes of cases tried in the Recorder's Court, and that the Privy Council shares

with this Court appellate jurisdiction over the Recorder's Court, does not remove the Recorder's Court from the operation of Section 15 of the Charter Act, if, however, it be objected that the words in that Section "*which may be subject to its* "*appellate jurisdiction*," mean only *made subject by the Letters Patent of this Court*, and that the words of Section 15 of the first Letters Patent cannot be construed into having the effect of making any Court subject to this Court which did not exist at the time when the Letters Patent were granted, still clearly this objection, if it be a valid objection, is removed by Section 16 of the present Letters Patent of the High Court which were granted in the year 1866. That Section says: "And we do "further ordain that the said High Court "of Judicature at Fort William in Bengal "shall be a Court of appeal from the Civil "Courts of the Bengal Division of the "Presidency of Fort William, and from "all other Courts subject to its superintend-"ence, and *shall exercise appellate juris-"diction in such cases as are subject to "appeal to the said High Court by virtue "of any laws or regulations now in force.*" We need hardly state that the Recorder's Court of Moulmein was established under Act XXI. of 1863 long before the year 1866. It follows, we think, from this fact, that since these Letters Patent have been issued, at any rate, whatever might have been the case before, the Recorder's Court of Moulmein by reason of the appeal given to this Court in Act XXI. of 1863, certainly has been a Court over which the High Court, by the express terms of the Letters Patent, possesses an appellate jurisdiction, and consequently it is a Court to which Section 15 of the Charter Act must apply.

Then comes the only remaining question, namely, whether the act of which the petitioner complains is an act done by the Recorder in his capacity of Judge of the Recorder's Court of Moulmein.

As to that we conceive there cannot be any reasonable doubt. In the "Minute," which is the only guide we have to the learned Recorder's own views as to the nature of his proceeding, some emphasis seems to be placed upon the passage within brackets "(the suspension from practice "of a pleader of the Small Cause Court "of Moulmein);" and we suppose that the learned Recorder intends thereby to suggest that the granting or withdrawing of a license to practise as a pleader in the Small Cause Court of Moulmein, is not such an exercise of the power and authority possessed by the Recorder as will come under the superintendence of this Court. In the first place, we would remark with regard to this that we can find no ground for making any distinction between the Court of Small Causes at Moulmein and the Recorder's Court. Act XXI. of 1863 throughout its text no where speaks of any other Court than the Recorder's Court. It is true that by Section 35 of that Act, the Registrar has the power of a Judge of a Court of Small Causes in suits of the nature of those described in Act XLII. of 1860; but it appears to us that that Section does not constitute the Registrar a Judge of a Small Cause Court. It only empowers him to try suits in the Recorder's Court which are of a nature cognizable by a Court of Small Causes and below a certain value. But, however, this may be, the power which the Recorder possesses for licensing advocates is given by Section 15 in these words: "No person "shall be permitted to appear or act as the "advocate of any suitor in any Court held "under this Act, in any action or suit or "touching any matter whatever, unless such "person shall have been previously licensed "by the *Recorder of such Court* to act for "the suitors of such Court generally, or spe-"cially for the particular occasion, &c."

And Section 17 provides that "the "Recorder of any Court may, for any suffi-"cient reason, withdraw any license which "shall at any time be granted by such Re-"corder to any person to act generally or "specially as an advocate under this "Act."

It appears to us as plain as words can make the matter, that the authority thus given to the Recorder is part of his authority as Judge of the Recorder's Court, and that it is bestowed upon him simply with the view to enable him the more effectively to administer justice in the Court over which he presides. We are also of opinion that the superintending power given to this Court by the 15th Section of the 24 and 25 Victoria, Chapter 104, enables us, and indeed makes it our duty to take care that all acts done by the Judge of a Court which is subject to the appellate jurisdiction of this Court by virtue of his authority as Judge, be done regularly and according to law; and that while we cannot interfere with his

discretion in cases wherein no appeal against the exercise of that discretion lies to this Court, still we have power to take such measures as may be necessary for insuring the due observance by him of such proceedings as are essential to the right application of his discretion.

From the facts before us, it appears that Mr. Thompson was licensed specially to act for suitors in the Recorder's Court; that is, he was licensed to act for suitors in causes which could be heard by the Registrar under Section 35.

It may be doubted whether the framers of Section 16, when using the word "specially," contemplated the case of the Recorder licensing an advocate for a particular, special class of cases, for the words are "*specially for the particular occasion.*" But as the Recorder has thought proper to license Mr. Thompson as an advocate of the so-called Small Cause Court, which at the utmost we may take to be a division of his own Court, he cannot withdraw such license excepting "for any sufficient reason;" and as we have already said at the commencement of this judgment, he cannot rightfully and lawfully come to a conclusion that a sufficient reason does exist without first specifying a distinct charge against Mr. Thompson, and giving him an opportunity to answer that charge.

We think, therefore, that the rule must be made absolute.

The 29th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Leases—Construction—Hereditary tenures—Conditions—Lessor's right of re-entry—Cause of action.

Case No. 785 of 1870.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 22nd January 1870, affirming a decision of the Subordinate Judge of that District, dated the 19th January 1869.

Lekhraj Roy and others (Plaintiffs), *Appellants,*

versus

Kanhya Singh and others (Defendants), *Respondents.*

Messrs. J. T. Woodroffe and *R. E. Twidale* and *Baboo Grish Chunder Ghose* for Appellants.

Mr. C. Gregory and *Baboos Debendro Narain Bose, Chunder Madhub Ghose* and *Kalee Kishen Sein* for Respondents.

Where there are no words in a lease extending its provisions to other parties beyond the lessee, its terms must be interpreted as applicable to the lessee only, unless the Court is able, from the conduct of the parties and the surrounding circumstances, to come to a different conclusion.

Where a lease contains a condition whereby the lessor agrees not to put an end to the mokurruree of his lessee except on the occurrence of a fresh settlement on the part of Government, it does not follow that the lessor intends to constitute a hereditary lease if no Government settlement takes place.

In such a case a lessor's right to re-enter arises on the death of the lessee; but if the representatives of the lessee have been allowed to hold over by the heirs of the lessor to whom they have paid rent, the cause of action to a purchaser of the lessor's rights and interests arises on the refusal of the lessee's representatives to permit him to re-enter.

Loch, J.—In 1866, the plaintiff purchased, as he alleges in execution of a decree, the rights and interests of Muddun Gopal in Mouzahs Toé and Tatarpore, and on attempting to take possession he was opposed by the defendants Kanhya Singh and others, alleging that they held a mokurruree of Mouzah Toé from the ancestor of the judgment-debtor, and by Ram Sahoy and others who alleged that they were the mokurrureedars of Mouzah Tatarpore, and further, that the plaintiff's purchase did not cover that village.

It will be necessary to dispose of the question regarding Mouzah Toé before we enter upon that of Tatarpore.

It is admitted by all parties that one Choonee Lall held a mokurruree from Government of Mouzah Toé, and that in 1215 (1808) he gave a lease to or in the name of Nirput Singh, now represented by the defendant Kanhya Singh. The allegation on the part of the defendant is that the lease to Nirput Singh is an hereditary transferable tenure bearing a fixed rent.

The Lower Courts have considered the mokurruree to be of the nature pleaded by the defendants, and have further held that plaintiff, as representative of the former proprietors, is bound by the result of certain decrees in which they and Nirput Singh were engaged, and consequently the plaintiff is not entitled, as he prays to be allowed to do, to evict the defendant and take direct possession of the village.

In special appeal, it is urged that the lease to Nirput Singh was only for his life; that it contains no terms which conveyed either directly or impliedly an hereditary tenure; that the words on which the first Court has relied in support of the conclusion it has come to, even if they bear the meaning put upon them by the Subordinate Judge, do not extend the lease beyond the life of Nirput Singh; that the decrees referred to by the Lower Courts are not evidence in the present case, for the question which has now to be tried was not and could not have been tried in the former cases, for Nirput Singh was then alive; and further that the judgment of the Privy Council in the case of Dhunput Singh, reported at 9 Weekly Reporter, page 3, Privy Council, is not, as the Judge supposes, applicable to this case.

In answer, the respondent urged that, even if the lease contained no direct terms constituting it an hereditary tenure, yet there was a condition therein which, so long as it remained unfulfilled, entitled the respondents to treat it as such; that there was nothing in the wording of the document that showed it to have been limited to the life of Nirput Singh; that its terms were those used ordinarily in leases which were intended to be perpetual, and that the absence of such words as "from "generation to generation" was not material, as ruled by the Privy Council in the case of Dhunput Singh, when the nature of the tenure and the intention of the parties might be gathered from their conduct; that in this case, as in that of Dhunput Singh, the property had devolved from one generation to another, for, as asserted by Jeetun Daye in 1827, the lease of 1215 was taken by Neem Chand in the name of his son Nirput Singh, and had then been held by Nirput Singh and had descended to his sons and his grandsons; that their long and undisturbed possession also proved the tenure to be, in the opinion of the parties, a permanent one. The respondents plead further that the suit is barred by limitation.

It is necessary to determine what is the nature of the lease before we can satisfactorily dispose of the question of limitation.

Looking at the terms of the lease, we have no hesitation in saying that it is a lease granted to Nirput Singh at a fixed rent for the time of his natural life, provided he continued to pay the rent agreed upon. When the lease was given in (1215) there appears to have been a probability that the Government would make some fresh settlement with Choonee Lall, and the Judge says that the lease to Choonee Lall extended from 1207 to 1216, F. S. Whether this were so or not, there appears to have been the probability of a fresh settlement, and Choonee Lall provides for this contingency. The first paragraph provides for the regular payment of the rent, *viz.*, Rupees 606, from 1215, F. S., up to the period of the lessor's mokurruree. Secondly, it provides that, if the Government make a fresh settlement with the lessor, the amount of such assessment would be separately charged to the lessee; the meaning of this clause, which is somewhat obscure, being apparently that, in the event of Government making a fresh assessment, the difference between the present and new jumma, if in excess of that payable by the lessee, would have to be borne by him; and then it gives the lessor power to re-enter or to sell, should the rent fall into arrears.

The first Court, in disposing of this point in the case, says that Choonee Lall gave a mokurruree in 1215 to Nirput Singh, the main condition of which was that this latter mokurruree was to continue as long as his mokurruree, *viz.*, that which he held from Government; and as plaintiff had failed to show that his mokurruree had lapsed or was at an end, so he could not set aside that of the defendant, whose condition must be determined by that of his own.

The Subordinate Judge apparently refers to the concluding words of the first clause of the lease, and there can be no little doubt that, so far as Nirput Singh was concerned, the plaintiff could not, during the life of Nirput, set aside the lease or alter the rent, without proving that the revenue which he paid to Government on account of the same estate had been subsequently altered, and that Nirput Singh had failed or refused to pay the difference. But it does not follow that, because Choonee Lall agreed not to put an end to the mokurruree of Nirput Singh except on the occurrence of the contingency referred to, *viz.*, a fresh settlement on the part of the Government, that he thereby intended to constitute an hereditary lease, if no fresh Government settlement took place. The words relied upon by the first Court do not go to that extent; and in the absence of any words extending the lease beyond the life of the lessee, it cannot

be said that the lessor intended it to extend beyond the life of Nirput Singh. The condition is quite compatible with the terms of a lease for life; and where there are no words in the document extending its provisions to other parties beyond the lessee, it is necessary to interpret its terms as applicable to the lessee only, unless, as urged by the pleader for the respondent, the Court is able from the conduct of the parties and the surrounding circumstances to come to a different conclusion. So far, then, as the document itself goes, we have no hesitation in saying that its terms are not sufficient to constitute an hereditary tenure at a fixed rent. It was as if A had let land to B on this condition—if my landlord does not raise my rent, I will not raise yours; but such a condition would not render the lease to B hereditary. On his death, A would have a right to re-enter.

But it is said that the judgments of 1827 and 1854 have determined the nature of the lease. What they determined was that the lease was genuine, and that the possession of Nirput Singh, who was a party to both suits, could not be disturbed. So far as Nirput Singh was concerned, they were conclusive. His right was clearly determined, but the judgments in those cases did not declare the tenure created by the lease of 1215 was hereditary, or that the lessor could not re-enter on the death of Nirput Singh; and we agree with the Counsel for the appellant that the decrees in those cases cannot be used as evidence against the plaintiff in the present suit.

But it is urged that regard must be paid to the long possession of the defendant as well as to the fact that the property has descended from father to son through various generations, and these facts prove, even if the document be silent on the subject, that the parties to the deed and all parties concerned, before the plaintiff came in, considered the lease to be hereditary, and intended it to be so.

With regard to the plea of possession, we have only to observe that the case quoted to us, reported at 9 Weekly Reporter, page 3, does not apply, and for this reason that the possession insisted on is merely the long possession of a long life, and not the long possession arising from hereditary descent. It is admitted that Nirput Singh died about 13 years previous to the institution of the suit, or about 1855. So that he was in possession from 1808, the date of the lease, for a period of 47 years; and the succession of his heirs to the property on his death is certainly not sufficient of itself to establish the hereditary nature of the tenure from long possession. But it is urged that the property has passed through several descents, and has, with the sanction of the lessors whom plaintiff, special appellant, represents, become hereditary, and plaintiff must be bound by the words of Jeetun Daye in the suit determined in 1827. She sued to set aside the lease as forged, alleging that a lease for one year had been taken benamee by Neem Chand, the father of Nirput Singh, in the name of his son, and that the law forbade such a lease as that propounded by the defendant Nirput Singh from being granted. The Court found the deed to be genuine, and held that, whatever might be the law, it did not lie in the plaintiff Jeetun Daye's mouth to object to the lease, after having received for many years the rent payable under that lease. It was not found, whatever Jeetun Daye might have alleged, that the lease had been given to any other than Nirput Singh, the defendant in that suit. Now, considering the loose way in which assertions of all kinds used to be made in the pleadings before the Code of Procedure was introduced, we do not think, in the absence of other evidence, that the allegation of Jeetun Daye is sufficient to prove that Neem Chand had any beneficial interest in the property; and since the death of Nirput Singh, which occurred about 13 years ago, there has been but one descent. It would be monstrous, under such circumstances, to apply the finding come to by the Privy Council in the case of Dhunput Singh to the present case, for in that case the property had descended through several generations both of lessors and lessees, and the descendants of the original lessee were recognized by the descendants of the original lessor as mokurrureedars, and were so styled in the receipts, and their transfers of property to third parties were admitted. This is a very different state of things to what we find in the case before us. From the fact that the property has passed into the possession of Nirput Singh's immediate heirs and representatives, we cannot gather that the intention of the original parties to the lease was that it should be considered permanent and hereditary.

On the point of limitation little need be said. It is urged by the respondent that, if the Court hold the lease to be good only for

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the life of the lessee, even then the plaintiff is out of Court, as his cause of action arose on the death of the lessee, since which time a period of 13 years has elapsed; that plaintiff cannot be allowed to date his cause of action from the time of his purchase, for he has always treated the defendant as a trespasser, and not as a tenant holding over. Now, looking at the plaint, we do not find that plaintiff has treated the defendants as trespassers. He says they have opposed his taking possession, and therefore he sues to recover, as the lease expired with the life of Nirput Singh. The defendants admit payment of rent to the heirs of Nirput Singh, whom the plaintiff represents. It is clear, therefore, from their own admission that the defendants were allowed to hold over by the heirs of Choonee Lall to whom they paid rent, and that, when the plaintiff wished to re-enter, which, as the lease had expired, he was entitled to do, he was opposed by the defendants. The right to re-enter arose on the death of the lessee, but as the defendants were allowed to hold over, paying rent to the representatives of the plaintiff, the cause of action to plaintiff arose on the refusal of the defendants to permit him to re-enter, and from that date he is clearly within time, and the suit is not barred by limitation. We hold, therefore, that the special appellant must succeed in this part of his case, and is entitled to take direct possession of Mouzah Toé, and that the decrees of the Lower Courts dismissing the plaintiff's claim to direct possession of Mouzah Toé must be set aside with costs in all Courts.

The next point we have to consider is whether the plaintiff did or did not purchase Tatarpore. Both the Lower Courts have found on the evidence that Tatarpore was not included in plaintiff's purchase, and from the documents read to us by the pleader for the special appellant, we think the conclusion at which the Lower Courts have arrived is correct. This being the case, it is unnecessary to enter into the question of the validity or otherwise of the mokurruree set up by the defendant Ram Sahoy, and we dismiss this part of the appeal with costs payable to Ram Sahoy and others.

The 29th August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Mahomedan Law—Pre-emption—Tullub-ishtishad.

Case No. 884 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 9th February 1870, reversing a decision of the Moonsiff of that District, dated the 29th November 1869.

Goluck Ram Deb and others (some of the Defendants), *Appellants,*

versus

Brindabun Deb (Plaintiff), *Respondent.*

Baboo Grish Chunder Ghose for Appellants.

Baboo Gopal Lall Mitter for Respondent.

It is essential to the proper performance of *tullub-ishtishad* that third persons should be formally called upon, either in the presence of the purchaser, or on the land, or if the vendor is in possession, in his presence, to bear witness to the pre-emptor's demand.

Phear, J.—I AM of opinion that it is essential to the proper performance of *tullub-ishtishad* that third persons should be formally called upon, either in the presence of the purchaser, or on the land, or if the vendor is in possession, in the presence of the vendor, to bear witness to the pre-emptor's demand. As I understand the Mahomedan Law on this point, there must be formal proceeding to which the witnesses are parties, and are, as it were, solemnly made vouchers, in order to complete the necessary foundation for asserting the pre-emptor's right.

I think this has been laid down now in a series of decisions of this Court, notwith-

standing a passage in Mr. Baillie's book, which at first sight seems to go the length of saying that the witnesses are not necessary, excepting so far as the claimant, the pre-emptor, will eventually require witnesses to prove that he made his demand.

A case very similar to the present came under the consideration of a Division Bench of this Court upon which I sat with Mr. Justice Mitter in the early part of this year. We then, as far as I remember, took the view which I have just expressed; and I see no reason for altering that view.

I think, therefore, that the judgment of the Lower Appellate Court, as it stands, is not sufficient to entitle the plaintiff to a verdict. The Subordinate Judge says that the plaintiff, after observing the *tullub-mohasibut*, went to the purchaser, and asked for a kobalah from him; "he has by this "circumstance proved the observance of the "maxim of *tullub-ishtishad*."

This simple demand of a kobalah is certainly not sufficient, and therefore it would be necessary at all events to reverse the decision of the Subordinate Judge. Whether or not we ought to send back the case to him for re-consideration of the evidence upon this point, depends upon whether or not there is such evidence.

But the first Court has found that the evidence is not sufficient in law to make out that *tullub-ishtishad* was properly performed by the plaintiff; and so far as the respondent's pleader has brought the evidence under our notice, it seems to me that this decision is a correct one. I do not think that that evidence is sufficient in law to support a finding (should the Lower Appellate Court come to it) that the *tullub-ishtishad* had been completely performed. There is no mention in that evidence, as far as I can see, that the witnesses *were* called upon, in the presence of the purchaser, to whom the demand of a kobalah was made, to testify to that demand.

I think, therefore, that it would be useless to remand the case, and that the decree of the Lower Appellate Court should be reversed, and the plaintiff's suit dismissed with all costs.

Jackson, J.—I am also of the same opinion. I am quite satisfied that there is not sufficient evidence on the record to prove performance of the *tullub-ishtishad*.

The 29th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Mahomedan Law—Pre-emption—Vicinage.

Case No. 1663 of 1869.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 18th March 1869, affirming a decision of the Moonsiff of Monghyr, dated the 24th August 1868.

Shaikh Mahomed Hossein (Plaintiff), *Appellant,*

versus

Shah Mohsun Ali (Defendant), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Moonshee Mahomed Yusuf for Respondent.

A right of pre-emption in a separate and distinct estate cannot be allowed merely on the ground of vicinage, except in regard to small plots of land and houses.

Loch, J.—THIS was a suit to enforce the right of pre-emption to certain property sold by one Hameedoollah, first party defendant, to one Shah Mohsun Ali, second party defendant. The right of pre-emption, as appears from the judgment of the first Court, was founded upon the plea of vicinage. In the first instance, the Lower Court dismissed the suit on the ground of limitation. A special appeal was preferred to this Court against an order of remand by the Judge, which was disposed of on the 27th August 1867. In that case, the Judges say: "In "special appeal, the defendant abandons his "objection as to limitation, and pleads "that the plaintiff, who claims as a shuf-"feajar (pre-emption by right of vicinage), "holds an inferior position to himself as "shuffeeah khaleet (partnership); and that, "therefore, his suit ought to have been dis-"missed." And in the opening of their judgment, they describe what was the suit instituted by the plaintiff. They say that "this was a suit by the plaintiff for the "right of pre-emption to a 5 annas share "of a certain estate on the ground of vici-"nage."

The special appeal was dismissed as being premature, the case having been remanded by the Lower Appellate Court to the first

Court to try the different rights of the parties claiming by partnership and vicinage respectively.

After the case was remanded, it came before the Moonsiff of Monghyr, who disposed of it on the 24th August 1868; and in his judgment he says that the plaintiff bases his claim of pre-emption on the right of vicinage; and he holds that, under the Mahomedan Law, the plaintiff was not entitled merely from the circumstance of vicinage to the right of pre-emption in a separate and distinct estate. In his judgment, the Moonsiff says that "the plaintiff admits that Chuck "Hosseinabad of which he is proprietor is "distinct and separate from Mouzahs Kadira-"bad and Mooradapore; and he can, there-"fore, under the exposition of the Mahome-"dan Law as contained in the above ruling, "have no right of pre-emption to the share "of those mouzahs."

The plaintiff appealed to the Judge, and the issues before the Judge were—

First.—"Whether the appellant, who "claims to be proprietor of a plot of "14 beegahs of lakheraj land termed "Hosseinabad and situated in the village "of Hydrabad, has or has not a right of "pre-emption on the sale of a share in "Hydrabad to a third party.

Secondly.—"Whether, as recipient of "malikana of the said village, his right to "pre-emption does or does not accrue."

On both the points, the Judge held against the appellant, and dismissed the appeal.

With regard to the second point, the Judge observes: "The appellant did not, "in my opinion, claim on the basis of re-"ceipt of malikana, and this plea cannot "now be entertained."

Looking at the plaint, we see clearly that the plaintiff claims on the right of shuffeajar (vicinage). It is true that he also calls himself proprietor of Hydrabad, but he does not clearly and distinctly set forth his right of pre-emption upon the ground that he was a partner in that estate; and it appears to me that, wherever a party seeks to enforce a right of pre-emption, he is bound to state unmistakeably the grounds on which he seeks to enforce that right. The Courts below appear to me to have taken a right view of the ground on which the plaintiff came into Court, namely, that he claimed on the right of vicinage, and rightly determined that on that ground he was not entitled to purchase the estate in preference to the defendant Mohsun Ali.

When the special appeal came before us on the 2nd May 1870, we were informed that a question whether a claim for pre-emption founded on vicinage extended to a large estate was then referred to a Full Bench, therefore the decision of this case was postponed till the result of the trial before the Full Bench was made known. We have now the judgment of the Full Bench* before us, and there the question seems to have been as to the difference, if any, between right by vicinage and the right by partnership, and the Full Bench held in conformity with a long course of decisions that a partner would have a right to pre-emption in preference to a stranger where large property was sold, but where the right was claimed on the ground of vicinage, no such right existed except, as pointed out in Baillie on Mahomedan Law, in regard to the small plots of land and houses.

We think, therefore, that no ground has been made out for special appeal, and we therefore dismiss the appeal with costs. Two hundred rupees are allowed for pleader's fees for all the proceedings of this Court.

The 29th August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Issues—Irregularity—Appellate Court.

Case No. 876 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 16th February 1870, affirming a decision of the Moonsiff of Nubeegunge, dated the 6th December 1869.

Sham Churn Doss and others (Defendants), *Appellants,*

versus

Goono Moyee Chowdhrain (Plaintiff), *Respondent.*

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* 14 W. R., F. B., p. 1.

standing a passage in Mr. Baillie's book, which at first sight seems to go the length of saying that the witnesses are not necessary, excepting so far as the claimant, the pre-emptor, will eventually require witnesses to prove that he made his demand.

A case very similar to the present came under the consideration of a Division Bench of this Court upon which I sat with Mr. Justice Mitter in the early part of this year. We then, as far as I remember, took the view which I have just expressed; and I see no reason for altering that view.

I think, therefore, that the judgment of the Lower Appellate Court, as it stands, is not sufficient to entitle the plaintiff to a verdict. The Subordinate Judge says that the plaintiff, after observing the *tullub-mohasibut*, went to the purchaser, and asked for a kobalah from him; "he has by this "circumstance proved the observance of the "maxim of *tullub-ishtishad*."

This simple demand of a kobalah is certainly not sufficient, and therefore it would be necessary at all events to reverse the decision of the Subordinate Judge. Whether or not we ought to send back the case to him for re-consideration of the evidence upon this point, depends upon whether or not there is such evidence.

But the first Court has found that the evidence is not sufficient in law to make out that *tullub-ishtishad* was properly performed by the plaintiff; and so far as the respondent's pleader has brought the evidence under our notice, it seems to me that this decision is a correct one. I do not think that that evidence is sufficient in law to support a finding (should the Lower Appellate Court come to it) that the *tullub-ishtishad* had been completely performed. There is no mention in that evidence, as far as I can see, that the witnesses *were* called upon, in the presence of the purchaser, to whom the demand of a kobalah was made, to testify to that demand.

I think, therefore, that it would be useless to remand the case, and that the decree of the Lower Appellate Court should be reversed, and the plaintiff's suit dismissed with all costs.

Jackson, J.—I am also of the same opinion. I am quite satisfied that there is not sufficient evidence on the record to prove performance of the *tullub-ishtishad*.

The 29th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Mahomedan Law—Pre-emption—Vicinage.

Case No. 1663 of 1869.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 18th March 1869, affirming a decision of the Moonsiff of Monghyr, dated the 24th August 1868.

Shaikh Mahomed Hossein (Plaintiff), *Appellant,*

versus

Shah Mohsun Ali (Defendant), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Moonshee Mahomed Yusuf for Respondent.

A right of pre-emption in a separate and distinct estate cannot be allowed merely on the ground of vicinage, except in regard to small plots of land and houses.

Loch, J.—THIS was a suit to enforce the right of pre-emption to certain property sold by one Hameedoollah, first party defendant, to one Shah Mohsun Ali, second party defendant. The right of pre-emption, as appears from the judgment of the first Court, was founded upon the plea of vicinage. In the first instance, the Lower Court dismissed the suit on the ground of limitation. A special appeal was preferred to this Court against an order of remand by the Judge, which was disposed of on the 27th August 1867. In that case, the Judges say: "In "special appeal, the defendant abandons his "objection as to limitation, and pleads "that the plaintiff, who claims as a shuf-"feajar (pre-emption by right of vicinage), "holds an inferior position to himself as "shuffeeah khaleet (partnership); and that, "therefore, his suit ought to have been dis-"missed." And in the opening of their judgment, they describe what was the suit instituted by the plaintiff. They say that "this was a suit by the plaintiff for the "right of pre-emption to a 5 annas share "of a certain estate on the ground of vici-"nage."

The special appeal was dismissed as being premature, the case having been remanded by the Lower Appellate Court to the first

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Court to try the different rights of the parties claiming by partnership and vicinage respectively.

After the case was remanded, it came before the Moonsiff of Monghyr, who disposed of it on the 24th August 1868; and in his judgment he says that the plaintiff bases his claim of pre-emption on the right of vicinage; and he holds that, under the Mahomedan Law, the plaintiff was not entitled merely from the circumstance of vicinage to the right of pre-emption in a separate and distinct estate. In his judgment, the Moonsiff says that "the plaintiff admits that Chuck "Hosseinabad of which he is proprietor is "distinct and separate from Mouzahs Kadira-"bad and Mooradapore; and he can, there-"fore, under the exposition of the Mahome-"dan Law as contained in the above ruling, "have no right of pre-emption to the share "of those mouzahs."

The plaintiff appealed to the Judge, and the issues before the Judge were—

First.—"Whether the appellant, who "claims to be proprietor of a plot of "14 beegahs of lakheraj land termed "Hosseinabad and situated in the village "of Hydrabad, has or has not a right of "pre-emption on the sale of a share in "Hydrabad to a third party.

Secondly.—"Whether, as recipient of "malikana of the said village, his right to "pre-emption does or does not accrue."

On both the points, the Judge held against the appellant, and dismissed the appeal.

With regard to the second point, the Judge observes: "The appellant did not, "in my opinion, claim on the basis of re-"ceipt of malikana, and this plea cannot "now be entertained."

Looking at the plaint, we see clearly that the plaintiff claims on the right of shuffeajar (vicinage). It is true that he also calls himself proprietor of Hydrabad, but he does not clearly and distinctly set forth his right of pre-emption upon the ground that he was a partner in that estate; and it appears to me that, wherever a party seeks to enforce a right of pre-emption, he is bound to state unmistakeably the grounds on which he seeks to enforce that right. The Courts below appear to me to have taken a right view of the ground on which the plaintiff came into Court, namely, that he claimed on the right of vicinage, and rightly determined that on that ground he was not entitled to purchase the estate in preference to the defendant Mohsun Ali.

When the special appeal came before us on the 2nd May 1870, we were informed that a question whether a claim for pre-emption founded on vicinage extended to a large estate was then referred to a Full Bench, therefore the decision of this case was postponed till the result of the trial before the Full Bench was made known. We have now the judgment of the Full Bench* before us, and there the question seems to have been as to the difference, if any, between right by vicinage and the right by partnership, and the Full Bench held in conformity with a long course of decisions that a partner would have a right to pre-emption in preference to a stranger where large property was sold, but where the right was claimed on the ground of vicinage, no such right existed except, as pointed out in Baillie on Mahomedan Law, in regard to the small plots of land and houses.

We think, therefore, that no ground has been made out for special appeal, and we therefore dismiss the appeal with costs. Two hundred rupees are allowed for pleader's fees for all the proceedings of this Court.

The 29th August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Issues—Irregularity—Appellate Court.

Case No. 876 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 16th February 1870, affirming a decision of the Moonsiff of Nubeegunge, dated the 6th December 1869.

Sham Churn Doss and others (Defendants), *Appellants,*

versus

Goono Moyee Chowdhrain (Plaintiff), *Respondent.*

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* 14 W. R., F. B., p. 1.

Baboos Ashootosh Dhur, Mohinee Mohun Roy, and *Bungshee Dhur Sein* for Appellants.

Baboo Sreenath Doss for Respondent.

The trial of the issue of limitation after the issue on the merits is an irregularity which, if committed in an Appellate Court, is not necessarily productive of any disadvantage even to the defendant.

Phear, J.—No doubt, the Lower Appellate Court has pursued the different points in this case somewhat, we may say, in the reverse order relative to that in which they properly arise.

For instance, he has tried the issue of limitation after coming to a conclusion upon the issue on the merits, and he has discussed the plaintiff's evidence on the issue of limitation after having expressed his opinion on the value of the defendant's evidence on the same issue.

Had he been sitting as a Judge of a Court of first instance and trying the case for the first time, this course of proceeding might, no doubt, besides being an irregularity, have been productive of mischievous results to the parties. But we think that in an Appellate Court it does not by any means follow that an irregularity of this sort should be productive of any disadvantage even to the defendant.

The judgment of the Subordinate Judge is in this case very lengthy. He goes most fully into the evidence of both sides as it bears upon the different issues.

We are not prepared to say with regard to his determination of the issue of limitation, that his judgment has been in any way warped by the fact that he has looked at the evidence of the defendant first, and has afterwards taken up the evidence of the plaintiff. He certainly finds in distinct terms that the evidence of the plaintiff establishes to his satisfaction that the plaintiff was in the enjoyment of the property sued for, within the period of limitation. There is certainly evidence adduced by the plaintiff to that effect, and we do not think that we ought to disturb on special appeal the conclusion to which the Subordinate Judge has arrived.

Accordingly, we dismiss this special appeal with costs.

The 29th August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Alluvion—Title—Fishery—Regulation XI. of 1825.

Case No. 883 of 1870.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 15th February 1870, affirming a decision of the Moonsiff of Rungunneah, dated the 30th January 1869.

Ram Shurn Shaha (Plaintiff), *Appellant,*

versus

Bhote Kinkur and others (Defendants), *Respondents.*

Baboo Okhil Chunder Sein for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

Before Clause 4, Section 1, Regulation XI. of 1825, can have the effect of depriving a party of the title given by Clause 1, the opposite party must prove that the land in question was the bed of a small and shallow river which, with the julkur right of fishing over it, was recognized as the property of such opposite party.

Phear, J.—It seems to us quite clear that even on the facts on which the plaintiff comes into Court the land which he seeks to recover belongs to the defendant by a statutable title, namely, by the title which is given by Clause 1, Section 4 of Regulation XI. of 1825, unless the plaintiff can show that the land in question is for some reason exempted from the operation of that Clause.

The appellant's Counsel has contended before us that Clause 4 of that Section has the required effect; but, in order to avail himself of Clause 4, the plaintiff must prove that the land in question was "the bed of a small and shallow river," which, with the julkur right of fishery over it, was recognized as the property of the individual through whom he claims.

It does not seem to us that there is any evidence to establish these *data*. The allegations, if any there are, of the manner in which he obtained the pottah from the Government does not prove his right as against the defendant, and there is no evidence, as we understand it, that the *khal* of which the land was formerly the bed was "a small shallow river" within the meaning of that Clause. So the plaintiff has failed to deprive the defendant of the

benefit of Clause 1, Section 4, Regulation XI. of 1825, and the suit was correctly dismissed by the Lower Appellate Court. The appeal is likewise dismissed with costs.

The 30th August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Illegal exaction of rent—Clause 2, Section 23, Act X. of 1859.

Case No. 767 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 17th January 1870, reversing a decision of the Moonsiff of Bongong, dated the 26th August 1868.

Gopal Paul Chowdhry and others (Defendants), *Appellants,*

versus

Grish Chunder Pandey and others (Plaintiffs), *Respondents.*

Baboo Grish Chunder Mookerjee for Appellants.

Baboo Sreenath Banerjee for Respondents.

Clause 2, Section 23, Act X. of 1859, relating to the illegal exaction of rent, is not limited to suits at the instance of the ryot, but applies to any under-tenant.

Jackson, J.—We are somewhat reluctant to come to the conclusion that the proceedings in this case have been without jurisdiction, but we think we are compelled to hold that it is so. This was not, as supposed by the Moonsiff, a suit for abetment, but it was a suit under the preceding Clause of the same Section, that is, a suit on account of an illegal exaction of rent. The words are not limited to suits at the instance of the ryot, but they apply apparently to any under-tenant.

The precedents cited by the Lower Appellate Court do not apply to the present case. The claims in those cases were altogether of a different nature. We think, therefore, that the decision of the Court below must be reversed, and the plaintiff's suit dismissed with costs.

The 30th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Section 10, Act VI. (B. C.) of 1862—Ameen's functions—Remedy—Evidence.

Case No. 897 of 1870.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 22nd February 1870, reversing a decision of the Deputy Collector of that District, dated the 23rd July 1869.

Bala Thakoor and another (Defendants), *Appellants,*

versus

Meghburn Singh and others (Plaintiffs), *Respondents.*

Baboos Debendro Narain Bose and *Khetter Nath Bose* for Appellants.

Mr. C. Gregory and *Baboos Romesh Chunder Mitter* and *Bama Churn Banerjee* for Respondents.

An Ameen deputed to make a measurement under the provisions of Section 10, Act VI. (B.C.) of 1862, is bound to record the state of things as actually existing, and has no business to record what he thinks ought to be the rates. If however the Ameen, or the Collector superintending his proceedings, does any act not in conformity with this Section, the remedy for any party dissatisfied is to appeal to the Civil Court within the time and in the manner prescribed by Act X. of 1859.

Rough notes taken down by an Assistant Collector of what was said by witnesses whose depositions were not recorded are not evidence such as is required by law; and an opinion based on such evidence is without legal validity.

Loch, J.—The plaintiff in this case sued to recover arrears of rent for 1273, 1274, and 1275 on account of 20 beegahs 12 cottahs and 13 dhoors of land at a net rent of Rupees 170-9 annas, alleging that the area held by the defendants has been ascertained by measurement carried on under the order of the Collector under the provisions of Section 10, Act VI. of 1863, B. C., in 1272; and that, after deducting the payments, he sued to recover the balance, amounting with interest to Rupees 611-4 annas and 6 pie.

The defendant stated that he held only 8 beegahs and 10 cottahs at a jumma of 17 rupees, from which he was entitled to a deduction of 12 rupees on account of naukur, and 1 rupee 1 anna on account of

"Sair Chout," leaving a net jumma of Rupees 3-15 annas which he had paid.

The Deputy Collector, after making a local investigation, dismissed the suit. On appeal, the Judge considered that the proceedings held under Section 10, Act VI. of 1862, B. C., were valid, and that they could not be set aside as vitiated by fraud; that the pottah set up by the defendant was not proved, and he rejected the evidence of one Ram Ruttun Tewary, who was called by the defendant to prove the execution of that pottah, on the ground that it was not the best evidence, as the grantor of that pottah was still alive, who should have been called and examined, and he considered the mode in which the first Court had tested the signature on the pottah, namely, by comparing it with other signatures, was a fallacious test. He accordingly set aside the order of the Deputy Collector, and decreed the plaintiff's claim with costs.

It appears from the proceedings of the Assistant Collector that there had been litigation going on between the parties from a long time, and that, so far back as 1860, the plaintiff sued for the sum of Rupees 37-8-3 as the rent due upon 11 beegahs 18 cottahs and 14 dhoors of land. In that case, the plaintiff obtained a decree, but on appeal the Moonsiff's order was reversed, and when the case up to the High Court in special appeal a compromise was entered into, and the case was struck off the file on the 30th June 1863; and it is alleged by the defendant that, under the terms of that compromise, a pottah and kubooleut were interchanged between the parties, and a pottah is put in by him as the one then received from the plaintiff.

It appears that, subsequent to this, in 1866, the plaintiffs applied to have their village measured under the provisions of Section 10, Act VI. of 1862, B. C., and it is on the measurement then made that the present suit has been brought; and the Assistant Collector, in disposing of this case, expresses his surprise how, when in 1860 the rent was said only to be 37 rupees, it should, in the rent-roll of 1863 filed by the plaintiff, be stated to be Rupees 104; and again on the measurement under Section 10, Act VI. of 1862, B. C, be still further raised to 171 rupees.

A special appeal has been filed from the order of the Judge, giving the plaintiff a decree for the sum claimed. The first objection taken is that there is no legal evidence to prove that the defendant is in possession of the land at the rate mentioned by the plaintiff.

As this point was not taken below nor taken in the petition of special appeal, we need take no further notice of it.

The second objection taken is that the measurement papers filed by the plaintiff under Act VI. of 1862, B. C., are not conclusive, and in support of this proposition a case reported in 12 Weekly Reporter, page 371, has been cited. Now, I have no hesitation in saying that I quite agree with what is stated in the judgment referred to. It is perfectly correct that an Ameen deputed to make a measurement under the provisions of Section 10, Act VI. of 1862, is bound to record the state of things as they are actually existing; that he has no business to record what he thinks ought to be the rates; and that a zemindar cannot, by the deputation of an Ameen under that Section of the law, get his rates raised, for the law requires that the Ameen should ascertain what is the area, and should record the names of the persons in occupation and the rate of rent payable in respect of such lands and the persons by whom respectively the rents are payable. If, however, the Ameen, or the Collector superintending the proceedings of the Ameen, does any act not in conformity with this Section, and any party has any objection to the proceedings of the Collector or the Ameen, a remedy is provided by that same Section, for it is said in the latter part of the Section: "Save as aforesaid, the decision of the "Collector on all matters enquired into and "determined by him under this or the last "preceding Section, shall be final, unless "the same shall be reversed on appeal "therefrom to the Civil Court." And then it goes on to say that "such appeals shall "lie to the Zillah Judge or to the Sudder "Court, subject to the provisions and condi-"tions contained in Sections 160 and 161 "of Act X. of 1859."

It is clear, therefore, that the remedy for any party dissatisfied with the proceedings of the Ameen or of the Collector, was to appeal to the Civil Court within the time and in the manner prescribed by Act X. of 1859. Nothing of that kind appears to have been done in this case; and such being the case, the Judge appears to be right when he considers

those proceedings to have a finality, when the defendants have failed to prove that they were vitiated by fraud.

With regard to the charge of fraud, we find that there are some mere general statements made. But, in reality, there is no distinct allegation of fraud, nor is there any statement on oath nor any verified petition to the fact that fraud was practised. We think, therefore, that the Judge was right when he held that the defendant, special appellant, had failed to substantiate this ground.

Another objection raised is that the local investigation held by the Assistant Collector, Mr. Charles, has been rejected without any legal ground. It appears that Mr. Charles proceeded irregularly and illegally. He says in his examination, taken on commission, that he took down rough notes in pencil of what was said to him by the witnesses, and on his returning home he made an exact copy of them—which copy was annexed to his judgment; and he says that to the best of his recollection the depositions were taken on solemn affirmation, and he does not remember whether the depositions were recorded in Urdu by the mohurrir who accompanied him.

The Judge considers this to be no evidence, for he finds that, with the exception of these notes taken by the Assistant Collector, no depositions were recorded and none were forthcoming; and we think the view which the Judge has taken of these notes is correct—that they are not evidence as required by the law.

Reading the provisions of Section 73, Act X. of 1859, with Section 172 and Section 180 of Act VIII. of 1859, it is clear that the evidence has not been recorded as the law requires, *viz.*, that it be taken down in the language in ordinary use in the proceedings before the Court; that is, in this case, it should have been taken down in Urdu by or in the presence of the Judge, and when completed, it should have been read over to the witness in the presence of the parties to the suit or their pleaders, or such of them as were present, and signed by the Judge.

Section 73, Act X. of 1859, requires that the Collector after completing the enquiry, "shall record on the proceedings such observations as appear to him appropriate; and "the observations so recorded shall be received as evidence in the suit."

It is urged that the Judge should not have rejected the remarks that were made by the Collector on the proceedings he held on the local investigation. But it must be observed that the whole of that investigation was without any legal validity, for it was not carried out in the way required by law; and if the proceedings, then the opinion of the Assistant Collector based on the evidence taken in those proceedings, was without any legal validity; and we think, therefore, that on this ground also the special appellant must fail.

The only other ground taken by the special appellant of which we need take notice is that the Judge has rejected the evidence of Ram Ruttun Tewary. The Judge has not accepted that evidence, in the first place, because the witness was not an attesting witness to the pottah; and the Judge considered that as the grantor of the pottah was still alive, he should have been sent for and examined. We do not think that it is a sufficient ground for the admission of special appeal.

It has also been urged that the Judge is in error in holding that it was for the defendant to prove the rate of rent of his tenure and the area of land he held. The plaintiff started his case quite sufficiently, resting it on the measurement made by the Ameen under Section 10, Act VI. of 1862; and as that has not been set aside by any order of the Civil Court, it was a sufficient proof that the defendant did hold the land at the rate entered in those measurement-papers, and it was for the defendant to satisfy the Court that the entry as to the area and rate was erroneous; and this, in the estimation of the Judge, the defendant has failed to do.

Under these circumstances, we think that the special appeal must be dismissed with costs.

The 16th August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Pre-emption—Res adjudicata.

Case No. 810 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 11th February 1870, reversing a decision of the Moonsiff of Nubeegunge, dated the 1st December 1869.

Asgur Mahomed (one of the Defendants), *Appellant,*

versus

Nuzeema Bibee (Plaintiff), *Respondent.*

Baboo Rajendronath Bose for Appellant. No one for Respondent.

Where a party claiming certain land by right of pre-emption, failed to set up her rights in a suit in which the purchaser of that land sued her for possession and obtained a decree, it was held that she was not entitled to bring a fresh suit to enforce the same rights.

Phear, J.—It appears to me clear from the judgment of the Lower Appellate Court that the matter in issue between the parties in the present suit must be taken to have been judicially determined in a former suit between the same parties.

The Subordinate Judge says the plaintiff sues to obtain possession of certain land from the defendant to which she alleges she is entitled by right of pre-emption.

In the course of a somewhat lengthy judgment, the Subordinate Judge says as follows: "The plaintiff has proved that she observed the preliminaries of *shuffa, viz., tullub-i-mowasibut,* and *tullub-i-ishtishad,* on the 15th Srabun 1274, *i. e*, immediately on receipt of the intelligence (of the sale), and that at that very moment she told the ryots not to deliver over possession to the defendant, and that she would herself make the purchase. And when the defendant brought a suit, she, plaintiff, informed the Court that she would bring a pre-emption suit, and oppose defendant from obtaining possession of the land. At last when the Court found a decree for the defendant, and made over to him possession on the 13th June 1868, the plaintiff's cause of action accrued, and she brought the suit on the 12th June 1869, that is, the present suit."

Assuming the facts found by the Subordinate Judge to be legitimately established by the evidence, it appears to me that when the present defendant brought his suit against her (plaintiff) to recover possession of the land which is the subject of the present suit, she had the very right of pre-emption which she now sets up. and upon which she founds her present action. And the Subordinate Judge states that it is the very fact of the Civil Court having on the former occasion decreed that the present defendant was entitled to possession of the land, and the fact that the present defendant consequently obtained possession of this land, which gave the plaintiff proper cause to bring the present suit.

If that be correct, there certainly is, as it appears to me, an end of all finality as regards a judicial decision.

There is a case decided by a Division Bench of this Court and reported in Volume VIII., Weekly Reporter, page 307, which is, I think, undistinguishable from the present. At page 308, the facts of that case are thus stated: "Assuming that we are at liberty to take the plaint in the present case as a plaint seeking enforcement of a right of lien upon the husband's property, the facts bearing on the point are as follows. On the death of the husband, his widow, the present plaintiff, took possession of the property which had apparently been his during his lifetime, and she retained that possession until his heirs (the present defendants) brought a suit against her to eject her. In that suit, her defence was that part of the property in question was her own; and that although the remainder had been her husband's, still she had purchased it under a bye-mokasa. Her present claim of lien for dower would have afforded her ample ground for defence, for it is admitted that the property now sought to be reached is identical with that which was then in suit; but she did not for some unexplained reason take this ground at that time. The result of that suit was adverse to her, and the present defendants obtained possession under, and by virtue of the decree then given."

In the present case, as in that, when the defendant brought his suit against the present

plaintiff, if she had the right of pre-emption on which she now sues that would have been a good defence to the action. The right of *shuffa* is a right to have possession of land which the purchaser has bought. The pre-emptor has a right to require that possession from the purchaser, and if the purchaser will not voluntarily give up possession, the pre-emptor can enforce his right by suit.

That is precisely what the plaintiff is endeavouring to do now. But in the previous action between her and the defendant it was decided by a competent Court that she had no right as against the present defendant to possession; and yet her rights then were, by her own account, precisely what they are now.

I think, therefore, that this is a clear case on the facts presented by the judgment of the Subordinate Judge of *res adjudicata*. Consequently, therefore, I think that the judgment of the Lower Appellate Court is wrong in law, and should be reversed with costs both in this Court and in the Lower Appellate Court.

Jackson, J.—I am quite of the same opinion.

I have no doubt that the plaintiff gained no new cause of action by the defendant's being put in possession in a former suit. Whatever rights she has now she had when she was sued by the present defendant, and she was bound to put forward whatever rights she had. I do not know why she did not do so; perhaps she was not well advised at the time; but she was bound to put her rights forward, and not having done so, she cannot bring a fresh suit to enforce those rights.

From the evidence, I think that the claim put forward to pre-emption is not properly supported as to the performance of the ceremonies required by the Mahomedan Law on such occasions. Therefore, on both grounds, I think that the plaintiff's suit ought to be dismissed with costs both in this Court and in the Lower Appellate Court.

Phear, J.—I will add that I quite concur with Mr. Justice Jackson as to the value of the evidence by which the plaintiff endeavoured to prove her right of pre-emption. It seems to me manifest that it is insufficient in law for the purpose of proving her right. I did not mention this at first, because I thought it quite sufficient to base my decision on the first ground alone

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The 30th August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Rent—Transferable tenures—Landlord and tenant.

Case No. 962 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 23rd February 1870, reversing a decision of the Deputy Collector of that District, dated the 20th September 1869.

Gobind Chunder Chunder and others (Plaintiffs), *Appellants,*

versus

Kristo Kanto Dutt and others (Defendants), *Respondents.*

Baboos Tarucknath Dutt and *Anund Chunder Ghossal* for Appellants.

Baboo Kishen Dyal Roy for Respondents.

The person into whose hands a transferable tenure comes is bound to pay rent to the landlord, unless kept out of possession and enjoyment by the fault of the landlord, and the landlord's right to claim rent from his tenant does not depend upon the fact of possession by the tenant.

Phear, J.—We think the Lower Appellate Court has made a mistake of law in this case.

It seems to us that the judgment of the first Court as to the liability of the present respondents to pay the rents was correct, and was put upon a right basis.

The Lower Appellate Court has reversed the decision of the first Court for these reasons:—

The Judge says: "It seems to me that, "to render the claim of the plaintiffs valid "as against the appellants" (that is, the present defendants, respondents), "it must "be proved that they were in *bonâ-fide* "possession, and that they cultivated the "land in respect of which rents are now "sought to be recovered."

He goes on to say later in his judgment as follows: "There is no proof whatever "that the appellants" (*i. e*, respondents here on special appeal) "were in actual or "legal possession of the lands in question "in 1272, and it is my opinion that no suit "for rent on account of that year will lie "against them."

We think that the Judge is in error when he supposes that the right of the plaintiff to claim rent from the now respondents, defendants, depended upon the fact of possession. Had the plaintiff merely preferred a claim for a reasonable rent on the ground of use and occupation of his land by the defendants with his permission, and nothing more, that would have been so, no doubt. But his right to rent is a right to rent in respect of a particular tenure, and he can only claim that rent from the actual owner of the tenure, not from a third person.

It appears from the facts of the case that the tenure was a transferable tenure; into whosesoever hands it came that person was bound to pay the rent to the plaintiff. It might, no doubt, have been the case that the transferee of the tenure was kept out of the possession and enjoyment of it by the fault of the plaintiff, and in that case he would have had a right to urge the fault of the plaintiff as a bar to the latter's right to claim the rent. But nothing of the kind has occurred, or is even suggested, in this case. The person who has kept the defendants out of possession is a stranger, a trespasser, whom they can make liable for his trespass, if so advised.

It has been objected, on special appeal, that the title of the present plaintiff does not date back further than the commencement of 1273, and that consequently he has no right to claim the rents of 1272.

It is not made clear to us that this issue, which is an issue of fact, was raised in the first Court, or that the plaintiff has had in any Court an opportunity of meeting it. We think, therefore, that we ought not to give effect to it here on special appeal.

The suit altogether from beginning to end has been very badly managed on the part of the plaintiff. He brought his plaint against two persons in the alternative, and it seems certainly remarkable that a suit of this kind should have been allowed to be maintained in such a shape by the Court before which it was preferred.

But if the plaintiff has been faulty, the present defendants, respondents, have scarcely been less so on *their* side. It certainly appears on the whole that they, the persons who have succeeded in making out their title to the tenure from the end of 1271, are, in truth, the persons liable to pay rent for it during the year 1272; and there is nothing on their side to show that the plaintiff, who has made out a *primâ-facie* title, is not the person properly entitled to claim that rent.

The first Court gave a decree in his favor, and the grounds on which that decree has been reversed by the Lower Appellate Court certainly seem to me insufficient in law.

The decision of the Lower Appellate Court is, therefore, reversed, but as that Court has not determined the issue which was raised between the parties in the first Court as to the amount of rent due in respect of the tenure, the case must be remanded to the Lower Appellate Court for the trial of this issue.

The appellant will have his costs both in this Court and in the Lower Appellate Court.

The 30th August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Enhancement — Notice — Section 13, Act X. of 1859.

Case No. 918 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 25th February 1870, reversing a decision of the Deputy Collector of that District, dated the 29th November 1869.

Dinonath Doss and another (Defendants), *Appellants,*

versus

Gugun Chunder Sein (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Baboos Onookool Chunder Mookerjee and *Kalee Mohun Doss* for Respondent.

A landlord has never been able in this country to recover rents at enhanced rates for a past time, in respect of which he has given no antecedent notice; and, since the passing of Act X. of 1859, Section 13, has made it necessary that the notice should bear sufficient ground of enhancement.

It is not a good ground of enhancement that the holder of a tenure may possibly, having regard to the quality of the land, be able to increase the profits which he derives from it. It must be shown that he is able to increase the profits.

Phear, J.—I THINK that the judgment of the Lower Appellate Court, and indeed that also of the first Court, is wrong for error of law.

The suit is brought by the zemindar to recover arrears of rent at enhanced rates from the defendant whom he admits to be the holder of a tenure other than a ryotee tenure.

Now, I need not say that a zemindar is not entitled to recover *back* rents at enhanced rates from any tenant, unless he has previously given notice to that tenant of his intention to claim enhanced rates for some period succeeding the giving of the notice.

The Lower Courts appear to think that this is a case of enhancement of rent of a tenure falling within the provisions of Section 51, Regulation VIII. of 1793; and that in such a case notice is not necessary.

This is entirely a mistake. As far as I understand the law of this country, it never has been the case that a zemindar could recover enhanced rates for a past time in respect of which he has given no antecedent notice. Of course, the case of his claiming a kubooleut for *a future time* at enhanced rates involves different considerations, and possibly it was a decree affecting a case of this kind which misled the Lower Appellate Court.

But not only must a notice have been given, as I have already stated, but since the passing of Act X. of 1859, Section 13 of that Act has made it necessary that the notice should bear, on the face of it, sufficient ground of enhancement.

It appears to me that the notice which is the foundation of the plaintiff's claim in this case is a bad notice, because it does not give a sufficient ground, that is to say, a good ground in law, for enhancement of rent.

As it has been translated to me, it, in effect, runs thus:—

Out of the profits of the estate, you are, by the custom of the pergunnah, entitled to 10 per cent. for malikana, and 10 per cent. for collection-charges; all the rest I am entitled to; but the total rent which you can recover is Rupees 28-13. according to the rates which prevail in the ground for lands of similar description.

In other words, that the capabilities of the lands of your talook are such that you could, if you chose, make a profit out of it of Rupees 28-13, and out of that you are entitled only to 20 per cent.; the remainder all comes to me.

If this be the true purport of the notice which was given, then I think that the notice is bad in law. It is not a good ground of enhancement of the rent of any tenure that the holder of it may possibly, having regard to the quality of the land, be able to increase the profits which he derives from it. It must, at least, be shown that he is able so to increase the profits.

Now, not only, as I understand this notice, does it omit to state affirmatively that the defendant is in a position to realize this increase, this Rupees 28-13, but there is not a particle of evidence on the record which could establish a conclusion of that sort.

The plaintiff confined himself at the trial to giving evidence of the quality of the land. He made no attempt to show what, in fact, are the profits which the defendant now realizes from it, or what the defendant might reasonably realize from it, if he chose to do so.

It seems to me, therefore, that the objection of law which has been made against the decision of the Lower Appellate Court on special appeal is good, and must prevail. The plaintiff's suit fails at its very foundation, and therefore I think that the decree of the Lower Appellate Court should be reversed, and the plaintiff's suit dismissed with costs in all the Courts.

Jackson, J.—I am of the same opinion.

The 31st August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Title—Possession—Onus probandi.

Case No. 1117 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 24th February 1870, reversing a decision of the Sudder Moonsiff of that District, dated the 21st December 1869.

Kaminee Mohun Chuckerbutty and others (some of the Defendants), *Appellants,*

versus

Kalee Kant Sein (Plaintiff), *Respondents.*

Baboo Ashootosh Dhur for Appellants.

Baboo Sreenath Doss for Respondent.

Where an heir's title to an estate is uncontested, and his possession is only obstructed by an alleged conveyance on the part of an ancestor, it lies upon the party holding possession, and who causes the obstruction, to prove that such a conveyance has taken place.

Jackson, J.—Two grounds are urged in the special appeal. The first is that the burden of proof was on the plaintiff, and not on the defendants. The plaintiff's allegation was that he had succeeded as heir to the estate of one Sonatun, who had got into possession of that estate, but that certain portions of land were in the occupation of the defendants, who alleged that they held them by virtue of a deed of conditional sale (kut-kobala), while the plaintiff alleged that no such deed had been executed by the ancestor of Sonatun, and that the defendants were liable to make over possession of that land.

The contention now is that the proof of this allegation lay upon the plaintiff. It seems quite clear that, when the plaintiff's title was uncontested, and his possession of the property was only obstructed by the alleged conveyance of the ancestor, it lay upon the defendants who held possession of the land to prove that such a conveyance had taken place.

We are referred to a case which is to be found in Volume X. of the Weekly Reporter, page 173. That is a case of altogether a different character. The defendant was in possession under a sale made in execution of a decree which the plaintiff impugned as fraudulent and collusive, and the Court, of course, held that he must prove that allegation.

The second point raised is as to the share in a part of the property in dispute which is called No. 1, belonging to a lady named Ram Doorgah. It seems that, at the time when the alleged mortgage was executed, which purported to be executed by Sonatun and Ram Doorgah, Sonatun held and owned 6 annas of this property, and Ram Doorgah 3 annas. The mortgage purported to convey the whole of this 9 annas. Subsequently to the execution of it, Sonatun became entitled to 3 annas more.

Now, it is found as a fact by the Courts below that the plaintiff was in possession of 3 annas, which we may presume were the subsequently acquired 3 annas of Sonatun. They were, therefore, entitled to recover, as claiming under Sonatun, the very 6 annas which the mortgage deed purported to cover. They were not entitled, while Ram Doorgah was still alive, to claim any share of the land to which she was entitled.

Therefore, the decree of the Lower Appellate Court must, we think, be modified, so as to make it clear that the plaintiff is not to recover thereunder the share of Ram Doorgah—his right to sue for that share not accruing during the lifetime of Ram Doorgah. This order will be made without costs.

The 31st August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Section 184, Act XXXII. of 1860—Right of action.

Case No. 695 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 10th February 1870, reversing a decision of the Moonsiff of that District, dated the 29th June 1869.

Sheo Pershad Singh (Plaintiff), *Appellant,*

versus

Gopal Lall (Defendant), *Respondent.*

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Appellant.

Baboos Debendro Narain Bose and *Ubinash Chunder Banerjee* for Respondent.

Where a third party objected to the auction-sale of certain immoveable property which had been attached by the Revenue Authorities, it was held that his right to bring an action to prove that the property was his was not barred by Section 184, Act XXXII. of 1860, because he had omitted to deposit the money demanded by Government or to file security.

Loch, J.—We think that the Subordinate Judge* is wrong in considering that this suit is barred by the provisions of Section 184, Act XXXII. of 1860. He himself on the former occasion has ruled that this Section is not applicable, and even if the plaintiff were a claimant as described in that Section, it does not appear that it would bar his right to bring an action to prove that the property is his. We set aside the order of the Subordinate Judge, and remand the case to him to try whether the mokurruree is a valid one or not; and if the mokurruree be found to be a valid document, he will give the plaintiff a decree.

With the consent of the pleader for the appellant, it is directed that the Subordinate Judge will confine his judgment to the mokurruree, bearing date the 21st August 1864.

Costs will follow the final result.

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* *Judgment of the Subordinate Judge.*

In my opinion this case is affected by Section 184, Act XXXII. of 1860. Although the plaintiff in his petition of objection filed on the 9th November 1865 before the Revenue Officer on the day of the auction-sale, had not asked for the postponement of the auction-sale, but only expressed a desire for the proclamation of the mokurruree right, yet the Revenue Officer paid no attention to it. He passed only this order that as this petition has been filed at the time of auction-sale, unsupported by any proof, let this auction-sale be concluded with the notice of the petition. Besides on a reference to the wording of the aforesaid Section, it is quite evident that the preservation of such kind of right also was not practicable without compliance with the provisions of the said Section, namely, depositing of the money demanded by Government or giving satisfactory security, for it is enacted in the said Section that if any claim be preferred in respect of any immoveable property, or any interest of an immoveable property, which has been attached under this Act, then the claimant or objector should deposit the amount required by Government, or file security of the same before the Collector or Commissioner. Although the claim of this plaintiff is not in respect of the immoveable property, yet there is no doubt that the claim of mokurruree right is in respect of the same immoveable property. Hence this suit should certainly be considered to appertain to Section 184, Act XXXII. (of 1860). Accordingly, the Hon'ble Judges, after taking these grounds into due consideration, have at first directed this suit to be tried under the aforesaid Act, since, except the said Section 184, there is no other Section in Act XXXII. for preferring regular suits against the orders of Revenue Officers. Therefore this suit (which is brought within one year from the date of attachment) is inadmissible in consequence of non-compliance with the provisions of the said Section, namely, making deposit of the money demanded by Government or filing of security. Although the pleaders for plaintiff, respondent, urged this objection that this suit is not to set aside the auction-sale, but according to general practice to obtain possession of the auction-sold property by confirmation of *mokurruree* right, yet this objection was not worthy of consideration, because the auction-purchaser in consequence of non-production of the mokurruree deed and non-compliance with the provisions of Section 184, considered this objection to be futile and absurd, and purchased the possessory right of the auction-sold property on a fair and suitable price.

Under the orders of the Revenue Officer, he (the purchaser) has obtained possession of the property Hence the claim for possession of the aforesaid property is in reality tantamount to a claim for setting aside the auction-sale, and cannot be admissible in consequence of non-compliance with the provisions of the aforesaid Section. Therefore it is ordered that the appeal of the defendant, appellant, be decreed, and the decision of the Moonsiff be reversed, and the claim of plaintiff, respondent, be dismissed with costs, and that the respondent be liable to pay the costs incurred by the appellant, with interest thereon from the date of the decision up to the realization thereof.

The 31st August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Registered bond—Section 53, Act XX. of 1866—Jurisdiction.

Grish Chunder Chowdhry, *Petitioner,*

versus

Kristo Soondur Sandyal and others, *Opposite Party.*

Baboo Gopal Lall Mitter for Petitioner.

Baboo Mohinee Mohun Roy for Opposite Party.

It is beyond the power of a Civil Court under Section 53, Act XX. of 1866, simply on the production of a registered bond and the petition of the bond-holder, either to make a decree to the effect that the amount decreed shall be realized out of the property mentioned in the bond, or to decree the whole amount of the bond on default to pay an instalment.

Phear, J.—I think the rule granted in this case must be made absolute.

The decree of the Subordinate Judge was clearly *ultra vires* so far as it declared that the amount decreed should be realized out of the property mentioned in the bond.

The only power which the Court had to make a decree upon the registered bond alone, without suit by plaint, is the power given in the 3rd Clause of Section 53 of Act XX. of 1866; and that Clause only gives the Court power to decree a sum of money. It clearly never was the intention of the Legislature that an application under Section 53, founded simply on the production of a registered bond and the petition of the bond-holder, should be substituted for a regular suit against the property.

I also think that the Subordinate Judge had not jurisdiction under Section 53 to decree the whole amount of the bond on default to pay an instalment.

An Appeal Bench of this Court sitting on the original side has held that a claim for the total amount of a registered bond on the ground of its having become due by a default to pay an instalment is not one of those intended by the Legislature to be comprehended within the provisions of Section 53. By that decision I think I am bound, sitting here in a Division Bench; but I also desire to say that I entirely concur in it.

The rule must, therefore, in my opinion, be made absolute, and the decree of the Judge and the execution-proceedings taken thereon must be set aside.

The applicant will have 32 rupees as his costs of this application.

Jackson, J.—I concur in the order that the rule should be made absolute.

I think the Lower Court has exceeded its jurisdiction in giving a decree, declaring a lien on the property mentioned in the bond.

On the other question, as to whether the decree should be for the whole amount specified in the bond, I am not quite clear in my mind; but as there have been several decisions of this Court on this point, I think it right to follow those decisions. On this point also, I think that the rule should be made absolute.

The bond-holder has his remedy by a regular suit.

The 31st August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Mortgage—Equity of redemption—Deposit—Regulation I. of 1798—Regulation XVII. of 1806.

Case No. 967 of 1870.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 28th March 1870, reversing a decision of the Subordinate Judge of that District, dated the 29th May 1869.

Abdool Khan (one of the Defendants), *Appellant,*

versus

Upendro Chunder Bhuttacharjee and others (Plaintiffs), *Respondents.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellant.

Baboos Romesh Chunder Mitter, Chunder Madhub Ghose, and *Sreenath Banerjee* for Respondents.

Under Regulation I. of 1798 and Regulation XVII. of 1806 taken together, a mortgagor preserves his right of redemption, if he deposits in Court the whole amount due to the mortgagee within the time when the final foreclosure may be effected under Section 8 of the Regulation last cited.

In cases in which the mortgagee has held possession of the land, and therefore has receipts and profits to account for, only the principal sum borrowed need be deposited as the "amount due."

Phear, J.—We think that the Lower Appellate Court has fallen into error in this case, and that its judgment ought to be reversed. No doubt, as Baboo Romesh Chunder argued, Regulation I. of 1798 and Regulation XVII. of 1806 must be taken together The second Section of the first of these Regulations provided that if the borrower deposited in Court, within the period stipulated in the mortgage-deed, the whole amount due to the lender, he would preserve his right of redemption just in the same way as if he had tendered or paid it actually to the lender.

Regulation XVII. of 1806 extended the period within which a deposit of this kind should be effective to preserve the right of redemption from the so-called stipulated period of the mortgage-deed up to the time when the final foreclosure might be effected by the lender under the terms of the 8th Section of that Regulation.

It is admitted by the special respondent in this case that the plaintiff did deposit in Court a sum greater than the principal sum borrowed before the occurrence of final foreclosure. But the special respondent says the amount due to him at the time of such deposit within the meaning of Section 2, Regulation I. of 1798, was the principal sum borrowed, together with a sum by way of interest, in the total a greater sum than that deposited.

Now, on reference to the 2nd Section, we find that there are two classes of cases distinguished by the Legislature.

The first class is that in which the lender has not obtained possession of the land, and therefore has nothing for which to account to the borrower. In that case, the Section says that the sum to be deposited *as the amount due* is the principal sum, together with the stipulated interest thereon not exceeding the legal rate of interest.

But the second class of cases is that in which the lender has held possession of the land, and therefore has receipts and profits to account for; and then the Section says that only the principal sum borrowed need be deposited in order to satisfy the previous part of the Section which directed that "the amount due" should be deposited.

We think that it is an immaterial question in this matter how long the lender has been in possession of the land If he has been in possession at all so as to be liable to render an account to the borrower, the case falls within that second class in which the amount of interest is left to be settled on an adjustment of the lender's receipts and disbursements during the time in which the lender has been in possession.

Now, if we look to the merits of the mortgage-transaction in the particular case which is before us, it is clear that it was the intention of the parties that the interest upon the money lent shoud be obtained by the lender from the usufruct of the property mortgaged.

The mortgage-deed, as it has been read to us, first gives a short estimate of what the net profits of the mortgaged property are, namely, Rupees 288, after deduction of specified outgoings; and then the borrower stipulates that this shall be taken by the lender *in lieu* of interest; also further, the borrower engages that if the actual net receipts fall below the sum of Rupees 288, he, the borrower, will make up the difference at the time stipulated in the document for the re-payment of the principal; and also, that if he does not at that time re-pay both the principal and the amount which he might in this way have become liable to pay, then the lender should stand absolute proprietor of the mortgaged property.

It is quite clear from this arrangement that the lender became liable to account to the borrower for the rents and profits of the mortgaged property.

In the plaint, the mortgagee says that he has had possession, and that he has received rent and paid some outgoings (the Government revenue I think), and that in this way he had left in his hand a sum of Rupees 41 odd. By this very statement, he shows that there is matter of account as to the profits of the mortgaged property between him and the mortgagor.

Nothing therefore can be plainer, we think, than that this is a case falling within the second of the two classes of cases mentioned in Section 2, Regulation I. of 1798, and that consequently a deposit of the principal sum only, without interest, would be sufficient to preserve the borrower's right of redemption, if the deposit were made according to that Regulation within the period stipulated in the mortgage-deed; and, therefore, according to the Regulation of 1806, within such extended period as would expire upon final foreclosure.

As we stated at the commencement, undoubtedly a sum equal to the principal sum lent *was* deposited in Court by the mortgagor or the mortgagor's representatives before final foreclosure.

Under these circumstances, the mortgagor will preserve his right of redemption, and the plaintiff in this suit has not a right to recover possession of the land as absolute owner.

As the plaintiff has in this suit simply asked for *possession*, his suit fails, and was rightly dismissed by the first Court.

We, therefore, reverse the decree of the Lower Appellate Court, and dismiss the plaintiff's suit. The defendant will have his costs in all the Courts.

The 31st August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Mahomedan Law—Conveyance—Possession

Case No. 963 of 1870.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 25th February 1870, affirming a decision of the Subordinate Judge of that District, dated the 29th July 1869.

Sumboonath Misser (Defendant), *Appellant,*

versus

Furhutoonissa Bibee (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Appellant.

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Respondent.

Where a Mahomedan lady had been in possession upwards of 20 years of property alleged to have been given her by her husband under a kabinnamah, it was held that neither he nor his creditors could assert a title against her on the ground that when he gave the kabinnamah he had not the property in his possession, and therefore could not pass it under Mahomedan Law.

Phear, J.—We do not think that Mr. Allan has shown us any good cause for disturbing the decision of the Lower Appellate Court.

It appears by the finding of that Court that the lady has been in possession for upwards of 20 years of the property in question, which she says her husband gave her under a kabinnamah, and the Court finds that to be a genuine document.

It seems to us impossible that the husband in this state of facts should be allowed to assert a title against his wife on the ground that at the time when he gave the kabinnamah he had not the property in his possession, and therefore could not pass it under Mahomedan Law. And if he could not say that, his creditors certainly cannot do so.

The appeal must be dismissed with costs.

The 1st September 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Appeal to Privy Council—Restoration of a decree—Section 337, Act VIII. of 1859.

Case No. 232 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Purneah, dated the 21st April 1870.

Luchmeeput Singh Bahadoor (Objector), *Appellant,*

versus

Khoobunnissa (Decree-holder), *Respondent.*

Mr. G. C. Paul and *Baboos Sreenath Doss* and *Rash Beharee Ghose* for Appellant.

Mr. C. Gregory for Respondent.

A plaint having been dismissed by the first Court, which decreed that the costs of all the defendants who had filed answers were to be borne by the plaintiff, the plaintiff appealed to the High Court which reversed the decree. One of the defendants then appealed to the Privy Council which reversed the decree of the High Court, and restored that of the Zillah Court.

Held that the decree of the first Court by being restored as it was made was re-affirmed in its integrity, and the defendants generally were entitled to execute it, though only one had appealed to the Privy Council.

Loch, J.—We think the order of the Court below must be affirmed. It appears that about the year 1860, Someer Chand, as purchaser of the rights and interests of one of the heirs of Deedar Hossein, brought a suit for possession against Enaet Hossein, the eldest son of Deedar Hossein, then in possession of the ancestral property, and against several other parties among whom was Khoobunnissa, respondent in this case. A similar suit was brought by one Greedharee Lal, and on the 2nd October 1860 the first Court dismissed both the suits on the plea of limitation, advanced by the defendant Enaet Hossein. An appeal was preferred to the High Court, and on the 13th April 1863 the High Court reversed the judgment of the first Court, and remanded the case to be tried on its merits. Enaet Hossein appealed to the Privy Council, and on the 17th May 1869 the Privy Council set aside the judgment of the High Court and affirmed that of the first Court.

The present application before the Subordinate Judge of Purneah is on the part of Khoobunnissa to be allowed to execute the decree for costs which she obtained in the Zillah Court on the 2nd October 1860, and permission has been given accordingly. An appeal to this Court from the order of the Subordinate Judge has been put in, and the question raised before us is as to the effect of the decree of the Privy Council of the 17th May 1869, and it is urged that that decree did not restore the decree of the first Court as regards the other defendants, but only restored it as far as the appellant Enaet Hossein before the Privy Council was concerned.

Now, looking at the decree of the Privy Council, we find that Enaet Hossein was the appellant, and among the respondents were Someer Chand, Mussamut Khoobunnissa, Mussamut Roshain Jan, and many others. The decree of the Privy Council sets forth what was the purport of the decree of the first Court of the 2nd October 1860, to the effect that the claim of the plaintiff should be dismissed with costs,

and that the costs of all the defendants who had filed answers were to be borne by the plaintiff. It then goes on to recite the steps taken by the plaintiff in that case, of the appeal to the High Court and the judgment of the High Court in that case, and then it recites what was the relief prayed for by the appellant to the Privy Council, namely, that the decree of the High Court, dated the 13th April 1863, might be set aside, reversed, or varied, and that all necessary directions consequent thereupon might be given, or for other relief. And their Lordships in the Privy Council recommended that the decree of the High Court of the 13th April 1863 should be reversed; that the decree of the Civil Court of the District of Purneah of the 2nd October 1860 should be affirmed, and the appeal of the respondent from the Civil Court to the said High Court should be dismissed with costs. And a decree was passed accordingly setting aside the decree of the High Court and affirming the decree of the first Court, and directing that the last-mentioned decree of the High Court should be set aside with costs, in addition to the costs of the appeal.

Though none of the defendants in the suit appealed to the Privy Council except Enaet Hossein, yet it appears to me from the wording of the decree of the Privy Council that the defendants generally are entitled to have the benefit of the decree which was passed on the 17th May 1869, for that decree distinctly restores the decree of the Zillah Court of the 2nd October 1860; and though it has been said that there was no common ground upon which the Privy Council went, such as is referred to in Section 337, Act VIII. of 1859, we cannot say that the Privy Council is bound by that Section, or that they acted at all with reference to that Section. Clearly, the decree goes to the extent that the decree of the first Court is to be restored as it was made, and under such circumstances I think the respondent in the present appeal is entitled to execute that decree. Therefore, this appeal must be dismissed with costs, pleader's fees being assessed at three gold-mohurs.

Hobhouse, J.—I am of the same opinion. I think that, by the decree of the Privy Council, the decree of the first Court of 1860 was distinctly re-affirmed in its integrity.

The 1st September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Pauper-suit—Jurisdiction—Section 304, Civil Procedure Code.

In the Matter of
Gunga Dass Adhikaree, *Petitioner.*

Baboo Khettur Nath Bose for Petitioner.

Per Jackson, J.—Where the grounds stated in Section 304, Civil Procedure Code, appear, the Court is bound to refuse an application to sue as a pauper; but should the Court not see reason to refuse, and should fix a day for hearing evidence on the question of pauperism, and, upon such further hearing, if the opposite party should bring to notice any ground upon which the Court would have been bound under Section 304 to refuse the application, it would be at the discretion of the Court upon being informed to refuse leave. The words "within the jurisdiction of the Court" in Section 304 mean within the local jurisdiction.

Jackson, J.—THIS is an application for the purpose of obtaining the intervention of this Court under Section XV. of the High Court's Act, to set aside an order passed by the Subordinate Judge of Midnapore, purporting to have been under the provisions of Chapter V. of the Code of Civil Procedure.

The application was presented by the petitioner in person; but at the request of the Court, Baboo Khettur Nath Bose has been good enough to argue it for him, and has done to us the service of bringing to our notice several decisions on the point.

The suit which the petitioner proposed to bring was a suit to establish his right to be a joint sebait of a certain religious establishment under a will of the late Mohunt Sitaram Doss.

It appears that the Subordinate Judge, after hearing the petitioner, gave notice under Section 305 to the opposite party, and on the opposite party appearing, proceeded to consider the interpretation of the will on which the petitioner relied; and finding that a construction had been put upon the will by a previous decision of the High Court, he considered that the petitioner had no right to institute a suit *in formâ pauperis*, and on that ground has rejected his petition; and the ground on which our intervention is asked for is that, in coming to this decision, the Court below has gone beyond the limits prescribed for it under Section 304 of the Code of Civil

Procedure, and has, therefore, made an order beyond its competency to make.

We have been referred to two cases, one in VIII. Sevestre's Reports, page 465, and the other in 3 Weekly Reporter, page 20, which are expressly upon this point, and a third case has also been referred to, to be found in 10 Weekly Reporter, which is not, I think, precisely to the point, although it had a certain bearing on the case, but there is also a case in 2 Indian Jurist, page 121 (Shurfoonissa Bibee and another against Kaminee Bibee and another).

In the first case which I have mentioned, the learned Judges held that the only points for consideration by the Court in the 5th Chapter of the Code were whether the defendant or matter of the suit is within the jurisdiction of the Court, or whether the claim is barred by the statute of limitation, or whether the allegations of the petitioner constitute a reasonable ground of action. I observe that by, apparently, an oversight in that part of the judgment, the words used are—"constitute a cause of action;" and in the case in 2 Indian Jurist my brother Markby held upon the hearing that, under the 305th and 306th Sections, the only objections which the Court could hear were those advanced, together with evidence upon the point, upon the question of pauperism.

Now, if the form in which this matter came before us required it, I think we should be bound to refer this question for the decision of the Full Bench, because, as at present advised, I do not entirely concur in the decisions of those cases.

The Sections relating to this subject must be read together. Section 304, in particular, must be read with the Section immediately preceding, namely, Section 303. The first-mentioned Section provides that, "if "the petition be in form and duly presented, "the Court shall proceed to examine the "petitioner regarding the merits of the "claim and the property of the petition-"er." These must be taken in connection with the words occurring in a clause of Section 304, *viz.*, "that the allegations of "the petitioner do not constitute a reason-"able ground of action," which must, I think, be held to mean that the claim has no merits, that is to say, that the plaintiff would not probably succeed in his action.

The grounds stated in Section 304 are, it seems to me, those which, if they appear, compel the Court at once to refuse to allow the petitioner to sue as a pauper, and take away the discretion of giving notice to the opposite party and fixing a day for hearing; but if the Court should not then see reason to refuse the application, the Court is at liberty to fix a day for hearing evidence to be adduced on either side upon the question of pauperism; and on the day so appointed the Court is at liberty to consider any objections which may be made by the opposite party, examine any witnesses produced by either party, and either allow or refuse to allow the petitioner to sue as a pauper; and I apprehend that, upon such further hearing, if the opposite party should bring to the notice of the Court any ground upon which the Court would have been bound under Section 304 to refuse to allow the petitioner to sue as a pauper, it would be the duty of the Court, at any rate it would be at the discretion of the Court, upon being so informed, to refuse leave.

If this were not so, the Court would be competent to allow a suit to be brought *in formâ pauperis*, although it might be brought to the notice of the Court on the appearing of the opposite party, that the cause of action on which the petitioner desired to sue had been already determined.

The words "within the jurisdiction of the Court" in Section 304 I understand to mean within the local jurisdiction. The words are "the defendant or matter of suit is not "within the jurisdiction of the Court." I understand that to refer to local situation, and not to refer to the power of the Court to take cognizance of the matter.

Many other instances might be pointed out in which the Court would be compelled to go on and entertain a suit which manifestly could not succeed, if it were shut out from considering such matters as might be brought to its notice by the opposite party at the hearing under Section 306.

I have stated these reasons at some length, because I should not wish it to be supposed that I had refused to consider the cases which were referred to on this occasion; but, in point of fact, it seems to me sufficient to say, for the purpose of disposing of this application, that in my judgment the Court below has not exceeded its jurisdiction, nor made an order which it was not

competent to make in taking into consideration the construction of the will on which the plaintiff relied, even although it allowed its judgment to be guided by a previous decision of the High Court on the same point. Consequently, there is no ground for our interfering under Section XV. of the Charter.

Mitter, J.—I am of the same opinion. I do not think that the Subordinate Judge has exceeded his jurisdiction in this case, and I think he was competent to take into consideration the will upon which this suit was brought, for the purpose of determining whether the plaintiff had a valid ground of action or not.

Whether the enquiry under Section 306 is to be restricted to the question of pauperism or not is a point upon which I wish to express no opinion; but it seems to me quite clear that the Subordinate Judge was fully competent to enquire into the true meaning of the will in order to ascertain whether the plaintiff had a good cause of suit or not. Section 361 expressly takes away appeals from orders passed under Chapter V. of the Code of Civil Procedure, and if the order passed by the Subordinate Judge was passed with jurisdiction, I do not see how we can interfere with it under the provisions of the Charter.

Whether the construction put by the Subordinate Judge upon the will propounded by the plaintiff was correct or not is not a matter which we can be called upon to decide upon this application.

The 1st September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Sale for arrears—Purchaser's rights—Regulation VIII. of 1819.

Case No. 1034 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 7th January 1870, affirming a decision of the Deputy Collector of Bongong, dated the 17th August 1868.

Tara Pershad Mitter (Plaintiff), *Appellant,*

versus

Ram Nursingh Mitter (Defendant), *Respondent.*

Baboo Kalee Mohun Dass for Appellant.

Baboo Mohendro Lall Shome for Respondent.

The purchaser of an under-tenure sold at the suit of a landlord acquires rights higher than those of an ordinary purchaser by private contract, only to the extent conferred by express terms of law. The purchaser of a putnee talook is not entitled to set at nought all decisions arrived at against the defaulting putneedar.

Jackson, J.—THE only question raised in this appeal is whether the purchaser of a putnee talook under the provisions of Regulation VIII. of 1819 is, or is not, bound by an adverse possession between the defaulting owner and defendant, the suit being one for enhancement.

It is admitted that there is no authority which places the purchaser in the very advantageous position contended for, nor is that privilege conferred upon him by the terms of Regulation VIII. of 1819, but we have been referred to several decisions in which it has been held that the purchaser of an estate sold for arrears of Government revenue is not so bound, and the pleader of the special appellant argues that he is entitled to place his client, the putnee talookdar, on the same ground of advantage as the zemindar. It seems to me, however, that there is a great difference between the cases. Indeed, the ground of decision in the cases of purchasers and zemindars have not always been uniform. In some cases, the decision against the previous landlord has been declared to be wholly inadmissible; in others, it has been merely held to be not conclusive but to be entitled to considerable attention.

It seems to me that in the case of a person purchasing an under-tenure sold at the suit of the landlord, the purchaser is entitled to acquire rights higher than an ordinary purchaser by private contract only to the precise extent to which such privileges are conferred by express terms of law. I find no warrant for holding that a purchaser of a putnee talook is entitled to set at nought all decisions arrived at against the defaulting putneedar; and I think there are good reasons why he should not be so authorized. It does not appear necessary to go into those reasons at present. It is sufficient to say that there is no authority which favors the special appellant, and, therefore, I think that the special appeal ought to be dismissed with costs.

Mitter, J.—I concur.

The 1st September 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Revenue-sale—Sections 13 and 14, Act VIII. (B. C.) of 1865.

Case No. 530 of 1870.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 14th February 1870, reversing a decision of the Moonsiff of Aosgram, dated the 1st September 1869.

Prannath Roy (one of the Defendants), *Appellant,*

versus

Troyluckhonath Roy (Plaintiff), *Respondent.*

Mr. Mun Mohun Ghose and *Baboo Mohinee Mohun Roy* for Appellant.

Baboos Romesh Chunder Mitter and *Luckhee Churn Bose* for Respondent.

A sale having been effected by order of a Deputy Collector, an appeal was made to the Collector, who set aside the sale. The Commissioner, however, considering that the Collector had no jurisdiction, and that no injury had been made out, reversed the order of the Collector.

HELD that the sale did not become confirmed or otherwise final and conclusive before the date of the Commissioner's order.

Hobhouse, J.—THE plea taken before us in special appeal is that the Judge of the Court below was wrong when he held as a matter of law that the plaintiff was in time when he sued to set aside a certain sale.

The learned Counsel for the special appellant argues that Clause 3, Section 1, Act XIV. of 1859, is the Clause which provides for the limitation applicable to the present suit, and we will take it for the purpose of the contention before us that this is so, and that the words—"to suits to set aside the sale of any property, moveable or immoveable, sold in pursuance of any decree or order of a Collector or other Officer of Revenue," that these words apply to the case before us, and that, therefore, the period of limitation is one year from the date at which such sale was confirmed, or would otherwise have become final and conclusive, if no such suit had been brought.

Now, the plaintiff sued on the ground that the sale was confirmed on the 16th May 1868, and the date of his suit was on the 16th February 1869. So that, if the sale was not confirmed until the 16th May 1868, and did not, until that time, become final and conclusive, then the plaintiff was in time, and the Judge was right when he held that plaintiff was in time. By this finding he has substantially held that the sale was not confirmed, and did not become final and conclusive until the 16th May 1868. The question, therefore, which, in reality, is before us is whether there was or was not any evidence on the record which justified the Judge in coming to this finding.

We think that there was such evidence. The sale in this case took place on the 13th August 1867, and we are told by the learned Counsel for the special appellant that within 8 days from that date the plaintiff in this case applied to the Deputy Collector, saying, amongst other things, that the sale was irregular. The Deputy Collector, on the 10th September 1867, rejected the application of the plaintiff, but made no order as to the sale. The plaintiff then, on the 21th September 1857, appealed to the Collector objecting to the sale, and on the 28th February 1868 the Collector set aside the sale. The Commissioner, however, considered that, in setting the sale aside, the Collector had no jurisdiction, and that no injury had been made out: he reversed the order of the Collector, and what other order he passed we do not know. But we must take it, we suppose, that the sale, at any rate, whether it had been confirmed before or not, did become final and conclusive. Then the question before us is whether, upon such evidence as the above, the Judge was justified in finding that the confirmation of the sale was made at this time, and not before this time.

Now, by the provisions of Section 13, Act VIII. of 1865, B. C., the sale-law applicable to this case, it is stated that "an "appeal shall lie to the Collector from any "proceedings of a Deputy Collector or "Assistant Collector, if made within 15 "days; and to the Commissioner from any "original proceedings of a Collector under "this Act, if made within 30 days from the "date of the sale." And that afterwards, by Section 14, the Commissioner has authority to call for the record at any time within three months from the date of the order passed in appeal, and pass thereon such order as he may think proper.

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Looking to the dates of the proceedings which have been quoted to us, it seems to us that there was nothing done by way of confirmation of sale until the order passed by the Commissioner on the 16th May 1868. The Deputy Collector did not confirm the sale. But even if he did, there was, as the law says, an appeal to the Collector within 15 days, and the Collector, on appeal, set aside the sale, and then again the Commissioner declared it a good sale. The Collector clearly had jurisdiction under the law to deal with any proceeding of the Deputy Collector; and after the Collector had dealt with it under the law, the Commissioner also, according to law, dealt with it, and it seems to us that, so far as the evidence on record goes, until the Commissioner has so dealt with it, and set aside the order of the Collector, that the sale, which the Collector declared not to be good, did not become confirmed nor otherwise final and conclusive. We think, therefore, that the Judge was right in saying that the plaintiff's suit was in time, and was also right in remanding the case for the purpose for which he remanded it. We dismiss the appeal with costs.

The 2nd September 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Remand—Jurisdiction—Section 73, Act VIII., 1859.

Case No. 827 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 4th March 1870, affirming a decision of the Sudder Moonsiff of that District, dated the 21st December 1869.

Luleet Pandey (one of the Plaintiffs), *Appellant,*

versus

Byjnath Singh and others (Defendants), *Respondents.*

Moonshee Mahomed Yusuf for Appellant.

Mr. R. T. Allan for Respondent.

An order of remand by a Subordinate Judge is final so far as the purpose of the remand goes, and cannot be set aside by his successor.

Section 73, Act VIII. of 1859, is not restricted to suits for title for immoveable property, but applies also to moveable property.

Bayley, J.—We think this case must be remanded for trial on the merits.

The Subordinate Judge, Moulvie Abdool Mujeed Khan, is clearly wrong in holding that the order of the former Subordinate Judge remanding the case to try whether Luleet Pandey had a right to sue or not was opposed to the provisions of Section 73. That order was final as far as the action under Section 73 went, and the Subordinate Judge had no power to set it aside.

The Subordinate Judge is also wrong in holding that Section 73 is restricted only to suits for title to land and other immoveable property, and does not apply to moveable property. The terms of it are: "If it "shall appear to the Court at any hearing "of a suit that all the persons, &c., &c."

We reverse the judgment of the Subordinate Judge, and remand the case for trial on the merits.

The 2nd September 1870.

Present:

The Hon'ble E. Jackson and Sir Charles Hobhouse, *Bart., Judges.*

Enhancement of rent—Onus probandi—Prima-facie evidence.

Case No. 581 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 16th September 1869, modifying a decision of the Deputy Collector of Boodbood, dated the 30th June 1869.

Mun Mohun Dey and another (Plaintiffs), *Appellants,*

versus

Sreeram Roy and another (two of the Defendants), *Respondents.*

Mr. G. C. Paul and *Baboos Ram Chunder Mitter* and *Bykuntnath Paul* for Appellants.

Baboo Dwarkanath Sein for Respondents.

In a suit for enhancement of rent upon a certain area of land which plaintiff alleged to be mâl, defendant set up that a portion of that area was lakheraj, and did not belong to plaintiff's zemindaree.

Held that plaintiff was bound to prove that he had received rent for the disputed portion before he could obtain a decree for rent for such portion.

Quære.—Is it sufficient that defendant's plea is a mere allegation of lakheraj, or must such allegation be supported by *primâ-facie* evidence?

Jackson, J.—I THINK we ought not to interfere with the decision of the Lower Appellate Court in this case. It was a suit for enhancement of rent. The defendants in answer alleged that some plots of land for which the suit was brought were mâl belonging to the plaintiff's zemindaree; but as regards other plots, they were lakheraj, and not belonging to the plaintiff's zemindaree. The special appeal before us relates especially to these plots which the defendants claim as lakheraj.

The Lower Appellate Court has found that the plaintiff has not produced any reliable evidence whatsoever to show that the lands contained in the plots which are claimed as lakheraj had ever paid rent, and thereupon has dismissed the plaintiff's suit as regards the claim referring to those plots.

The plaintiff has referred a special appeal to this Court, and for the plaintiff, special appellant, the learned Counsel, Mr. Paul, contends in the first place that, in accordance with a decision of this Court, to be found in 3 Weekly Reporter, page 178, as the defendant admits that some portion of his holding is mâl, the onus should be shifted from the plaintiff, and should be thrown upon the defendant to prove that the land alleged by him to be lakheraj was really lakheraj. There was something special in the case quoted. Apparently from the terms of the judgment it would appear that the defendant there did not separate the mâl land from the lakheraj, by which I understand that he did not state which portion of the land he claimed was mâl, and which portion was lakheraj. There is no such confusion in this case. The defendant has distinctly stated which of the plots he claims to hold as lakheraj land, and which of the plots he admits to be mâl. Mr. Paul admits that, under the Full Bench Ruling of this Court to be found at page 115 of the Special Number of the Weekly Reporter, in a case where the plaintiff is suing for rent alleging the land to be mâl, and the defendant contests his claim alleging it to be lakheraj, the onus is upon the plaintiff to prove in the first place that the tenant has been paying rent for the land in dispute. I can see no good reason why this rule should be changed in cases where the defendant claims only a portion of the land as lakheraj, and not the whole of it. Exactly the same rule must apply in cases in which the defendant claims a portion, as well as in cases in which he claims the whole land, as lakheraj.

But it is urged further that there have been several subsequent decisions, namely, such as in V. Weekly Reporter, page 48, VIII. Weekly Reporter, page 183, IX. Weekly Reporter, page 103, and II. Bengal Law Reports, page 211*; and that the rule which has been adopted in all these has been to require in the first place the la-

* The 3rd December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Case No. 1760 of 1868.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 27th March 1868, modifying a decision of the Deputy Collector of that District, dated the 31st July 1867.

Sridhur Nundee (Defendant), *Appellant,*

versus

Brojonath Koondoo and others (Plaintiffs), *Respondents.*

Baboo Ramanath Bose for the Appellant.

Baboos Tara Prosunno Mookerjee, Sham Lall Mitter, and *Mohendro Lall Seal* for the Respondents.

Jackson, J.—THIS appeal only refers to certain plots of land which the defendant has alleged to be lakheraj, and for which he, therefore, contends that the plaintiff's suit for enhancement of rent should be dismissed. In support of his plea that the land is lakheraj, he has put in his taidad and kobalahs. The Judge finds that these are not even *primâ-facie* evidence of a lakheraj title; that the onus of proving that these lands are lakheraj is upon the defendant; and that it is for him to prove that these lands are not included within the tenure which the defendant held from the plaintiff. To each of these points the special appeal relates. We are of opinion, as we have already stated in several other decisions, that the Judge is wrong on all three points It is not for the defendant to show that this land is not included within the mâl tenure the onus is not upon the defendant to prove that these lands are lakheraj. The onus is upon the plaintiff, as it has been frequently stated in numerous decisions of this Court, to prove that these lands are mâl lands, and that they have been paying rent. At the same time, to prevent the ryots from merely setting up this plea without any evidence at all that they hold any lakheraj lands, the Courts have been accustomed to require the defendants to show, by some *primâ-facie* evidence, that they do hold lakheraj lands.

In this case, the defendant has put in kobalahs and extracts from the lakheraj register, which are such sufficient *primâ-facie* evidence as is required. We think the Judge is wrong in saying that it is not *primâ-facie* evidence; and it is evident from the reasons that the Judge gives for so holding, that he makes no distinction between *primâ-facie* evidence and complete and conclusive evidence.

We are obliged, therefore, to reverse the decision of the Judge in this suit, in so far as it affects the lands which the defendant claims as lakheraj; and as it appears from the decision of the Judge that the plaintiff has not proved that these lands are mâl, we decree this appeal, and dismiss the plaintiff's suit as far as it refers to these lands.

kherajdar to produce evidence showing that he really holds some lakheraj title, before throwing the onus upon the plaintiff to prove that the land is mâl. It would appear from a decision to be found in 11 Weekly Reporter, page 35, that there is some question as to whether the onus should not be placed immediately upon the plaintiff to prove in such a case that the land is mâl. I think that in all the cases which have been quoted, the question was whether the defendant did *really* put forward an allegation that the land was lakheraj. I think it is not sufficient that he should merely allege that he has been holding the land rent-free. There is a great distinction between a mere holding of land without payment of rent (such as many ryots do in excess of their own jumma), and a lakheraj holding. I think the Court must be clearly satisfied in all these cases that the defendants claim to hold a lakheraj holding, and are not merely claiming to hold without payment of rent.

In the present case, there seems to be no doubt that the defendant claims to hold the land as lakheraj. Even the plaintiff has, since the institution of the suit, admitted that some portion of the land is lakheraj. and there is also evidence of witnesses in the case who distinctly depose that a large portion of the land is and long has been in the defendant's possession as lakheraj. It may be that this evidence is not sufficient to prove that the plots claimed by the defendant are valid lakheraj, but I think it is sufficient *primâ-facie* evidence to throw the onus upon the plaintiff to prove that the lands for which this suit has been preferred are rent-paying. Strictly speaking, according to the Full Bench Ruling, the onus of proof, under these circumstances, is upon the plaintiff. The Judge has followed that ruling, and I think his decision, therefore, ought to be affirmed, and the appeal should be dismissed with costs.

Hobhouse, J.—I also think that the appeal must be dismissed. I do not do so exactly upon the grounds taken by my learned colleague. I think, in reality, we are bound by the Full Bench Ruling to be found at page 115 of the Special Number of the Weekly Reporter. That ruling seems to me to be exactly upon the facts and upon the finding in point. That was a case in which, as in this case, the plaintiff sued for rent at enhanced rates after notice. The area upon which the enhanced rates were claimed was 37 beegahs and odd cottahs, and it is stated that in the matter of that area the defendant, amongst other defences, set up that 11 beegahs and 7 cottahs of land were lakheraj. That is exactly the case here; a certain area of land was stated by the plaintiff to be mâl, and he claims enhanced rate upon that area. The defendant set up that a portion of the area was lakheraj.

Then what the learned Judges found in the Full Bench case was this. They said: "In the case the Court had no power to try "the validity of the alleged lakheraj tenure "to entitle the plaintiff to recover enhanced "rent for that portion of the land; he ought "to have shown that it was his mâl land, "and that the defendant had paid rent for "it. But no evidence of the kind appears "to have been given. The lakheraj was "assumed by the Judge to exist, though it "was declared invalid for want of registra-"tion. We, therefore, think that no decla-"ration of the plaintiff's right to enhance "the rent of that land can be made in this "suit. The validity or invalidity of that "tenure must be previously tried and de-"termined in a suit to resume or to "assess."

The learned Judges then go on to say that "the 11 beegahs 7 cottahs of land "claimed to be lakheraj must, therefore, be "deducted from the 37 beegahs 7 cottahs 7 "chittacks which has been found to be "the total amount of the plaintiff's mâl "land."

It is very true that after the passing of this decision, there have been expressions dropped from various benches of this Court interpreting the word "alleged" as applying to a defendant's allegation of a lakheraj tenure in such a suit. I do not myself think that any distinction can be drawn between one shape of allegation and another, provided only the allegation be distinct and unmistakeable: nor can I see any indication in the finding of the Judges of the Full Bench that they had any intention of laying down as a rule of law that the allegation they were speaking of was not an allegation "*pure et simple*" of lakheraj, but was an allegation of lakheraj supported by *primâ-facie* evidence; and I think, therefore, that those decisions which have been relied upon by the learned Counsel for the appellant are in opposition to the Full Bench Ruling, and cannot, therefore, be followed by us. I would, therefore, say upon the strength of

the Full Bench decision that the Judge was right when he held in this case that the plaintiff was bound to prove that he had received rent of the land before he could obtain a decree for rent.

In this view of the case, I agree in dismissing the appeal with costs.

The 6th September 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Modified decree—High Court—Limitation.

Case No. 245 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 25th June 1870.

Chowdhry Wahid Ali (Decree-holder), *Appellant,*

versus

Mullick Enaet Ali (Judgment-debtor), *Respondent.*

Mr. R. E. Twidale and *Baboo Onookool Chunder Mookerjee* for Appellant.

Mr. C. Gregory for Respondent.

Where a decree of the Lower Court for possession and mesne-profits was altered in appeal by the High Court and possession awarded on a smaller share, it was held that the modified decree was a decree of the High Court, and that the period within which the decree-holder was entitled to sue out execution was 12 years.

Kemp, J.—THIS case was before this Court on the 1st April last. The question that then arose was whether execution was barred under Section 20, Act XIV. of 1859, inasmuch as the decree-holder had taken no proceeding to enforce his decree or keep the same in force within three years next preceding the application for execution. The case was remanded by Mr. Justice Bayley and Mr. Justice Norman to the Zillah Judge to find whether the decree obtained by the decree-holder was a *joint* decree, and whether *as such* it was kept alive by proceedings taken against Mussamut Titoo.

The Judge has found that the decree was not kept alive by that proceeding, and that the application is barred by limitation.

The point now raised in appeal here, and that too for the first time, is to be found in the *seventh* ground, *viz.*, that the decree being a decree of the High Court—a Court constituted by the Royal Charter—12 years and not 3 years is the period of limitation. Baboo Onookool Chunder, who appears for the appellant, informs us that not being aware of the fact that this was a decree of the High Court, and not of the Lower Court, he had not taken this objection before. As the objection, however, affects the jurisdiction of the Court, we think we are bound to take notice of it even at this late stage.

We find that the judgment-creditor, who was the plaintiff in the first Court, sued for possession and wassilat of 13 annas and some fractions against a number of parties, including Enaet Ali, the present judgment-debtor, Mussamut Titoo, Mussamut Joomaye, Mullick Imdad Ali, Hafez Ahmed and others. He obtained a decree in the first Court for the share claimed, with mesne-profits to be ascertained in execution.

On appeal to the High Court by Mussamut Joomaye, Mussamut Titoo and others, the decree of the first Court was altered and possession awarded on 10 annas and odd dams instead of 13 annas. No order was passed in reference to mesne-profits. The order as to the costs of the suit was altered, some of the defendants were held to have been unnecessarily made parties to the suit, and were allowed costs as against the plaintiff.

It is contended, and we think rightly, that this decree was not a decree of the Lower Court, but of this Court. The decree of the Lower Court was materially altered, and the wassilat which was left to be ascertained in execution was diminished by so much as represented the difference between the share claimed and the share decreed by this Court. We are referred by Baboo Onookool, to a decision reported at page 26, Volume XIV., Weekly Reporter, where the learned Chief Justice lays down that a decree of the Lower Court modified in regular appeal becomes a decree of the High Court. We think there can be no doubt in this case that the decree having been materially altered and the wassilat cut down, the decree was a decree of this Court. It matters not that the present judgment-debtor Enaet was no party to the appeal; he was a party to the original suit and benefited by the alteration in the

decree of the first Court, and it is not the decree of the first Court but the decree of the High Court which is now under execution.

It is clear that if the defendants had thought it proper, on discovery of any fresh evidence or for any other good reason, to apply for a review, they would have been obliged to apply to this Court, and not to any other Court.

Holding, therefore, that the decree in question was a decree of this Court, and this Court being a Court established by Royal Charter, the period within which the decree-holder is entitled to sue out execution is not 3 years but 12 years. It is admitted that in this view the decree-holder is in time.

The appeal is decreed and the judgment of the Lower Court is reversed. Looking to the fact that the present objection was not taken at an earlier stage, we direct that each party pay his own costs in all the Courts.

The 7th September 1870.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Section 32, Act VIII., 1859 — Right of suit — Fraud — Presumption — Procedure.

Case No. 948 of 1870.

Special Appeal converted into Regular Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 21st January 1870, reversing a decision of the Subordinate Judge of that District, dated the 5th May 1869.

Kadumbinee Dossia (Plaintiff), *Appellant,*

versus

Unnopoorna Daye and another (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Mohendro Lall Shome, Ashootosh Dhur, and *Prosunno Coomar Roy* for Respondents.

Where a plaint is rejected under Section 32, Act VIII. of 1859, the plaintiff can bring a suit on the same subject-matter, provided he is not barred by lapse of time.

In a suit for a declaration that certain property which plaintiff as decree-holder attempted to sell, belongs to his judgment-debtor, where the opposite party claims to have been in possession of the same under an alleged hibba; and plaintiff gives sufficient evidence to raise a reasonable presumption that there has been fraud and collusion in the case, it becomes the duty of the Court to go on to the evidence on the other side and ascertain whether the transactions which are the subject of inquiry are fraudulent or valid.

Jackson, J.—THIS was a suit for a declaration that certain property which the plaintiff had attempted to sell in execution of a decree against one Huro Pershad Patnaik, were, in fact, the property of Huro Pershad Patnaik, and were not, as had been objected to in the execution-proceedings, the property of Huro Pershad's widow, Mussamut Unnopoorna Daye, and son, Sodoy Kalee Patnaik.

It appears that when this objection was taken in the execution-department, the Judge who had to try the claim of the objectors did not try the question of possession, but apparently on the ground that there had been a previous unsuccessful claim, rejected the plaintiff's prayer to sell the property as the property of Huro Pershad Patnaik.

The case in the Civil Court first came before the Subordinate Judge of Midnapore, who went very carefully into all the evidence, and came to the conclusion that the whole of these properties were the properties of the judgment-debtor, Huro Pershad Patnaik, and had been collusively transferred to the names of his wife and son, probably in fraud of creditors.

On appeal, the Judge has set aside that decision, being of opinion that the plaintiff had not given sufficient evidence to show that the property held in the name of the wife did not really belong to her and was collusively transferred to her name; and as regards the son, that the plaintiff had not given sufficient evidence to show that the property was the property of the father, and not of the son.

The Judge's decision is somewhat remarkable. In addition to the question on the merits, he has also decided on a point of law against the plaintiff in consequence of his having formerly brought another suit regarding this same matter; and that suit having been withdrawn without the permission of the Court in accordance with the provisions of Section 97, Act VIII. of 1859, the Judge is of opinion that, under these circumstances, no fresh suit can be brought.

On special appeal, the Judge's decision on this point of law is objected to, and his decision on the merits is also objected to on several grounds.

With regard to the applicability of Section 97 to the plaintiff's case, we are of opinion that the Judge is altogether in error.

There is no doubt that the plaintiff on a former occasion preferred a plaint in which one of the reliefs claimed was of the same description as that which he now claims. In the same plaint, he had claimed relief on other causes of action against other persons; and it very soon became evident, after he had put in that plaint, that it could not proceed to trial. The plaintiff then asked to be allowed to withdraw that portion of the claim which referred to the subject-matter of the present suit. No order was passed on that application, but finally the whole plaint was rejected by the Judge. Thus, in point of fact the plaintiff did not withdraw any portion of his claim, but his plaint, as it stood was rejected. This rejection was under Section 32 of Act VIII. of 1859 and Section 97 was not brought into question at all.

It is very clear that if the plaint was rejected under Section 32, the plaintiff can bring a suit on the same subject-matter, provided he is not barred by lapse of time. When the plaintiff brought that claim he had no cause of action against the present defendants. His cause of action did not arise until his claim to sell the property of Huro Pershad Patnaik was repudiated by the defendants. The present cause of action has arisen under the following circumstances.

The plaintiff was security for Huro Pershad Patnaik for the payment of the rents due by him for an ijarah which he obtained from Baboo Motee Lall Seal. Baboo Heera Lall Seal, the son of Motee Lall Seal, sued Huro Pershad Patnaik, and also the plaintiffs, as his security, for rents. On execution of the decree obtained in that case, the plaintiff was obliged to pay off Huro Pershad's debt, and he now sues to recover the amount so paid from the estate of Huro Pershad Patnaik, who has since died. He has obtained a decree against Huro Pershad Patnaik, and in execution of that decree against the property now in dispute, he is met by Huro Pershad's widow and son, alleging that the property which has been attached did not belong to the judgment-debtor, but to them.

The properties in dispute in the case may be divided into two classes, *viz.*, property claimed by the widow and property claimed by the son. Of the former, the most important consists of certain landed property containing the family dwelling-house which, it is said, was made over by hibba by Huro Pershad to his wife in the year 1253. It is over this particular property that there has been special dispute in the case.

On the part of the plaintiff, it was alleged that this was a mere nominal transaction; that the property was not in reality transferred; that, on the face of the document, the hibba was executed between the husband and wife during the lifetime of the son; that it purported to convey the deceased judgment-debtor's entire estate, including even articles of domestic use, such as pots and pans, beds and pillows; that no consideration is proved to have been paid for the property; and finally, that registration of the instrument was not effected until three years after the date when it is said to have been executed, and even then not until a plaint was about to be filed against Huro Pershad Patnaik for the recovery of a large sum of money.

The Judge, in considering these allegations, says: "It is specially important in "a case of this sort, in which it is hardly "contended that evidence on either side is "complete, to see clearly at the outset on "which side the onus of proof lies, because "the result will very much depend upon "that.

"Now, upon the whole state of facts "and pleadings, it seems clear that it was "upon the respondent (plaintiff) to prove "*primâ facie* the deceased judgment-debtor's "title."

Then the Judge goes on to say that, if the facts alleged be proved, "it would afford "strong evidence against the *bona fides* of "the deed—sufficient to shift the obligation "of proof."

He then passes on to consider the evidence on the several points. The first point which he considers is as to whether the hibbanamah passed the deceased judgment-

debtor Patnaik's entire estate at the time or not.

He then goes on to consider the evidence as to whether the debtor was at that time indebted, and he finds that the plaintiff was unable to produce any sufficient evidence to prove either fact.

On the first point, we find that the plaintiff's own witnesses, Kinoo, Nund Lall, and others, admit that at the time it was executed, the hibba passed the whole of the estate. The Judge, therefore, is clearly wrong in law in his finding on that point. Then as to the evidence regarding the circumstances under which the document was registered, the plaintiff showed that at that very time a suit was brought against Huro Pershad Patnaik for recovery of 10,000 rupees. At first the Judge seemed to object altogether to the admission of the plaint in the suit as evidence, and he goes on to say that "the utmost that it can prove is that such "a plaint was filed on the date given. It "is not shown who really filed it, or that "any debt was found due thereon; to both "of which facts, if facts, legal evidence "must exist, and might have been pro-"duced."

We think that that plaint was sufficient *primâ-facie* evidence to show that there was a very large claim brought against Huro Pershad Patnaik at the time when the hibba was published. The evidence as to what resulted on this point has been put before us and has been examined by us, and it appears on that evidence that a very heavy debt did exist against Huro Pershad Patnaik, and that he took steps, and adopted means to compromise that claim. There is no doubt that the plaint was a genuine plaint, and that the debt did exist, and it is certainly very strange that just about that time he should determine upon conveying his family house to his wife and son without any reason.

The Judge then goes on to speak of the enjoyment of the family-house by the deceased judgment-debtor subsequent to the execution of the hibba, and he says that, as it was the family-house and all the members of the family continued to live in it, nothing definite can be inferred from this. He then adds that he ought not to act upon any suspicion of fraud, and finally he thinks that although the circumstances connected with the execution of the hibbanamah are suspicious, that document has not been proved to be fraudulent or false; and that, therefore, he ought to support it.

We think that the reasons for which the Judge has rejected the presumption of fraud which arises upon the evidence are not good in law. There was certainly a large mass of evidence raising the strongest presumption of fraud, and throwing such strong suspicion on all the facts and circumstances connected with the hibba, that the Judge was bound to go into the evidence on the other side to determine whether this hibba was a genuine document or not. The Judge, however, does not go into the evidence on the other side, but throws over the plaintiff's case simply upon the ground that the evidence which he produced in support of it was not sufficient.

The same remarks apply to the case of the property claimed by the son. The Judge says that the plaintiff has not given sufficient evidence to satisfy him that the property claimed does not belong to the son, whereas even the evidence adduced by the defendant strongly corroborates that of the plaintiff as to its being impossible that a great portion of the property could be that of the son, it having been obtained when the son was only a few years old.

The Judge is, therefore, wrong in law in disregarding the presumptions arising out of the facts proved in the case, and we have no doubt that his error in this matter has materially injured the case of the plaintiff; and we are, therefore, of opinion that the special appeal should be allowed, the Judge's decision reversed, and the case remanded for re-trial.

However, as the whole of the evidence on which the parties relied is on the record of the special appeal before us, we have, with the consent of the pleaders on both sides, thought it desirable to order that the case should be heard as a regular appeal by this Court, and we now proceed to deliver final judgment upon it.

We have asked the respondent's pleaders to show us the evidence upon which they rest the validity of the hibbanamah, and we have had the whole of the oral evidence on that point read before us.

It would have been far better, as I have already observed, if the Judge had not confined himself to the plaintiff's case. As very often happens in cases of this description,

had he gone on to look at the defendant's evidence, he would have had still stronger reasons for suspecting the *bona-fides* of the hibbanamah. Certainly, after hearing that evidence, we are not satisfied that the hibbanamah was really executed, or that possession passed under it. In fact, there is no evidence of any change of possession. There is no evidence that any consideration was paid, though there is an allegation that some money and ornaments were made over in return for the property conveyed. But the witnesses who speak to this when asked about the consideration-money, say that they did not see it paid over.

There seems to be, in fact, no reason whatever for the alleged transfer. If there were any doubts as to the true nature of this document, they would be removed by the facts which appear in connection with the other parts of this case.

The property classified in Schedule B which the plaintiff has claimed is said to be the property of Unnopoorna, the widow of the deceased Huro Pershad Patnaik. The evidence regarding this is that, although it was purchased in the name of Unnopoorna, the money was paid by her husband.

A number of books have been put in to prove that Unnopoorna had property of her own, and that she was in the habit of lending money, and was able to make these purchases. No doubt, there are a number of books, in all of which the business is shown to be carried on in the name of Unnopoorna, but it is not proved that the property belonged only to her and not to her husband. Although the books of Unnopoorna's business have been put in, no books have been put in relating to Huro Pershad's business. It is admitted that he was a person holding very large ijarahs, and therefore in the receipt of large sums of money; and it can hardly be supposed that, if the wife and son kept regular books of *their* business, Huro Pershad kept none of *his* transactions; yet no books of his have been produced. I am not satisfied that there was any separate property belonging to the widow of Huro Pershad. The evidence does not in any way show where, or when, or how she obtained any separate funds of her own. She alleges that she had *stridhun*, but there is no evidence to support this allegation. There is a vague story told by a witness that she received some money from her brother-in-law's wife and her mother-in-law. How they gave her this money, or why, or when, or how much, there is no evidence to show.

Then as to property claimed by the son, the Judge himself had admitted that the claim of the son cannot stand as regards some indigo vats, which the Judge has declared to be the property of the father, notwithstanding the objection of the son Sodoy Kalee. But with regard to items Nos. 39, 40, and 41, he says it seems clear that they are the property of the son, and cannot be sold. The son's own witness states that they were purchased when he was a boy, and that they have been about 20 years in the family. How can the items then have been originally the property of the son? It is direct evidence that they were purchased by the father in the name of the son, but the property in them was that of the father.

There may be some difficulty as to items 24 and 29, but looking to the manner in which the defendants have concealed Huro Pershad Patnaik's property, we think that these properties must be taken to be also his property, unless some good evidence can be brought forward to prove the contrary.

The Judge says that there is a witness, Nund Ram Patnaik, who speaks to two kubooleuts, dated in 1267 and 1271; and the Judge thinks this to be sufficient. There is no other evidence on this point. We have considered the evidence of this witness, and we do not think that it is sufficient, or that any reliance can be placed upon it. The son ought to show where he obtained funds to purchase the property in question, and when he purchased it. The evidence to my mind is not sufficient to uphold these alleged transactions, and the purchase by the son Sodoy Kalee.

After giving great consideration to this case, I think that it is very similar to that reported in Volume IX., Weekly Reporter, page 338. I think that it is one of those cases where sufficient evidence has been given on behalf of the plaintiff to raise in the mind of every reasonable person the presumption that there has been fraud and collusion in the case; and when such presumption is once raised, no other evidence is required on the part of the plaintiff, and it is the bounden duty of the Court to go on to the evidence on the other side, and ascertain whether the transactions which

are the subject of enquiry are fraudulent or valid. Our opinion, then, is that the property in suit is not the property of his widow and son, but is property belonging to the deceased Huro Pershad Patnaik, and that therefore the plaintiff's suit must be decreed, and the decision of the Subordinate Judge must be affirmed with all costs.

Miller, J.—I am of the same opinion. The admitted facts of this case are sufficient to raise a strong presumption of fraud against the respondents, and this presumption has been no way rebutted by any satisfactory proof on their side.

The 7th September 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Mahomedan Law—Disappearance of proprietor—Alienation by heirs—Pleas—Subscribing witnesses—Evidence.

Case No. 519 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 28th December 1869, reversing a decision of the Moonsiff of Nowabad, dated the 29th March 1869.

Hosseinee Khanum (one of the Defendants), *Appellant,*

versus

Tijun Lall (Plaintiff), *Respondent.*

Moonshee Mahomed Yusuf and *Lalla Rughoobuns Sahoy* for Appellant.

Baboo Khettur Nath Bose for Respondent.

In a suit to recover possession of a share of landed property, where plaintiff claimed on the ground of purchase from the heirs of the proprietor who had been missing for many years, and in which the defendant set up a mokurruree, and pleaded that as 90 years had not elapsed since the disappearance of the proprietor, the property could not, under Mahomedan Law, be inherited by his heirs, and the alienation by them was therefore invalid:

HELD that 90 years is the least period within which, according to Mahomedan Law, the estate of a missing person can be alienated by his heirs.

HELD that, as plaintiff had been found in possession under the conveyance from the heirs who did not dispute his title, the defendant, a stranger, who had failed to prove either title or possession under the mokurruree which he set up, was not in a position to advance the plea in question.

In a suit for possession, the fact of plaintiff having been a subscribing witness to a pottah which is set up by the defendant is not conclusive against the former.

Kemp, J.—THE plaintiff, special respondent, sued several defendants to recover possession of a 4-annas share which, he alleged, he purchased from the heirs of one Choolun who has been missing for many years; as also of a 12-annas share which he alleged he held under a ticca lease. The cause of action was said to be the dispossession of the plaintiff under an Act X. award.

The first Court found that as 90 years had not elapsed since the disappearance of Choolun, his heirs had not inherited his share, and therefore any alienation by them was invalid. This was as regards the 4-annas share claimed by the plaintiff In reference to the ticca lease of 12-annas, the Moonsiff found that the plaintiff failed to prove his possession; that the Collectorate dakhilas put in by the defendant, the local inquiry made by the Nazir, and the evidence of witnesses, proved the defendant's possession; whereas the Collectorate dakhilas filed by the plaintiff were suspicious, inasmuch as it appeared that Kanhya Lall, a cousin of the plaintiff, who was a ticcadar under defendant No. 1, and who received those dakhilas on payment of the Government rent during the term of his ticca, made them over collusively to the plaintiff. The Moonsiff concludes his decision by stating that the plaintiff was bound to prove his title and possession, and ought to succeed on the strength of his own title, and not on the weakness of the defendant's. The Moonsiff, therefore, dismissed the plaintiff's suit.

On the facts, also, the Moonsiff appears to have gone thoroughly into the case, but on appeal the Subordinate Judge has come to an entirely opposite conclusion.

The Subordinate Judge has also carefully considered the evidence. He finds that the plaintiff's possession has been satisfactorily and fully made out by his evidence, oral and documentary; that the plaintiff's witnesses are reliable and trustworthy, especially as they are cultivators of the lands in dispute, and therefore better capable of speaking to the fact of possession than anybody else. The Subordinate Judge also observes that the ticca pottah set up by the plaintiff is admitted by the malik; that although the plaintiff was cited by the defendant as a witness, he was not examined as to the *bona fides* of the ticca lease set up

by him ; and that the defendant's pottah was not registered, whereas the plaintiff's ticca pottah was so.

As to the local enquiry made by the Nazir, the Subordinate Judge thought that the Moonsiff ought not to have deputed his Nazir or any other Omlah or even an Ameen to make an investigation on a point of possession, but that the deposition of witnesses taken in Court were sufficient for that purpose.

We are not prepared to say that these remarks by the Subordinate Judge are unsuitable to the circumstances of this particular case.

On the law-point, which refers only to the 4-annas share alleged by the plaintiff to have been acquired by purchase from the heirs of Choolun, the Subordinate Judge holds that, under the Mahomedan Law, no such period as ninety years adjudged by the Moonsiff is prescribed for the sale and purchase of the property of a missing person. He does not, however, quote any authority in support of this opinion, but of the several grounds two have been taken in special appeal. The first is that the Subordinate Judge is wrong on the Mahomedan Law point. Moonshee Mahomed Yusuf, the pleader for the special appellant, has called our attention to Macnaghten's work on Mahomedan Law, page 29; Baillie's Digest, page 703 ; Elberling, page 30 ; Surajiah, page 56, and to a decision in Volume V., Select Reports, pages 108 and 109.

It appears that, according to the three great Mahomedan lawyers,* as laid down in those authorities, there is some difference of opinion as to whether 100, 105, or 110 years is the proper time to wait before the property of a missing person can be said to be inherited by his heirs, and therefore alienable by them ; and looking to this difference, it is laid down that 90 years is the least period which must elapse before the estate of a missing person can be alienated by his heirs.

*1 Aboo Haneefah.
2. Mahomed.
3. Aboo Yusuf.

If this plea had been advanced by the heirs of Choolun or by any member of his family, it would be entitled to very great weight ; but looking to the fact that the objection is set up by a stranger to the family ; that the plaintiff has been found in possession under the deed of conveyance from the heirs of Choolun ; and that his vendors have not disputed his title, we think the defendant, who set up a mokurruree for only 12 annas, and failed to prove his title or possession under the mokurruree, according to the finding of the Subordinate Judge, is not in a position to take this objection.

We, therefore, overrule the first plea taken.

The second ground is that the Subordinate Judge has not taken into consideration the fact that the plaintiff was a subscribing witness to the mokurruree in favor of the defendant, and that he is, therefore, precluded from denying the existence of the said mokurruree. The mere fact of the plaintiff being a subscribing witness to the pottah, although it is a matter for observation, is not conclusive against him. His cognizance of the defendant's mokurruree has not been established, and though cited by the defendant, he was not examined on this point

The Subordinate Judge has found upon the whole evidence, oral and documentary, that the plaintiff's ticca pottah which is registered and admitted by the grantors is *bonâ fide*, and that his possession has been satisfactorily proved by the evidence of the ryots cultivating the lands in dispute.

We, therefore, dismiss this special appeal with costs.

The 7th September 1870.

Present :

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Mesne-profits—Compensation.

Case No. 594 of 1870.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 4th October 1869, modifying a decision of the Sudder Moonsiff of that District, dated the 12th July 1869.

Madhub Chunder Dutt (Plaintiff), *Appellant,*

versus

Haradhun Paul Sootrodhur (Defendant), *Respondent.*

Baboo Bykuntnath Paul and *Moulvie Syed Murhumut Hossein* for Appellant.

Baboos Oopendro Chunder Bose and *Bhowanee Churn Dutt* for Respondent.

In a suit for possession and wassilat where the plaintiff was the actual cultivator of the land, and obtained a decree, it was held that the Full Bench Ruling

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reported in 9 W. R., p. 446, and not the case in 13 W. R., p. 37, was applicable, and that plaintiff was entitled to such fair and reasonable rent as the defendant might have derived from the land had he let it during the period of his wrongful occupation.

Loch, J.—THE plaintiff in this case sues to recover possession from the hands of the defendant, whom he describes in his plaint as holding the lands in question in his own cultivation, and he sues to recover the value of the crops grown on the land from the year 1270 to 1275. The Courts below have found that he is entitled to possession, and the Judge says in his judgment: "The "plaintiff will obtain possession of beegahs "4-12 cottahs out of beegahs 6-8 cottahs, "and wassilat on beegahs 2-6 cottahs at "the rate fixed by the Lower Court from "1270 to 1275."

The rate found by the first Court was at Rupees 2-12 per beegah, and the Court considered it to be a reasonable and fair rate of rent for the land.

A special appeal has been filed, and it is urged that the Lower Courts were in error in supposing that the Full Bench Ruling reported in 9 Weekly Reporter, page 446, was applicable to the present case; that the circumstances of that case were different from those of the present, inasmuch as the plaintiff in that case was a zemindar, whereas the plaintiff in this case is the cultivator of the land; that where the plaintiff is the actual cultivator of the land, he is entitled, as held by a Division Bench of this Court in a case reported at page 37, 13 Weekly Reporter, to recover the full amount of what he would be enabled to obtain had he been in possession of the land.

Now, looking at the judgment of the Lower Courts, it appears to us it cannot be said that they were in error in applying the Full Bench decision to this case. In that case, there is nothing to show us that the plaintiff, had she not been prevented from doing so by the defendant, might not herself have cultivated the lands referred to in that suit; and the plaintiff in this case is in a similar position. Under the Full Bench Ruling, which we think to be applicable, plaintiff would be entitled to a fair and reasonable rent for the land, such as the defendant might have derived from it had he let it during the period of his wrongful occupation instead of retaining it in his own possession, and the Lower Courts have found that the fair and reasonable rent is the rate which they have awarded. We think, therefore, that the ground taken in special appeal is not a valid ground, and that the appeal should be dismissed with costs.

The 8th September 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Court of Wards—Section 7, Act XL. of 1858.

Case No. 278 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 15th July 1870.

Rowshun Jehan and another (Petitioners), *Appellants,*

versus

The Collector of Purneah on behalf of Government (Opposite Party), *Respondent.*

Messrs. G. C. Paul, J. T. Woodroffe, and *G. C. Gregory* for Appellants.

Baboos Onookool Chunder Mookerjee and *Juggodanund Mookerjee* for Respondent.

The Court of Wards is not "a person" within the meaning of Section 7, Act XL. of 1858, and is not entitled to administer to an estate by virtue of a will or deed executed by a private person.

Hobhouse, J.—THE essential facts of this case are these: One Ahmed Reza died leaving six sons, who were and are minors, and a widow Rowshun Jehan, who is one of the appellants before us. She, in conjunction with Meheroonissa, the maternal grandmother of two of the sons of Ahmed Reza by his first wife, applied for a certificate under the provisions of Act XL. of 1858 to administer to the estate of the minor sons. The Collector of Purneah intervened in the case, and put in a petition executed by Ahmed Reza on the 1st November 1869, and filed by him in the Court of the Deputy Collector of Kishengunge in the District of Purneah. On the occasion of putting in this petition, the Collector of Purneah objected to the grant of the certificate to administer to the estate of the minors to the persons applying for such certificate, but the Collector did not ask that himself or any one else should

obtain such certificate, but objected simply to the grant of it to the applicants before the Court, and that upon the following grounds:—

The petition, the Collector contended, of the 1st November 1869 was, in reality, a will, and by that will Ahmed Reza appointed the Court of Wards to administer to the estate of the minors, and it was by reason of this appointment that the Collector objected to any certificate being given to the appellants before us.

The judgment of the Court below is somewhat confused, and it will be better, therefore, to give that judgment or rather the material part of it in the words of the Judge himself. He states the facts or most of the facts that we have now stated, and he refers to the petition on which the Collector relies in these words:—

"This petition, although not having the "force of a will, and apparently dealing "with some matters over which the Rajah "would not have disposing power, very "decidedly expresses his desire that the "estate should be taken up by the Court of "Wards, and dealt with in a manner therein "indicated."

Then the Judge goes on to say: "The "pleaders for the applicant have urged "with great strength that the interests of "the estate will be much better secured "by the grant of the certificate now prayed "for than by any other course. It is urged "that, as the ladies Rowshun Jehan and "Meheroonissa are already in charge of "valuable estates belonging to the family, "which they have managed in the most "unexceptionable manner, the introduction "of outside element is uncalled for, and will "lead to schisms and complications un-"favorable to the proper management of "the property. It appears to me, however, "that the law, as it stands, forces me to re-"ject the application.

"In justice to both the ladies con-"cerned, I will say that I am not at all "convinced that they are not fully compe-"tent to take charge of the estate in point "of fitness as well as in that of propinquity "of relationship. At the same time, it is "clearly inferable from the Rajah's peti-"tion (the genuineness of which is fully "admitted) that he did not think so, "and the third Section of the Act lays "very great stress on the intention of "the person whom, for the purposes of this "case, I may call the testator. The ap-"plicant does not come in on the strength "of a will or deed, but her opponent does; "and looking at the very decided language "of Section 7 of the Act, and the construc-"tion put upon it by the High Court (*vide* "the remarks at the top of the second "column, page 343 of the 9th Volume, "Weekly Reporter), it seems to me that I "have no discretion in the matter.

"Under these circumstances, I reject the "application, and under the power vested "in this Court by Section 12 of the Act, I "direct the Collector to take charge of the "estate. This order of the Court will in "no way interfere with any previous certi-"ficate of administration granted to either "party by this Court with reference to the "other estates managed by them."

In the first part of this judgment, it will be remarked the Judge seems to think that the petition in question is not exactly of the nature of a will, for he says that it has not "the force of a will." But then again, in another part of his decision, he seems to intimate that the petition in question is of the nature of a will, because he says that the opponent of the applicant, that is the Collector, does come in "on the strength of a will or deed." So that, in the first place, we do not know whether the Judge considers this document to be of the nature of a will or not. There is a further confusion in this judgment in the finding at which the Judge arrives. In one part he quotes the decided language of Section 7 of the Act as obliging him to grant a certificate to the Collector; and in another part he says that he grants the certificate under another Section of the Act, namely, Section 12.

So that, in fact, we cannot exactly say from the judgment and the finding of the Court below what exactly that finding is. We will, however, take it to be that the Judge meant to say, as in fact he does say in one part of the judgment, that, by the provisions of Section 7 of the Act, he was bound to grant a certificate to the Court of Wards. Those provisions are as follow:—

"If it shall appear that any *person* claim-"ing a right to have charge of the property "of a minor is entitled to such right by "virtue of a will or deed, and is willing to "undertake the trust, the Court shall grant "a certificate of administration to such per-"son."

It would seem, then, that the Judge was of opinion that the Court of Wards was a *person* claiming a right to have charge of the property of the minors in this case, and was entitled to such right by virtue of a will or deed.

Now, in the first place, as we have said before, there was no claim on the part of the Court of Wards on the basis of any such right. At the most there was a setting forth that some such right was created by the document which the Court of Wards propounded, and there was an opposition to the grant of a certificate to the applicant before the Court on the ground of the document which seemed to give that right. But there was not, strictly speaking, any claim on the part of the Court of Wards to a certificate by virtue of any right given by the will or deed. There is, therefore, very considerable force in the arguments of the learned Counsel for the applicants, who are the appellants before us, when they say that the Court of Wards were not claiming a certificate within the meaning of the provisions of that part of Section 7 of the Act which we have quoted. There is, in fact, nothing on the record from which we can positively declare that the Court of Wards in the first place claimed the right, that they claimed it as entitled to it by virtue of the document which they propounded, and that they were willing to undertake the trust.

But we prefer to take it for the purposes of the decision at which we have arrived that the Court of Wards in this case did claim the right, that they thought they were entitled to it by virtue of the document which they propounded, and that they were willing to undertake the trust. We also, for the purpose of the argument, prefer to take it that the document before us was of the nature of a will. But we still think that the Collector was not a person—that is, the Collector as representing the Court of Wards—who, within the meaning of this Section of the law, could be said to be entitled to such right under the circumstances of the case before us.

Ahmed Reza, the person who executed the document in question, did, no doubt, sincerely desire, and did express his desire, that the Court of Wards should administer to the estates of his minor children. He desired something more than this: he desired that the Court of Wards should administer to the whole of his estate. But the question still remains whether the Court of Wards can be said to be a "person," within the meaning of the law, "entitled" to the right which the Court of Wards now claims in this case. We think that the Court of Wards is not shown to be any such person. We need hardly point out that the Court of Wards is not a person at all, that the Court of Wards is not even a corporate body, nor in that sense a person. The Court of Wards is a Court which has certain special functions assigned to it for certain particular purposes with reference to certain estates, and obliged by the law, and not entitled under the law, to exercise those functions, except in a particular way. The law—taking Section 2 of Act IV. of 1870, B. C., which is after all very little more than a substantial repetition of Regulation X. of 1793—taking that to be the law which defines the authority of the Court of Wards—appears to restrict that authority to the cases of minors, lunatics, or females not deemed by the Court competent to the management of their own estates, who are "proprietors of entire estates;" and then the way in which the Court of Wards is to exercise that authority over those estates is defined in another part of the law to be exercised by a particular procedure. Therefore, it seems to us that the authority of the Court of Wards is very strictly and definitely limited, and that it cannot exercise any authority except such as is given by law, and in the way in which that authority is prescribed to be exercised by law.

But if we are to support the argument of Baboo Onookool Chunder Mookerjee on the part of the Court of Wards, then we are to say that the Court of Wards has other functions: that, in fact, whenever any private person may choose to appoint the Court of Wards to be the executor of any estate, whether it is an entire estate or not, but of *any* estate of that person, then under the provisions of Act XL. of 1858 the Court of Wards becomes an executor of that estate, and may act as such executor. Before we could adopt and act upon any such doctrine, we should require very strong authority on the point. But no such authority of any kind has been shown to us. We see very distinctly what the Court of Wards is under the law. We are not shown that it is anything except what it is there described to be. We are certainly not shown that the Court of Wards is a person within the meaning of Act XL. of 1858, and so

entitled to administer to the estate by virtue of a will or deed executed by a private person.

We think, therefore, that the Court below was wrong when it granted a certificate to administer to this estate to the Court of Wards; and the question only remains whether, when we set aside this order, we shall, in the place of it, direct that a certificate be granted to the applicants before us. The law says (Section 7): "If there is no person "so entitled, or if such person is unwilling "to undertake the trust, and there is any near "relative of the minor who is willing and fit "to be entrusted with the charge of his pro-"perty, the Court may grant a certificate to "such relative."

Now, there has not been in this case any sort of hesitation on the part of the Collector, or of any person, in saying that the applicants before us are not fit to be entrusted with the charge of the property of the minor. From the papers from the Board of Revenue read out to us, it appears that the Court of Wards represented by the Board of Revenue had no objection to the persons of the present applicants. The Board of Revenue expresses simply a doubt as to whether those persons can administer to the estate in the face of the document which was in their possession. But as to the fitness of those persons, they express no objection; neither was there any objection made by the Collector in the Court below; and in the fact which the learned Counsel, Mr. Woodroffe, has pointed out to us that one of these persons, during the lifetime of Ahmed Reza, actually did administer to the estate of two of the minors before us, in that fact there is evidence that even in the mind of Ahmed Reza himself there was no objection to the fitness of one at least of these ladies. He might have thought, and apparently he did think, that the Court of Wards was more fit, but he did not say that these persons were unfit. And again the Judge himself distinctly says in a finding which is not contravened by Baboo Onookool Chunder Mookerjee on the part of the Court of Wards that he does not say that the applicants before him "are not fully competent to take charge of the estate in point of fitness as well as in that of propinquity of relationship." It appears, therefore, that the ladies who are the applicants before us are fit and proper persons to administer to the estate, and we direct that a certificate be granted to them for such administration, and we reverse the order of the Court below, and cancel the certificate granted by it.

We think, too, there is not only no objection, but that, on the contrary, there are certain manifest advantages in dividing the certificate in this case, namely, that Rowshun Jehan should take out a certificate to administer to the estate of her four sons, and Meheroonissa should take out a certificate to administer to the estate of her two grandsons.

We think the applicants are entitled to their costs in this Court and in the Court below, and we assess the costs here at Rupees 100.

The 9th September 1870.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeals under Clause 15, Letters Patent—Appeals to Her Majesty in Council.

In the Matter of

The Court of Wards, on behalf of the Rajah of Durbhangah, *Appellant to England,*

versus

Rajah Leelanund Singh Bahadoor, *Respondent to England.*

Baboo Onookool Chunder Mookerjee for Appellant.

Mr. J. W. B. Money for Respondent.

In cases heard by the High Court in its appellate jurisdiction, where the Judges are equally divided in opinion, a party desirous of appealing is bound to appeal under Clause 15 of the Letters Patent before he can appeal to the Privy Council.

Jackson, J.—It is brought to the notice of the Court in this case by Mr. Money, who appears for Rajah Leelanund Singh Bahadoor, and it is admitted by the Senior Government pleader, that the learned Judges who heard the decree against which the appeal is to be preferred differed in opinion.

It has been held by a majority of the Judges that Clause 15 of the present Letters Patent of the High Court applies to cases heard in that Court in its appellate jurisdiction, so as to give an appeal from a decision, passed by the High Court in appeal, where the Judges are equally divided in opinion; and

consequently it would appear that the petitioner will be first bound to appeal to the High Court, because the 39th Section of the Letters Patent restricts the appeal to the Privy Council to those cases "from "which an appeal shall not lie to the said "High Court under the provisions contained "in the 15th Clause of these presents."

It appears that the judgments in this case have only very recently been signed, and the decree has not yet been drawn up. It appears to me, therefore, that I can make no order in this matter until the decree has been prepared, and until I am satisfied by the Government pleaders that the matter upon which the Court of Wards desires to appeal to Her Majesty in Council is not one upon which they have an appeal to the High Court.

The 9th September 1870.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Order under Act XL. of 1858—Valuation—Appeal.

Mussamut Pearee Daye, *Petitioner,*

versus

Hurbuns Koer, *Opposite Party.*

Mr. R. E. Twidale for Petitioner.

No one for Opposite Party.

An appeal from an order under Act XL. of 1858, appointing a person to be guardian of a minor and manager of his property, bears no value, and cannot be carried to Her Majesty in Council.

Jackson, J.—It appears to me that the petitioner is not entitled to appeal to the Privy Council. The petition has been framed as if the estate of the minor, which is valued at 90,000 or one lakh of rupees, were in question; but the estate is not, in reality, in question at all.

Under Act XL. of 1858, the care of the person of all minors and the charge of their property being subject to the jurisdiction of the Civil Courts, the Zillah Court acted in the exercise of that jurisdiction in appointing a certain person, being the opposite party, to be the guardian of the minor, and to manage his property.

By the 28th Section, all orders passed in the Civil Courts in such matters are open to appeal under the rules in force for appealing in miscellaneous cases from the orders of such Courts; and in pursuance of that privilege, an appeal was made to this Court. That appeal was not made in respect of the estate of the minor, but in respect of the contending claims of the parties to be guardian and manager of the minor. It is not said, and I think it cannot be said, that the value of the petitioner's claim in that respect was valued at one lakh of rupees, or that it bore value at all.

I think, therefore, that the case does not come within the terms of the Clause relating to appeals to Her Majesty in Council, and that leave must be refused.

The 9th September 1870.

Present:

The Hon'ble E. Jackson and Sir Charles Hobhouse, *Bart., Judges.*

Section 119, Act VIII. of 1859—Section 11, Act XXIII. of 1861—Execution—Allegation of fraud—Procedure.

Case No. 243 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Midnapore, dated the 14th April 1870, affirming an order of the Subordinate Judge of that District, dated the 2nd October 1869.

Hemmo Moyee Dayee (Judgment-debtor), *Appellant,*

versus

Messrs. R. Watson and Co. (Decree-holders), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Respondents.

W obtained a decree against D and others, founded upon a solehnamah said to have been put in by them. Certain property belonging to D was attached in execution, and a notice of sale proclaimed. Thereupon D came into Court, alleging that she had never had notice of the original suit, and that the solehnamah put in, as far as she was concerned, was a cheat and a forgery, and asked for an inquiry, and to be relieved from the execution.

HELD that the decree was not an *ex-parte* decree, and could not, therefore, be disturbed by a resort to the provisions of Section 119, Act VIII. of 1859.

HELD, that, as the question raised went behind the decree, it could not be gone into under Section 11, Act XXIII. of 1861, which pre-supposed the existence of the decree.

Per Jackson, J.—If the applicant desired an inquiry into the charges of fraud and forgery, her proper course was to apply directly for that purpose, and the Court should enquire into her charges.

Jackson, J.—I THINK that this special appeal must be dismissed. Messrs. Watson and Co. obtained a decree against Radhika Pershad Roy, Sreenath Roy, and Hemmo Moyee Dayee, founded upon a solehnamah said to have been put in by them. They executed that decree, and, in execution, attachment against certain property belonging to the judgment-debtor Hemmo Moyee Dayee was issued, and subsequently a notice of sale was proclaimed. Thereupon Hemmo Moyee Dayee came into the Court, and alleged that she never had any notice of the original suit, that she had not put in any solehnamah, and that the solehnamah, so far as she was concerned, was a cheat and a forgery; and she asked that an enquiry might be made, and that she might be relieved from the execution of the decree.

Her application was specially put in as under Section 119, Act VIII. of 1859. She stated that the decree was, in fact, an *ex-parte* decree as against her, and asked that the question might be re-opened and tried whether such a decree had been properly passed against her.

Both the Lower Courts decided against her on the ground that she was beyond the time laid down in Section 119. The special appeal to this Court is that, even if she is beyond the time laid down in Section 119 of the Act, the question might be tried under the provisions of Section 11, Act XXIII. of 1861.

I think there can be no doubt that no question under that Section can be gone into which goes behind the decree. Any question relating to the execution of the decree, taking the decree as it stands, is open to enquiry under that Section. This ground of appeal must, therefore, in my opinion, fail.

It seems to me also that the Courts were quite right in the decision which they have given with regard to Section 119 of Act VIII. of 1859; because, in the first place, no *ex-parte* decree was passed against the appellant; and, secondly, because the application was not made within proper time, even if it can be supposed that the decree was an *ex-parte* decree. But if the applicant wishes for an enquiry of the charges of fraud and forgery which she says have been committed against her, she ought to apply directly for the purpose, and I think that the Court should enquire into those charges.

The special appeal is dismissed with costs, sixteen rupees being allowed for pleader's fees.

Hobhouse, J.—I agree that the special appeal must be dismissed. I think it is quite clear that the judgment-debtor, the special appellant before us, could not succeed in disturbing this decree by any resort to the provisions either of Section 119 of Act VIII. of 1859 or of Section 11 of Act XXIII. of 1861. Her endeavour was to get rid of the decree altogether. If the decree had been an *ex-parte* decree, she might have got rid of it by having resort to the provisions of Section 119. But it was not an *ex-parte* decree; and therefore she could not resort to the provisions of that Section of the law. Then she could not resort to Section 11 of Act XXIII. of 1861, because by that Section it is pre-supposed that a decree exists, and the Section does not contemplate the case of those persons who wish to get rid of the decree altogether, but the case of those persons who admit that there is a decree, and because there is a decree, and because they are parties to that decree, they on some ground or other object to the execution of that decree.

It then remains whether, on the other ground of special appeal taken, the first Court was not bound to enquire into the allegation of fraud made before it by the special appellant with a view to get rid of the decree. I do not think that in this particular case it was bound to do so, and I give no opinion at all as to whether generally in any case it is so bound. The reasons why I do not think that it is so bound in this case are these, *viz.*, that the allegation of fraud was an extremely vague and general one; that it was not supported by any verified petition or any statement on oath; and that, when the first Court refused to go into the matter of fraud, there was no appeal to the Lower Appellate Court, which was the other Court of fact, upon the question of this alleged fraud. It seems to me, therefore, upon this

point that the allegation was one which the special appellant before us never really intended to pursue; and whether, therefore, the Court, sitting as a Court in execution of decree, was or was not bound to enquire into this allegation (on which point I give no opinion), I do not think that it ought to enquire into this allegation of fraud. I may mention that the course which I should have thought preferable in a case of this kind is that pointed out by the learned Judges in the case reported in 1 Weekly Reporter, page 29, Miscellaneous Rulings.

I agree in dismissing this appeal with costs, sixteen rupees being allowed for pleaders' fees.

The 12th September 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Pottah—Boundaries—Jurisdiction—Clause 6, Section 23, Act X. of 1859.

Case No. 683 of 1870.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 17th January 1870, modifying a decision of the Moonsiff of Sulkea, dated the 30th September 1869.

Sheeb Chunder Mahneeah (Defendant), *Appellant,*

versus

Brojonath Aditya (Plaintiff), *Respondent.*

Baboo Mohendro Lall Mitter for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where a pottah purports to convey so many beegahs of land "more or less" within certain boundaries, the test of what is really conveyed is not the area of the land, but its boundaries.

In a suit to recover possession on the ground of illegal ejectment, a Collector has no jurisdiction to inquire into any matter having reference to the rights of the parties.

Hobhouse, J.—THE objections taken in special appeal are these: First of all, that a certain pottah upon which the plaintiff relied is not admitted by the defendant, as the Lower Court has found. We have had the defendant's statement read over to us, and we find that there is a distinct admission of the pottah—an admission which goes to the full extent of saying that the defendant did, not only in words, but in fact, admit the pottah by actually taking the rents which were laid down in the pottah.

It is then said that the pottah itself has been misconstrued, and that, whilst the pottah, in reality, simply conveyed one-half of the julkur which was in dispute, it has been held to convey the whole of it. The answer to this is that the pottah itself purports to convey one beegah of land, more or less, and within certain boundaries. The test, therefore, of what was really conveyed was not the area of the land, but the boundaries of that land, and those boundaries have been found as a fact by the Court below to be definitely those of the lands of the julkur which the plaintiff claimed. When, therefore, the Court below has given a decree to the plaintiff in accordance with those boundaries, it has properly construed the pottah.

It is then urged that the matter was a *res judicata* by the Collector on a former occasion, and it is said that the plaintiff's vendor on that occasion claimed possession of this julkur once before in the Collector's Court, and the Collector then simply gave him possession, not of the whole, but of only half of the julkur, and so it is said that the matter has been once for all decided, in the presence of the person from whom the plaintiff derives his title, in a competent Court, and which Court has held that the plaintiff is entitled, not to the whole of the julkur, but only to the half of it. The answer to this is that the Collector, on the previous occasion, had no jurisdiction at all to go into the rights of the parties. His jurisdiction was confined by the provisions of Clause 6, Section 23, Act X. of 1859, to determine whether the plaintiff before him had been illegally ejected, and so was entitled to recover possession. It was a simple possessory action, and the Collector's jurisdiction was defined to enquiring whether or not the plaintiff had been illegally ejected; and if he had been, then it would have been the Collector's duty to put him again into possession, and the Collector had no jurisdiction when the case was before him to enquire into any matter having reference to the rights of the parties.

The next objection is that the Lower Court has not sufficiently considered the acts and conduct of the parties with reference to the property now claimed by the plaintiff, and it is said that, on the previous occasions, the plaintiff's vendor himself sued in various Courts, not for the whole julkur, but only for half of it. The answer, however, to this is that the Court did, in fact, take into consideration the acts and conduct of the parties, and that at a time which showed much more conclusively what the rights of the parties now are than could any previous act and conduct in other Courts of Justice, for the question before the Court was, what was the right which now belonged to the plaintiff, and not what belonged to him formerly; and upon this question the Court below has taken the best evidence possible, the evidence of the defendant himself, and upon that evidence has found as a fact what the rights of the plaintiff in this case are.

It is then contended that the defendant is not liable for damages, because it was by an act of God, and not by any act of the defendant, that the damages were brought about. It seems, however, that the facts are that the defendant attached one-half of the julkur in question, and that consequently the plaintiff was not able to take the fish, which belonged to him, out of the julkur, and the floods came and carried away the fish. Of course, the act of carrying the fish away was not the direct act of the defendant; but it need hardly be pointed out that, if the defendant had not attached the julkur in question, the fish would not have been carried away. There is, however, this amount of force in this objection, that the defendant did not attach the whole of the julkur, but attached only half of it; it is just, therefore, that he ought not to be made liable to pay the whole damages, but only half of them. The damages found are Rupees 39, and we therefore reduce them to half of that sum, that is, Rupees 19-8. On the whole, however, we think that the defendant has failed in this special appeal, and we, therefore, dismiss it with costs.

The 12th September 1870.

Present:

The Hon'ble G. Loch and Charles Hobhouse, *Bart., Judges.*

Section 138, Act VIII. of 1859—Production of Registrar's books.

Case No. 647 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 7th January 1870, affirming a decision of the Moonsiff of that District, dated the 8th April 1869.

Mon Mohinee Dabee (one of the Defendants), *Appellant,*

versus

Sreedahma Churn Rannah (Plaintiff) and another (Defendant), *Respondents.*

Mr. R. T. Allan and *Baboos Ashootosh Dhur* and *Kalee Mohun Doss* for Appellant.

Baboos Kishen Succa Mookerjee and *Hem Chunder Banerjee* for Respondents.

In a suit on a registered bond, in which defendant asked the Court to send for the registration-books, with a view to prove the non-existence of the bond at the time it purported to be certificated: HELD that, as defendant had failed to summon the Deputy Registrar, it was not necessary for the Judge to use the discretion given in Section 138, Act VIII. of 1859.

Loch, J.—IN special appeal, the pleader for the special appellant proposed for the Court's consideration, first, whether the plaintiff was entitled to attach and sell the interests mentioned in this case. As, however, this point was not taken in the pet tion of special appeal, the Court decline to hear it.

The next point taken was, that the Lowe Court had not exercised a proper discretio in refusing to send for certain records fro the office of the Deputy Registrar, as ask for by the defendant. The object of t defendant in making this application appea to be this. The bond upon which t

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plaintiff has brought his suit bears date the 16th Bhadro 1273, and it was registered on the 29th Falgoon 1274; but there is a certificate signed by the Deputy Registrar, of the 8th Assin 1273 which shows that the document was produced before him on that date. The defendant contended that the bond produced by the plaintiff was not in existence at the time it purports to be certificated, and consequently he asked the Court to send for the Registrar's books in order to compare them with the document then before the Court.

Now, it is quite clear that it was unnecessary in such a case for the Judge to use the discretion which he is permitted to use by Section 138, Act VIII. of 1859. The defendant might have summoned the Deputy Registrar, and examined him with regard to the entry upon the back of the document; or he might have summoned him to produce the book, and asked the Court to compare it with the document: he having failed to do so, we do not think that the Court was bound at all to use the discretion given in the Section referred to above. And, further, we say that it is not a discretion which is intended to be used, simply because a party, whether the plaintiff or the defendant, fails to prove his case.

With regard to the third ground, namely, that the Subordinate Judge ought, at all events, to have directed the sale of the mortgaged premises to be made subject to the defendant's ijarah lease, we think it is quite unnecessary to express any opinion on the point, for it did not really arise in this case.

The special appeal is dismissed with costs.

The 22nd June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble J. B. Phear, *Judge*.

Pawnee—Interpleader suit—Small Cause Court—Act IX. of 1850.

Reference to the High Court by the first Judge of the Court of Small Causes at Calcutta.

Bhunjee Govindjee and others (*Plaintiffs*)

versus

Monohur Doss and Sewnarain (*Defendants*).

Hyde for the Plaintiffs.

No one for the Defendants.

In execution of a decree of the Small Cause Court obtained by *A* against *B*, goods of *B* in pledge with *C* were seized by and kept in the possession of a Bailiff of the Court. *C* instituted an interpleader suit against *B* to recover possession of the goods. HELD that the seizure by the Bailiff while the goods were in the possession of *C* entitled *C* to maintain the suit, and a decree was accordingly given him with costs.

Case.—In this suit, which was an interpleader suit under Section 88 of Act IX. of 1850, the plaintiffs claimed as pledgees to recover three bales, Nos. 869, 875, and 867, marked J. A. M., of longcloth, seized under a writ of execution of this Court, dated 11th May 1870, or the value thereof, Rupees 1,000.

In my judgment I declared that the plaintiffs had a *bonâ-fide* pledge on the property attached by defendants, and ordered that their claim should be dismissed, but that the right, title, and interest of the judgment-debtor should alone be sold.

I delivered judgment, subject to the opinion of the High Court (which I have now the honor, in accordance with the request of the plaintiff's Counsel, Mr. Hyde, to ask) on the following point, *viz.*:—

"It having been found that the money "was advanced, and that the pawn was a "*bonâ-fide* one, and that the goods were in "the possession of the pawnee at the time "of the seizure, and that the time of the "pawn had not then expired, whether the "learned Judge was not wrong in point of "law in not ordering the property to be re-"leased to the plaintiffs, pawnees, and whe-"ther he ought not to have ordered defend-"ants (the execution-creditors) to pay plaint-"iffs their costs."

In Scott *versus* Scholey (8 East, p 467), the question as stated by Lord Ellenborough amounted in a few words to this, *viz.*, whether an equitable interest in a term of years could be sold under a *fieri facias*; and Lord Ellenborough held that it was not, because the language of the writs and of the return evidently imports that the goods which are the subject of them are properly of a tangible nature, capable of manual seizure, and of being detained in the Sheriff's hands and custody, and capable also of sale and transfer by the Sheriff.

In Legg *versus* Evans (6 M. and W. 36) the goods attached and removed by the Sheriff were not the general property of the judgment-debtor, but of a third party wholly unconnected with the suit; and all that the judgment-debtor had in them was such special property as arises out of a lien, and what the Sheriff proposed to sell was, not the goods, but the lien upon them. Baron Parke here held that the lien could not be seized, partly because it was not tangible, and partly because the moment the goods were removed out of the judgment-debtor's possession his lien over them ceased to exist, and therefore could not be sold, and there remained nothing else that could be sold. Neither of these cases, however, is in point, as in both of them the equitable interest, or the lien which it was intended to sell, was the property of the judgment-debtor. Here the lien is the lien of a third party, and it is not proposed to sell it, but the goods of the judgment-debtor, subject to the third party's lien.

In Proctor *versus* Nicolson (7 C. & P. 67), Lord Abinger held that the Sheriff under a writ of *fi. fa.* against the guest can only take the guest's goods subject to the lien of the landlord for his bill; which seems at least to recognize that in that mode he can take them. In the argument in Legg *versus* Evans, it is stated that in Tidd's Practice, p. 1003 of one edition, and p. 1009 of another, the law is differently laid down. The only case I can find directly in point is that of Rogers *versus* Kennay (9 Q. B. 595); and that is certainly in favor of Mr. Hyde's contention. But it appears to me that that case went astray on a point of pleading, and the judgment appears to have been based on Legg *versus* Evans, which is stated by Lord Denman to have been directly in point. This it clearly was not, the intention in that case having been to sell the special property of the judgment-debtor in the general property of an unconcerned person; while in Rogers *versus* Kennay, as in the present case, the object is to sell goods which are the general property of the judgment-debtor, but to sell them subject to the special property of a third person in them, with which special property it is not desired at all to interfere. But whatever may be thought of the doctrine of the interpleader claimant's special property in cases of trover and detinue as applied in Rogers *versus* Kennay, it appears to me that there is a peculiarity in the case before me which renders the bearing of those forms of action entirely inapplicable. The Bailiff of this Court has seized the goods, but has not removed them, and will not do so. The goods are now, and have all along been, and will be up to and after the sale, in the possession and custody of the interpleader claimant, the pawnee, though no doubt they are also in the custody of the law. Under these circumstances, it appears to me that neither trover nor detinue would lie, it being impossible to allege conversion. Until the expiry of the period for which the goods were pawned, the interpleader claimant has not that right over the attached goods, and that right has not been and will not be disturbed.

The judgment of the High Court was delivered as follows by—

Couch, C. J.—The Judge of the Small Cause Court does not appear to doubt that plaintiffs have a special property in these goods which entitles them to possession, but he says that the goods not having been removed from their possession, and not going to be removed, they are still in possession of the property, although at the same time the goods are in the possession of Bailiffs of the Court, and in the custody of the law. But these two possessions cannot be reconciled. The possession of the Bailiffs in execution of the decree of the Small Cause Court is of such a character that it cannot exist at the same time as the possession of the plaintiffs who are pledgees. By Section 69 of Act IX. of 1850, "the Bailiff executing any process of execution against the goods of any person may, by virtue thereof, seize and take any of the goods of such person (excepting the necessary wearing apparel and bedding of such person or his family, and the tools and implements of his trade);" and by Section 73, the goods are to be deposited by the Bailiff in some fit place, or they may remain in the custody of a fit person approved by the Judges to be put in possession by the Bailiff. All this is inconsistent with the goods being still in the possession of the plaintffs, and in our opinion the Judge of the Small Cause Court is clearly wrong in saying that the possession of the plaintiffs has not been interfered with. Then he appears to have considered that there was no conversion, and the plaintiffs had no cause of action until the expiry of the period for which the goods were pawned. The seizure of the goods while

they were in the possession of the plaintiffs was sufficient to entitle the plaintiffs to maintain this suit. It is true the Bailiff did not seize the goods for his own use; still it was dealing with the goods in a way which was inconsistent with the right of the plaintiffs. The case of Rogers *versus* Kennay is quite in point, and did not proceed on the ground of the form of action, but was really on the principle of the law. The seizure by the Bailiff in this case was a seizure out of the possession of the plaintiffs.

The question which is put to us is: "Whether the learned Judge was not wrong in point of law in not ordering the property to be released to the plaintiffs' pawnees, and whether he ought not to have ordered defendants (the execution-creditors) to pay plaintiffs their costs." We think we must answer the question by saying that the learned Judge was wrong in point of law in not ordering the goods to be delivered to the plaintiffs; and, if he should have ordered that, we think that he should also have ordered the execution-creditors to pay the plaintiffs' costs. We, therefore, answer the whole question in the affirmative, and order that the judgment be entered for the plaintiffs as prayed for in the plaint, with costs of suit. The plaintiffs will also have the costs of reserving the question, and stating the same for the opinion of this Court, and otherwise arising thereout or connected therewith, to be taxed by the Taxing Officer of this Court.

The 6th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble J. B. Phear, *Judge*.

Statute of Frauds.

Reference to the High Court by the First Judge of the Court of Small Causes at Calcutta.

Neckram Jamadar (*Plaintiff*)

versus

Issuree Pershad Puchoory (*Defendant*).

Phillips for the Plaintiff.

Moody for the Defendant.

The 4th Section of the Statute of Frauds does not apply to suits in which the defendant is a Hindoo.

Case.—THE plaintiff sued the defendant for Rs. 266-5-6 on the following cause of action.

For that you became surety to the plaintiff for one Ruteeram Opadhea, and induced the plaintiff to receive him in employ on the guarantee of such suretyship, and that the said Ruteeram Opadhea has not accounted for certain moneys which he had collected in the ordinary course of his duties, whereby the plaintiff has sustained damages to the amount stated.

The pleas were these :—

Non-Assumpsit.

Never Indebted.

The evidence of the plaintiff himself was that he, the plaintiff, was Jamadar of Durwans at the Bonded Warehouse, and was security for all the Durwans, and appointed them all; that Ruteeram was one of those Durwans, and had embezzled the sum of Rs. 315-10-6; that plaintiff had been induced nearly 4 years ago to appoint Ruteeram at the request of the defendant, whose nephew Ruteeram was, and on an undertaking by the defendant, which was in the following terms, *viz.*: "If you suffer any loss by his negligence, or if any money be missing, I will pay;" but that this undertaking or agreement was not in writing, nor had any written memorandum or note of it been signed by the defendant or any agent of his, or been taken by any one.

I took no further evidence, as Mr. Moody, Counsel for the defendant, contended that the case must be dismissed under the 4th Section of the Statute of Frauds, and I was inclined to agree with him on the principle laid down in Leroux *vs.* Brown (12 C. B. 801). I considered that under Section 27, Stat. 21 Geo. III., C. 70, the Hindoo Law in matters of contract and dealing was the *lex loci* of Calcutta, and as such regulated the substantive law applicable to this case, but that the 4th Section of the Statute of Frauds differing in this respect from the 17th Section, which relates to the validity of the contract, and not to the mode in which it shall be proved, and which has been held in the case of Borradaile *versus* Chainsook (1 Hyde, page 51), not to apply to suits against Hindoo defendants, was the *lex fori*, and as such regulated the mode in which

such as the present should be proceeded, and the conditions on which they should be heard. I had thought that the carefully considered and separately delivered, but concurrent, judgments of Sir Lawrence Peel, Sir Arthur Buller, and Sir James Colvile in the case of Beerchund Poddar versus Romanauth Tagore and others (1 Taylor and Bell, page 131), had, in 1849, conclusively settled the effect of the 17th Section of Stat. 21 Geo. III., C. 70, and should have felt no hesitation in dismissing the suit. I was pressed, however, with the recent judgment of the High Court in the case of Jugodomba Dossee *versus* J. M. Grob and others, reported in this day's *Daily Examiner*, in which, if correctly reported, a decided contrary opinion appears to be expressed. I therefore dismissed the case, but in doing so gave judgment contingent upon the opinion of the High Court upon the question:—

Whether the 4th Section of the Statute of Frauds does not apply to suits in which the defendant is a Hindoo?

Should the Honorable the Judges be of opinion that that Section is not applicable, I shall proceed to hear the case on its merits.

The judgments of the High Court were delivered as follow by—

Couch, C. J.—The first Judge of the Small Cause Court has referred, for the opinion of this Court, the question whether the 4th Section of the Statute of Frauds does not apply to suits in which the defendant is a Hindoo, having held, upon the authority of the case of Leroux *vs.* Brown, 12 C. B. 801, that it does apply. In that case it was held that the 4th Section of the Statute, unlike the 17th, has reference to the mode of procedure, and not to the formality of the contract; and consequently that an action would not lie in the Courts of England to enforce an oral agreement made in France (and valid there) which, if made in England, would not, by reason of the Statute of Frauds, have been sued upon. Although this decision has been questioned on more than one occasion by an eminent Judge, Mr. Justice Willes, it has not been overruled; and the first Judge was, no doubt, at liberty to found his decision upon it. We must, however, see whether it is really a binding authority upon the question which has been put. The Statute of Frauds must be considered to have been introduced into Calcutta as part of the English Law by the Charter of George the First, by which, in the year 1726, the Mayor's Court was established (Advocate-General of Bengal *vs.* Ranee Surnomoyee Dossee, 9 Moore's Indian Appeals 391). Now, I cannot suppose that when it was introduced, any distinction was made between the 4th and the 17th Sections, and that one was introduced as law of procedure, and the other as a law affecting the formalities of the contract. No case had then been decided in the English Courts in which such a distinction was made; and Mr. Justice Story, in his "Conflict of Laws," Section 262, classes the two Sections together. As the effect of saying that no action shall be brought, whereby to charge any person upon any of the contracts described in the 4th Section, is practically the same as saying that the contract shall not be allowed to be good; it is not unlikely that the distinction which was made by the Court in Leroux *vs.* Brown would not occur to him. Mr. Justice Maule in that case says: "It may be that the words used, operating on contracts, may in England render them void."

In the case, 1 Madras H. C. R. 26, Muttiva Pillai *vs.* Western, the Court held that in a suit in the Court of Small Causes at Tanjore, in which the defendant was a British-born subject, the 4th Section of the Statute of Frauds was applicable. This decision cannot be supported if the 4th Section is only a law of procedure, as no part of the Statute of Frauds has ever been made part of the procedure of a Mofussil Small Cause Court. In Borradaile *vs.* Chainsook Buxvram, 1 Hyde 63, Mr Justice Wells says: "It is remarkable that from the time of the passing of the 21 George III., C. 70, down to the present time, the Statute of Frauds has never been pleaded as a defence on behalf of a Hindoo or Mahomedan; and this is a strong circumstance to show that the view I take of the law is the correct one, as many cases must have occurred in which the defence might have been raised, if applicable to Hindoos and Mahomedans." If the 4th Section has been considered in India not a law of procedure, but as of the same nature as the 17th Section, which it certainly appears to me it is, notwithstanding the difference in the language of the two Sections, I do not think we are bound, upon a decision of an English Court, to alter that state of the law, when the effect would really be to make the law of contracts for Hindoos and Mahomedans in the Presidency town different from what it is in the mofussil. I also think that as the intention of the 17th

Section of the 12 Geo. III., C. 70, was to preserve to the natives of India their own laws and usages in questions of inheritance and succession and matters of contract and dealing between party and party, it may be construed so as to include the proofs of authentication of the contract as being necessary to its validity. They differ from the limitation of the time for bringing a suit upon it. In Section 260 "Conflict of Laws," Mr. Justice Story says: "Another rule, naturally flowing, or rather illustrative of that already stated respecting the validity of contracts, is that all the formalities, *proofs*, or authentications of them, which are required by the *lex loci*, are indispensable to their validity everywhere else." And there is a difference of opinion whether the mode of proof is to be deemed part of the *vinculum obligationis* (Westlake on Private International Law, 160).

It remains to mention a case reported in the appendix to the second edition of volume 1st, Bombay H. C. R., p. 1, Manickjee Mahervanji *vs.* Rohimtulla Allubnai, in which it was held by the Supreme Court of Bombay, on a case referred by the first Judge of the Court of Small Causes, that the 4th Section of the Statute of Frauds is not applicable to Mahomedans. For the above reasons, I am of opinion that the judgment in the Small Cause Court must be reversed, and a new trial ordered, and that the defendant should pay the costs of reserving this case, &c.

Phear, J.—I agree with the Chief Justice, but I desire to guard myself from being supposed to throw doubt upon the correctness of the decision in Leroux *vs.* Brown, so far as that decision goes to lay down that the enactment of the 4th Section of the Statute of Frauds is substantially a rule of procedure. Indeed, the more closely the Section is looked into and considered, the more nearly impossible it becomes, as it seems to me, to class it under any other head.

It is parallel, I think, with such a rule as that which would disqualify parties to a suit from being witnesses in their own behalf. The effect of this rule in cases of any parol contract, to which the party alone could speak, would be precisely analogous to that of the 4th Section of the Statute of Frauds, for obviously the aggrieved party would be deprived by it of the only means which he possessed of proving his contract; and I suppose no one would consider a rule, which disqualified a certain class of persons from appearing as witnesses, to be anything other than a rule of procedure. But assuming the Section to be, strictly speaking, simply a rule of procedure, another question arises, which I take to be the cardinal question in this matter. For let us look at the immediate consequences of the rule. We see that it renders it impossible *ab initio* for the parties to a certain sort of parol contracts to enforce their rights in a Court of law. It does not come in *ex post facto* like a law of limitation; it does not leave the party who may desire to make himself safe the opportunity of doing so within any period following on the contract; if the other contractor will sign a memorandum, all well and good, but one of the parties alone cannot of himself do anything to mend his position.

A rule of this nature, pregnant with these consequences, does directly affect the potential rights of parties under the contract *from the very moment of the inception thereof;* and if it thus operates to deprive the parties of rights which, but for it, they would enjoy by virtue of any special law governing the contract, then the rule of procedure is in conflict with that law upon the very merits of the matter between the parties. At such a point it may, (I think will be) questioned whether the principles, which a mitiedly guide the Courts of all countries in the administration of justice under a conflict of laws, do not, in truth, necessitate the abandonment of the rule of procedure in favor of the law of the contract. The Court of Common Pleas in Leroux *vs.* Brown, no doubt, went the length of holding that the rule of procedure must still be maintained. I think I should hesitate a long time before I should be able to bring myself to concur in that conclusion. Fortunately, however, the case before us has elements in it which materially distinguish it from that of Leroux *vs.* Brown. The two laws which are here taken to be in conflict are laws of the same country and ruling power, not of different countries. The mode in which these laws are to be adjusted or to be subordinated, the one to the other, must be ascertained by giving a reasonable construction to all parts of the law prevailing here which bear upon the point; and I need hardly say that, if possible, the law should be construed in such a way as to give a remedy to aggrieved persons rather than to take it away. Now, looking at the question in this light, we find ourselves immediately in front of the enactment, Section 17 of 21 Geo. III.,

C. 70, the words of which are: "Provided always, and be it enacted, that the Supreme Court of Judicature at Fort William in Bengal shall have power and authority to hear and determine, in such manner as is provided for that purpose in the Letters Patent, all and all manner of actions and suits against all and singular the inhabitants of the city of Calcutta, provided that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos by the law and usages of Gentoos," &c.

Now, it is at once apparent that while the first part of this Section makes the manner of hearing and determining which comprises the procedure of the Supreme Court (and therefore impliedly, in my opinion, the 4th Section of the Statute of Frauds) generally applicable to the actions and suits to which it refers, the latter part expressly cuts this down by the proviso that in cases of Gentoos all matters of contract and dealing between party and party shall be determined by the laws and usages of Gentoos; in other words, the rule of procedure, if it affects the original rights of the parties, must, in the event of conflict, give way to the laws and usages of the Gentoos. It appears to me that this Section makes the present case perfectly clear. The operation of the 4th Section of the Statute of Frauds in the matter of a parol contract between Hindoos would be practically to prevent rights from arising and being recognized which by the laws and usages of Hindoos could be supported and enforced. Consequently the Section must not, in such a case, be allowed to operate.

I concur with the Chief Justice as to the order which must be passed.

The 13th August 1870.

Present:

The Hon'ble J. B. Phear and W. Markby, *Judges.*

Usury—Interest—Mahomedan Law—Act XXVIII. of 1855.

Reference to the High Court by the First Judge of the Court of Small Causes at Calcutta, in consequence of a difference of opinion between the First and Fourth Judges of the said Court.

Meeah Khan and Munnoo Khan (*Plaintiffs*)

versus

Bebee Beebeejan and Bebee Annoojan (*Defendants*).

Neither party was represented before the High Court.

The prohibition in the Koran and the Hedaya against the taking of usury is not part of the active Municipal Law of this country; and the Courts have always recognised and enforced the custom of taking interest as between Mahomedans.

Per Phear, J.—Act XXVIII. of 1855 repealed the Mahomedan Laws relating to usury. The words "laws relating to usury" in that Act refer to laws affecting the rate of interest which ought legally to be stipulated for, and not to laws which in strictness relate to usury, yet do not meddle directly with the rate of interest.

Case.—THE plaintiff sued for Rupees 84-12, balance of principal and interest due on a khut, dated 24th Falgoon 1275.

The defendant Beebeejan did not attend, but service of summons upon her was proved.

The other defendant Annoo attended and admitted execution of the khut, and made no defence.

It was admitted that both the plaintiffs and both the defendants were Mahomedans.

Baboo Koonjolall Banerjee, the Judge before whom the case came on in the first instance, gave the plaintiff a decree for Rupees 45-12, being the principal money only due on the khut, and refused to allow any interest.

This decision he based on the interpretation given to Act No. XXVIII. of 1855 in the case of Ramlall Mookerjee *versus* Harranchunder Dutt,* tried on the 27th Aug-

* 12 W. R., *Ori. Side Appeals*, p. 9.

ust 1869 in the High Court on appeal before the late learned Chief Justice and Mr. Justice Macpherson, in which it was held that that Act did "no more than repeal the various Regulations and Acts which the English Government of India had passed on the subject of usury." According to this decision, as the Mahomedan Law is not repealed, and does not allow a Mahomedan to charge another Mahomedan any interest whatever (see Hedaya, Vol. II., 489, Book XVI., Ch. 8), the Judge refused to decree for more than the principal of the khut.

The plaintiff's pleader applied for a new trial on the ground that the decision of the High Court in the case above mentioned is at variance with the intention of the Legislature, as that is to be gathered from the words used in the preamble and in Section 1 of the Act. I thought that there might still be some doubt on the point, especially as the opinion of the late learned Chief Justice on the facts was sufficient to support the conclusion at which he had arrived, confirming the decision of the Court below, and the expression of any opinion on this point was not necessary and does not appear to have been raised by the parties or concurred in by Mr. Justice Macpherson. I also thought that the terms of the first Section of Act XXVIII. of 1855 point in a somewhat marked manner to British Statutes in the first instance, to Regulation Law in the second; and lastly "to all laws in force," under which it seems to me to have been the intention of the Legislature to include Hindoo, Mahomedan, and customary laws. I was, therefore, inclined to give the plaintiffs a rule *nisi*, calling on the defendants to show cause why there should not be a new trial granted. But as my colleague differed from me on this point, I have the honor to refer for the opinion of the High Court the point:—

Whether or not the Mahomedan Law on the subject of usury has been repealed by Act XXVIII. of 1855?

If the Honorable the Judges should be of opinion that it has not, the rule will be refused; otherwise it will be issued.

A case turning on a similar point, but with reference to Hindoo Law, has been referred for the opinion of the High Court by my colleague Mr. Thomson and myself, and the Judges will perhaps find it convenient to consider the two cases together.

The judgments of the High Court were delivered as follow:—

Phear, J.—If for the purpose of disposing of the matter now referred to us, it were necessary to answer specifically the question which is put to us by the learned first Judge of the Calcutta Court of Small Causes, I think I should be prepared to say that it ought to be answered in the affirmative.

It seems to me almost impossible with sound reason to put a restriction on the generality of the words which are employed in Section 1, Act XXVIII. of 1855. Those words declare that a certain specified English enactment, and certain specified regulations and parts of regulations, and *all* laws in force in any part of the territories which are in the possession and under the government of the East India Company, relating to usury, are by that Act repealed. I have given my best consideration to the opinion which the late Chief Justice is reported to have expressed in Ramlall Mookerjee *versus* Harran Chunder Dutt. That opinion does not seem to have been essential to the decision of the particular case in which it was given, but it is, nevertheless, entitled to very great weight. According to the report of the case* which is to be found in 3 B. L. R., O. C., page 130, Sir Barnes Peacock said: "I do not think that Act XXVIII. of 1855 was ever intended to repeal the Hindoo or Mahomedan Law as to interest." He then quoted the title of the Act, the preamble, and the first Section, and he added: "That Act did no more than repeal the various Regulations and Acts which the English Government of India has passed on the subject of usury." With the greatest deference for the opinion of Sir Barnes Peacock, I feel it most difficult to take this limited view of the operation of the Act. I see nothing to indicate that the words, "the laws now in force relating to usury," of the preamble, and "all laws in force in any part of the said territories relating to usury" of the first Section, are to be limited in their meaning to Regulations and Acts passed by the English Government of India. If the Legislature had so intended, surely it would have used "Regulations and Acts" in the place of "laws:" instead of "the several parts of Regulations mentioned in the Schedule hereto annexed, and all laws in force in any part of such territories relating to

* 12 W. R. *Original Side Appeals*, p. 9.

usury are hereby repealed," we should have had "the several parts of Regulations," &c., "and all other Regulations and Acts in force in any part," &c.

Neither was the mischief at which Act XXVIII. of 1855 was directed, so far as I comprehend it, such as should induce us to suppose that it would be sufficient for the purposes of the Legislature that the Regulations and Acts of the English Government alone should be repealed. If this were so, possibly we should be found, if possible, to construe upon the words of the Legislature which would limit their operation to the bringing about this result; but since our decision the Regulations which are specifically repealed by this Act, I find that their general effect was to place a restriction of a universal character upon the rate of interest which should be recoverable by law under the terms of any contract of loan; and having regard to Act XXVIII. of 1855 as a whole, I can only conclude that the Legislature at the time of passing it was of opinion that restraint of this sort was mischievous. It appear to me, indeed, that the sole object of the Act was to leave the parties in any transaction entirely free to make their own; terms with regard to the rate of interest; and, if so, this object could only be attained by the removal of all prohibitions upon their freedom in this respect, whether imposed by English authority or by that of the recognized ancient law-givers. This view is, I think, not a little strengthened by the fact that Act XXVIII. of 1855 followed immediately upon the repeal of the usury law in England, and was, in appearance at any rate, an extension of that measure to India. Throughout the Act there is no trace to be found of reference or allusion to any still existing laws of prohibition, or any indication that the Legislature entertained the notion that such laws might remain in existence, notwithstanding the Act. On the contrary, every Clause of the Act seems to me to negative anything of the kind. By the second Section it is enacted that "*any* suit" (without a shadow of qualification). "in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties." And the application of all the other Sections is equally general. The contingencies upon which they severally take effect are designated by "whenever," "in any case," and so on.

It seems to me, then, something more than difficult to escape the conclusion that the repeal of "all laws relating to usury," which is effected by Act XXVIII. of 1855, must extend to Mahomedan Laws. I will add that in my judgment, the Legislature, by the use of the words "laws relating to usury" in this Act, intended to speak only of laws affecting the *rate* of interest which might legally be stipulated for. The rate of interest is the sole subject of the Act from the beginning to the end. There may be, however, laws which, in strictness, relate to usury, yet do not meddle directly with the rate of interest, such as a law limiting the period within which an action for arrears of interest must be brought by reference to the amount to be recovered. For instance, Manu, Section 151, Chapter 8, says: "Interest on money received at once, not month by month or day by day, as it ought, must never be more than enough to double the debt, that is, more than the amount of the principal paid at the same time." This, in substance, is a law for the limitation of suits, and, as such, does not, I think, fall within the scope of Act XXVIII. of 1855. The Bombay High Court pointed out the true character of Manu's rule in the case which is reported in Vol. I., Bombay High Court Reports, p. 47; and by two decisions given in Vol. III. of the same Reports, p. 25, A. C. J., that Court also held that the rule does not fall within the repealing operation of the Act of 1855. I do not, in any degree, dissent from these decisions.

Unfortunately, we have not been aided by the argument of Counsel in the case, and, therefore, having regard to the opposite opinion of Sir Barnes Peacock, I cannot do otherwise than greatly distrust my own judgment upon the question which has been proposed to us. It is consequently with considerable satisfaction that I find myself able to determine the matter of the reference which is before us without making that question the turning-point of my decision. The case is submitted to us by the learned first Judge under Section 55 of Act IX. of 1850. By the terms of that Section, the case constitutes a judgment of the Judge of the Court of Small Causes contingent upon the opinion of this Court, and by Section 8 of Act XXVI of 1864, which extended the jurisdiction of the Court of Small Causes "when judgment is given contingent upon the opinion of the High Court, the High Court may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for, either party, as the case may be, and may make

such order with respect to the costs of reserving the question, and stating the same for their opinion, and otherwise, arising thereout and connected therewith, as such High Court may think proper. And all orders made by the High Court under this Section shall be final." Act XXVI. of 1864, together with Act IX. of 1850, forms one procedure, and it appears to me that the words of the Section which I have just quoted from the latter of the two Acts were intended to apply as well to judgments contingent on the opinion of the High Court, which are passed under the provisions of the former Act, as to those of the like kind which are passed under the powers given by the last Act. If this be so, I think that the large discretion which the 8th Section of Act XXVI. reposes in us, enables us to give consideration to all the facts stated to us, and is not necessarily fettered by the form of the question upon which the judgment is made contingent. Now, it seems to me apparent, on the face of the stated case, that the question proposed to us does not properly arise between the parties, for I think the rule *nisi* for a new trial ought to issue, whatever may be the extent to which Act XXVIII. of 1855 operates.

The learned first Judge appears to be of opinion that if the Act of 1855 be put upon one side, the law which the Civil Courts of this country are bound to administer between Mahomedan suitors "does not allow a Mahomedan to charge another Mahomedan any interest whatever." It seems to me that this view is erroneous. No doubt the passage in the Hedaya to which the learned first Judge refers, and other passages in the Koran, do (as they are commonly understood) forbid the taking of interest; and certainly, as far as I have the means of judging, I should suppose that a very considerable number of religiously inclined persons of the Mahomedan faith consider themselves bound to observe these precepts, and conscientiously keep themselves out of all transactions which appear to infringe them. But, on the other hand, it is notorious that there are in India Mahomedan dealers in money and traders of unquestionable respectability, and that it has been the practice among this class for a very long period to take interest even from their co-religionists in the way of their business. Mr. Harrington, in his Analysis, Vol. I., p. 182, after remarking that the Mahomedan Law forbids the taking of interest for the use of money upon loans from one Mussulman to another, and that the Hindoo Law permits interest to be taken at prescribed rates only, goes on to say: "The Hindoo legislators have expressly sanctioned, and the Mussulman Government of India appear to have tolerated, directly or indirectly, the *customary interest* of the country, which, in the plan for the administration of justice proposed by the Committee of Circuit in 1772, is stated to have amounted to the most exorbitant usury." I cannot learn that our Courts have, in any case which is of authority, refused to decree interest to a Mahomedan on the ground that he was disentitled by Mahomedan Law to recover it. On the whole, it seems to me that, for a considerable period of time past, the prohibition of the Koran and the Hedaya against the taking of interest has not been treated by the Executive, and by the persons charged with the administration of justice in this part of India, as forming part of the active municipal law of the country. As a moral precept, it will, no doubt, always be influential with those who acknowledge its authority; but I think that as a part of the municipal law, if it ever had existence as such, it has long been obsolete.

I am, therefore, of opinion that we ought to pass an order that the rule *nisi* do issue.

Markby, J.—I also think the rule *nisi* ought to issue. Looking to the very strict construction which has been put on the prohibitions contained in the Mahomedan Law with respect to profit on transactions in the nature of a loan, or an exchange of commodities, I doubt whether any passage in the Hedaya (certainly I think not that to which the learned Judge of the Small Cause Court refers) would render invalid an agreement of a loan at interest, unless the loan was made and re-paid in coin of the same description. Possibly, there may have at one time been a general feeling amongst Mahomedans against the propriety of taking interest, and that feeling may still exist to some extent. Possibly, also, the Court administering Mahomedan Law may at some distant period have refused to enforce the payment of interest, but it seems to me unnecessary to consider this. Ever since our Courts have been established, and apparently long before, the custom of taking interest as between Mahomedans has been recognized and enforced. And until this case was tried in the Court of Small Causes, I cannot discover the slightest trace of the validity of

the custom having been questioned. I have not the least doubt that, by the law we are bound to administer, a Mahomedan may claim the right to take interest as any other person.

The 15th September 1870.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Markby, *Judge*.

Small Cause Court, Calcutta — Difference of opinion—New trial—Section 7, Act XXVI. of 1864.

Reference to the High Court by the First Judge of the Court of Small Causes at Calcutta, in consequence of a difference of opinion between the First and Second Judges.

Jardine Skinner and Co. (*Plaintiffs*)

versus

J. W. B. Money (*Defendant*).

Cowell and *Evans* for the Plaintiffs.

Woodroffe for the Defendant.

A question of fact cannot be reserved for the opinion of the High Court under Section 7, Act XXVI. of 1864, when there is a difference of opinion between two Judges of the Small Cause Court at Calcutta. Where the Judges differ on a question of law, it ought to be expressly stated. In a case of a difference of opinion between two Judges upon the point as to whether there should be a new trial, no rule can be granted.

Quære, whether the High Court can give costs in a case in which it has declined jurisdiction.

Case.—THIS was a suit to recover a certain letter-book belonging to the plaintiffs and wrongfully detained by the defendant, and damages for its detention, and to recover Rupees 510 as damages for the wrongful conversion by the defendant to his own use of a certain letter-book belonging to the plaintiffs and for wrongfully depriving the plaintiffs of the use and possession of the said book.

The defendant admitted possession of the book, but claims to hold possession of it as his own property. The defendant also pleaded that the damages claimed were excessive.

The facts of the case were as follow:—

In January 1866, the plaintiffs, Messrs. Jardine Skinner & Co., became the agents of Mr. Money, on a monthly salary, for the management of certain tea estates in Cachar, and continued to act as his agents up to some time in the month of March 1868. While acting in this capacity, the plaintiffs wrote numerous letters to Mr. Money himself, to his managers on the tea estates, to various merchants, bankers, auctioneers, brokers, transport agents, carriers, cooly suppliers, and others in connection with the management of the estate and the sale of its produce. These letters were copied by letter-press on separate sheets of copying-paper, from which sheets copies were made by hand into the book which is the subject of the present litigation. After the letters were copied by hand into the book, no care was taken by the plaintiffs to preserve the press copies on loose sheets. Besides the letters written by the plaintiffs as agents for Mr. Money, there appear also to have been copied into the said book various letters written from time to time by Mr. Money himself to different persons in connection with the business of the said tea estates. The attention of the Judge who tried the case was not directed to these letters at the hearing of the case, but it may be inferred that these letters were handed over by Mr. Money to his agents to be forwarded by them to the parties to whom they were directed. The copies of letters written by Mr. Money himself are much fewer in number than those written by the plaintiffs as his agents. The letter-book consists of 224 pages, but 32 pages only are filled with copies of Mr. Money's own letters. The first four pages of the book and part of the fifth page contain copies of letters written by Mr. Money to various parties, notifying that Messrs. Jardine Skinner & Co. have been appointed his agents. There are no letters in the said book relating to any other matter than those connected with Mr. Money's affairs. On the 24th April 1868, after the termination of the plaintiffs' agency, the said copy letter-book was forwarded to Mr. Money along with some other papers. It is explained by Mr. Bullen Smith, a member of the plaintiffs' firm, who was examined as a witness, that the book was inadvertently given over to Mr. Money, the delivery having been made by a clerk without the knowledge of the members of the plaintiffs' firm. Mr. Bullen Smith further states that the fact of its having been given up to Mr. Money was not discovered by his firm until February of the present year, when Mr. Money called for an explanation of certain acts done by the plaintiffs as his agents.

On finding that the book had been handed over to Mr. Money, the plaintiffs on the 20th January wrote as follows: "Among the documents and papers made over to you when closing our connection with your tea property in Cachar, *our own* letter-book appears to have been inadvertently included, and we shall feel obliged by your returning it by the bearer."

To this the defendant replied on the 26th February 1870: "Among the documents and papers made over to me when closing your connection with my tea property in Cachar, there were papers and books relating partly to that tea property and partly to other matters of mine transacted by you for me; but I do not find anything except what relates to my affairs, nor anything that can be called your letter-book. If among those documents there is anything not relating to my affairs which you can specify, I shall be happy to return it to you."

On the 28th February the plaintiffs wrote: "The book we ask for is one containing copies of all letters we wrote to yourself and others in matters connected with our conduct of your business, and which, for convenience' sake, we entered in a separate form, instead of including them in one general letter-book. The originals are with you and the other addressees, and we beg you will deliver to bearer the book, which can in no sense be considered your property, and was made over to you only through inadvertence."

On the 1st March Messrs. Watkins and Trotman, Mr. Money's attorneys, replied: "Mr. Money has consulted us with reference to your letter to him of yesterday's date. It appears to us that, as the letter-book in question contains, as we are informed it does, only copies of letters connected with Mr. Money's business transacted during the time you were acting as his agents, it is properly Mr. Money's property. At the same time, Mr. Money desires us to say that the book is at all times open for inspection or reference of any member of your firm."

On the 8th April the plaintiffs wrote to the defendant's attorneys: "We have not formally replied to your letter of the 1st ultimo, as your Mr. Watkins verbally told the writer not to do so, and that he would settle with Mr. Money for the return of our book in question. As several weeks, however, have elapsed, and we are still without our book, we presume your senior's good offices have failed, and we beg to give notice that, unless the book is returned in the course of to-day or to-morrow, we shall forthwith put the matter in the hands of our solicitors."

On the 9th of April, Mr. Money's attorneys answered: "Mr. Money instructs us to state that he has no objection to your having access to the letter-book in question at any reasonable times at his chambers; but, as he considers the book belongs to him, he therefore elects to retain it."

Before instituting the present action, the plaintiffs gave the defendant's solicitors to understand that, if the book were returned to them, it would be open for Mr. Money's inspection, whenever he should have occasion to refer to it.

At the hearing of the case it was contended for the plaintiffs that the book in question was their property: first, as it was bought with their money, and as the letters were copied into it at their expense; secondly, as it contained a record of their business in respect of their agency for the defendant. It was further urged that the book could be of no use or value to the defendant, since the original letters, of which the book contained copies merely, were in his possession; whereas, if the plaintiffs were deprived of it, they would have nothing to refer to in case their acts were questioned by the defendant. It was also said that, if these copies were made in the general book of the firm, instead of being made in a separate book, it could not have been contended that the defendant would have a right to their possession. The fact that the letters were copied for convenience into a separate book made no difference, and the right of the plaintiffs to possess it was not altered by the fact that it had been inadvertently handed over to the defendant. On the other hand, it was argued for the defendant that the book, which contained copies of letters exclusively relating to the defendant's affairs, must be presumed to have been kept by the plaintiffs in the interest and for the protection of the defendant, whose paid agents they were. The originals of all letters written to third parties were not with the defendant, and it was absolutely necessary that the defendant should have copies, in case of disputes with

those to whom letters have been written by his agents. The book itself could not constitute a record of the plaintiffs' business. The plaintiffs had their own book of accounts, and the fact of the copy letter-book having been made over to the defendant, and having been allowed to remain for nearly two years in his possession, indicated that he was its rightful owner.

It was held by the Judge who tried the case that, as a prudent owner of an estate, corresponding with many different parties on a great variety of matters connected with the management of his estate, he might reasonably be expected to keep copies of such letters as were written by himself; and as it is incumbent on an agent to do for his principal that which a prudent principal would do for himself, it was to be presumed that the copy of their correspondence which had been kept by the plaintiffs had been kept for the benefit and protection of the defendant, and was properly made over to him on the termination of the agency, and that, having been so made over, the plaintiffs were not entitled to have it returned to them. The Judge held that, if it was a part of the plaintiffs' duty as agents to keep a copy of their correspondence for the protection of their principal, it was of no importance with whose funds the book had been purchased or the copying clerk paid.

Application was made for a new trial of the case on the ground that the Judge was wrong in holding the book to be the property of the defendant. In addition to the arguments put forward on the original trial, it was argued that, assuming the defendant to be entitled to a copy of the correspondence, he was not entitled to this or to any particular copy; and that, as this particular book had been handed over through simple inadvertence, the right of property or of possession in it was in no way affected.

I at first felt inclined to concur in the view taken of the matter by my colleague, *viz.*, that an agent was bound to do in behalf of his principal what the principal, if a reasonably prudent man, would do for himself; and as a prudent principal would certainly keep copies of correspondence, an agent must be held bound to do the same; and inasmuch as it was, I understood, in evidence that the plaintiffs had kept no other copies of the correspondence but the one which is the subject of this litigation, they must be held to have kept it for their principals; their duty to their principal overruling in equity any duty that they might owe to themselves to keep copies for their own convenience and protection. On reflection and consideration, however, it appeared to me to be doubtful whether there is any duty cast on agents to keep either accounts or copies of correspondence *for their principals.* It appeared to me that the duty was, not to keep these documents for their principals, but to render them to their principals when called on to do so; in order to be prepared for which call, they must, of course, keep accounts and copies, but not necessarily for their principals. In this aspect of the matter, I clung to the view expressed by the plaintiffs' Counsel, and considered that what the defendant in this case had a right to demand was a copy, and not this copy, and access to the originals, if they existed. We both agreed with the learned Counsel that, if the defendant could not have demanded this copy of the correspondence, supposing it to have still remained in the possession of the plaintiffs, the mere circumstance of its having passed out of the plaintiffs' custody into that of the defendant through a mistake of facts could not affect the plaintiffs' right to recover possession of it. No express authority was cited to us; and I have not been able to discover any—except *in re Thomson* (20 Beaven 545). In that case, only the first part of the judgment of the Master of the Rolls is applicable to the circumstances of this case, but that portion seems to support the view to which I at last adhered. I have now the honor to refer for the opinion of the High Court the question on which I differ from my learned colleague, *viz.*, whether, under the circumstances of this case, a rule to show cause why a new trial should not be had should not issue.

The following judgment was delivered by the High Court:—

Couch, C. J.—Section 7, Act XXVI. of 1864, under which this case is sent up for the opinion of this Court, provides that the Judges of the Court of Small Causes "shall reserve any question of law or equity, or any question as to the admission or rejection of any evidence as to which they shall entertain any doubts, or which they shall be requested by either party to the suit to reserve for the opinion of the High Court, and shall give judgment, contingent upon the opinion of the said High Court, on a case which they shall thereupon be entitled to state to the said

Court." Then it says that, "if only two Judges sit together, and shall differ in opinion, the question on which they differ shall be so reserved." Now, it appears to me that this must mean only question of law or equity or any question as to the admission or rejection of any evidence. It does not extend to questions of fact on which the Judges sitting to decide the case may differ in opinion, because the Section says the question on which they differ shall be *so reserved*, that is, shall be reserved on a case which the Judges shall state to this Court. This Court could only decide questions of fact on the evidence in the case, and not on a statement of the facts by the Judges of the Small Cause Court, which they would probably not be able to state on account of the difference of opinion between them with regard to those facts.

If we look at the language of the Section, it must have reference to what is stated in the first part of it, that is, to a question of law or equity, or to a question as to the admission or rejection of any evidence, and it makes it imperative that, when the difference of opinion is in a case of that kind, it shall be reserved. Therefore, I think that a question of fact cannot be reserved for the opinion of this Court when there is a difference of opinion between two Judges of the Small Cause Court who may sit together in any case.

The question which has been reserved for our opinion in this case is whether, under the circumstances of this case, a rule to show cause why a new trial should not be had should be issued. Now, that may be a question of fact or partly of fact and partly of law; or it may be a question of law; but if the Judges differ on a question of law, it ought to be expressly stated.

Then there is this objection to our telling the Judges of the Small Cause Court, whether there should be a rule to show cause why there should not be a new trial in this case, that it is a preliminary proceeding. If this is a proper case to be discussed again, it might be discussed on a new trial being granted. If there should then be a difference of opinion on a question of law, the question might be referred to this Court; but the first Judge of the Small Cause Court, who differs from the second Judge as to whether a rule for a new trial should be granted, in effect asks this Court to decide that point so as to enable him to grant a new trial against the opinion of the second Judge. In a case of a difference of opinion between two Judges upon the point as to whether there should be a new trial, no rule can be granted.

Then it was urged by Mr. Cowell that this case should be sent back to the Small Cause Court for the purpose of being re-stated; but we think that it cannot be returned in the present stage of the proceedings for that purpose. It might be that, if this was a case in which there was a difference of opinion on a question of law, and the Court had, therefore, the power to ask for our opinion, that the second Judge would be bound to join in stating the case; but we do not think that, by his joining in stating the case now, the defect can be cured. This is merely a question of fact — whose property is this book? Is it the property of Messrs. Jardine Skinner and Co., or is it the property of Mr. Money? That question could not be referred to us, and the question which has been referred is one which, I think, the first Judge had no power to refer. The result is that we give no opinion upon this case.

We have considerable doubts whether we have the power to give costs in a case of this kind in which we have declined jurisdiction; but even if we have the power, we do not think, under the circumstances, we should give costs. Each party will pay his own costs of this reference.

Markby, J.—I am of the same opinion.

The 13th September 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges*.

Mutation Register—Petition—Testamentary disposition—Inheritance—Succession.

Case No. 53 of 1870.

Regular Appeal from a decision passed by the Judge of Patna, dated the 31st December 1869.

Syud Mahomed Shumsool Hoda (one of the Defendants), *Appellant*,

versus

Shewuk Ram *alias* Doorgah Pershad (Plaintiff), *Respondent*.

Baboo Onookool Chunder Mookerjee, Mr. R. E. Twidale, Baboos Romesh Chunder Mitter, and *Moonshee Mahomed Yusuf* for Appellant.

Messrs. G. C. Paul, M. M. Dutt, and *C. Gregory*, and *Baboo Umurnath Bose* for Respondent.

A petition was presented to the Collector by the proprietor of certain estates for the registration of the name of his son's widow in the mutation-roll in place of his own name, in which petition petitioner declared the said widow to be his heir, and that her daughters and their children were and would be the heirs and maliks, and provided for the management being kept in his own hands as long as he lived.

HELD (*Bayley, J., dissenting*) that the petition was a testamentary instrument disposing of the property to which it related, and that the daughters' children, not being in existence at the death of the testator, could not take any interest under the will; but that the widow took the property for her life, and subject to that estate, the daughters took it absolutely as joint owners.

Couch, C. J. (Mitter, J., concurring).—ON the 16th of August 1830, Roy Hur Narain, the great-grandfather of the plaintiff, presented a petition to the Collector, the translation of which is as follows: "The "entire rent-free and rent-paying estates "and gardens appertaining to the zillahs of "the Behar Province, and buildings and "ghât tungee, ryotkhanas and household "furniture, and other real and personal pro-"perty which descended to my ancestors, "one after the other, and at last to me, from "Ranee Myna Bibee, wife of my late "brother Rajah Bussuntram, who, the said "brother, was son-in-law of Maharajah Ram "Narain according to the Bywastha of the "Pundits, and decision of the Sudder Court, "are now in my possession. But as in "1229 my son Kalika Pershad died, and in "1237 my younger brother Rae Gunga "Pershad and his wife died, leaving no issue, "and as my wife pre-deceased them, and "only Ranee Dhun Koer, the widow of my "late son Kalika Pershad is at present "living, who has only two daughters "Mussamut Bibee Shitabo and Bibee Doo-"laree and no other children or heir, I "declare her (Ranee Dhun Koer) my heir; "and as, with the exception of the said "Ranee Dhun Koer, I have no other heir "or malik, nor can there be any, of "which circumstances I have already pre-"ferred information in my petition of 16th "April 1830, and life is uncertain, I "consequently request that the name of "Ranee Dhun Koer, the widow of my late "son, be registered in the Collectory muta-"tion-book as proprietor and malgoozar in "the place of my name, with regard to the "property, both kherajee and lakherajee, "noted at the foot of this petition, situate "in zillah Patna. Further, as of Ranee "Dhun Koer there are two daughters, who, "after marriage, by the blessings of Provi-"dence, may be blessed with children, they "and their children, therefore, are and will "be (the) heirs and maliks. (But) as long "as I live, I shall keep the management of "my household affairs in my own hands, "and look after all the transactions of dehat, "&c., myself as heretofore."

Roy Hur Narain died on 1st March 1838. He had an only son, Kalika Pershad, who had died leaving a widow Ranee Dhun Koer and two daughters, who survived Roy Hur Narain. One of the daughters married Amanut Roy, and died childless. The other married Roy Luchmun Pershad, and died on the 27th Kartick 1255 (1847) leaving an only son, the plaintiff in this suit, then an infant. On the 13th of November 1854, Ranee Dhun Koer sold to the defendant Shumsool Hoda a portion of the property which belonged to Roy Hur Narain, and this suit was brought to obtain a declaration that the sale was not binding on the plaintiff, and that he was entitled to the estate of Roy Hur Narain on the death of Ranee Dhun Koer.

The Lower Court held that the plaintiff was entitled to a decree for setting aside the sale, conditional on the re-payment of the purchase-money by the plaintiff, and the defendant appealed from this decision.

On the argument of the appeal, the defendant's Counsel rested his case upon the construction of the petition, and did not rely upon the case which the defendant had set up in the Lower Court that the sale was made to meet urgent necessities, and upon which the Lower Court had come to a finding against him. The plaintiff objected to the condition for re-payment of the purchase-money. Both parties treated the petition as a testamentary instrument, as it was their interest to do; for otherwise neither could have any title against the heir of Roy Hur Narain, if there was one. Notwithstanding this consent, it is necessary for us to decide whether it is a testamentary instrument or not.

In my opinion, it must be considered to be a testamentary instrument, although it sought to have the name of Ranee Dhun Koer registered immediately. The words "I declare her" (Ranee Dhun

Koer) "my heir" and "they and their children are and will be the heirs and maliks," as well as the provision that as long as he lived he should keep the management in his own hands, I think, show that it was Roy Hur Narain's intention that it should be a testamentary disposition of the property, and I believe that this mode of making one is not uncommon. If it is considered as a gift, the same rules of construction would apply to it. In construing it, we are entitled to look at the estate of the testator's family, and, I think, also at the fact that he was a Hindoo, and if either of his granddaughters had a son, that son would be entitled to offer funeral oblations to him. This mode of construction is fully confirmed by the following passage in the judgment of the Privy Council in the case of Sreemutty Soorjee Monee Dassee *versus* Deenobundoo Mullick* in 6 Moore's Indian Appeals, page 526. "In determining that "construction, what we must look to, is the "intention of the testator. The Hindoo "Law, no less than the English Law, points "to the intention as the element by which "we are to be guided in determining the "effect of a testamentary disposition; nor, "so far as we are aware, is there any difference between the one law and the other "as to the materials from which the intention is to be collected. Primarily the words "of the will are to be considered. They "convey the expression of the testator's "wishes; but the meaning to be attached "to them may be affected by surrounding "circumstances, and where this is the case, "those circumstances no doubt must be "regarded. Amongst the circumstances "thus to be regarded, is the law of the "country under which the will is made and "its dispositions are to be carried out."

Considering, then, the state of his family and that he was a Hindoo, and taking the entire instrument and construing its parts with reference to each other, I think it was the intention of Roy Hur Narain that the estate should be kept in his own family, and that the daughters and their children as well as Ranee Dhun Koer should succeed to his property, and this may be effectuated by allowing them to take after Ranee Dhun Koer. That is a more natural disposition than their taking jointly with her. I think the words, "have no other heir or malik nor can there be any," may be read as meaning immediate heir, and as showing an intention that Ranee Dhun Koer was to be the first to succeed.

According to the decision in Tagore *versus* Tagore, 4 Bengal Law Reports, page 103, the daughters' children, not being in existence at the death of Roy Hur Narain, could not take any interest under the will; but effect will be given to the intention consistently with this decision by holding that Ranee Dhun Koer took the property for her life, and that, subject to that estate, the daughters took it absolutely as joint owners. This also provides for the contingency of Ranee Dhun Koer dying before Hur Narain, as the gift to the daughters would then take effect at his death, and the interest of the daughters being vested, on the death of one of them without children, her share passed to the survivor, the plaintiff's mother; and on her death the plaintiff became entitled to the whole as her heir.

It may be objected that if the daughters take jointly and both have children, the children of the one who dies first will be excluded, unless there is a partition in her lifetime; but it is only by this construction that the estate can be kept in the testator's family, and the husband of a childless daughter be prevented from succeeding to her share. The construction which I put upon this instrument is different from what was put upon it in the suit in which Chutter Lal Singh and others were defendants, reported in 13 Weekly Reporter, page 285; and 5 Bengal Law Reports, page 125; I have carefully considered that judgment, and have found myself unable to concur in it. I am, therefore, of opinion that the plaintiff is entitled to the property on the death of Ranee Dhun Koer.

The condition that the sale is to be set aside only on the re-payment by the plaintiff of the whole of the purchase-money, cannot be supported. The Judge's reason for it is quite insufficient; but it appears that there was a mortgage upon the property for Rupees 14,000, which was made in order to discharge encumbrances created by Hur Narain and some bonds, and that this mortgage was redeemed by money paid into Court by the defendant. This sum of Rupees 14,000 ought to be allowed to him, and the decree must be modified by substituting it for the purchase-money which the decree requires to be paid as the condition upon which the sale is to be set aside. The costs of this appeal to be paid by the defendant.

* 4 W. R., P. C., p. 114.

Bayley, J.—I much regret to have to differ from the Hon'ble the Chief Justice and Mr. Justice Mitter in this case.

In Volume XIII., Weekly Reporter, page 285, a decision was come to upon the very same deed by Mr. Justice Hobhouse and myself. The translation there adopted was one agreed upon by both parties.

After most fully considering the further arguments and the judgment of the Hon'ble the Chief Justice and of Mr. Justice Mitter, I cannot say I am prepared to alter the opinion recorded by Mr. Justice Hobhouse and myself.

It is at the same time needless to repeat at length the reasons there recorded, as the same reasons prevail with me now. I still think that if Hur Narain intended to preserve the inheritance to his granddaughters and their children, he would have said so in the above deed, and the greater the necessity, according to Hindoo feeling, as to providing for funeral oblation (a feeling apparently relied on by the Hon'ble the Chief Justice and Mr. Justice Mitter), the greater the reason for Hur Narain to have been explicit in the terms he used.

The 13th September 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Deed of sale—Registration.

Case No. 677 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 12th January 1870, modifying a decision of the Sudder Moonsiff of that District, dated the 30th April 1869.

Sreenath Churn Dass (one of the Defendants),

Appellant,

versus

Dwarkanath Ghose (Plaintiff), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Obhoy Churn Bose for Respondent.

In a suit to recover possession of land alleged to have been purchased from two parties (*K* and *D*), one of whom (*D*) had appeared before the Registrar, admitted the sale, and allowed the deed to be registered so far as her interest was concerned; but the other (*K*) when he appeared before the Registrar, had denied the deed, and subsequently sold his share to the defendant by a registered kobala:

HELD that as there was no evidence of fraud on the part of the defendant purchaser, or that he had purchased with notice, plaintiff was not entitled to a decree for *K's* share.

Loch, J.—THE plaintiff in this case sues to recover possession of 5 cottahs of land, which he alleges to have purchased from Koer Narain and Dino Moyee—Koer acting for himself and the two acting as guardians for the minor Mohendro Narain. The deed of sale is dated the 13th Bhadro 1273. Dino Moyee appeared before the Registrar, and admitted the sale, and so far as her interest was concerned, the deed was registered; but Koer Narain, when he appeared before the Registrar denied the sale, and therefore, so far as his share is concerned, the deed was not registered, and he, on the 24th Aghran 1274, sold his share in the said 5 cottahs to the defendant, special appellant, Sreenath Churn Dass, by a registered kobala.

The first Court has found that the first deed of sale was, so far as regards the share of Dino Moyee, registered, but as regards the share of Koer Narain the deed was not registered, and, therefore, the plaintiff, in the face of the deed propounded by the defendant, which the first Court also considered to be genuine, could not recover the whole of the property, and, therefore, the first Court gave a decree to the plaintiff for half share only, namely, the share of Mohendro.

The plaintiff appealed, and the Lower Appellate Court found that the plaintiff's deed was a genuine deed, and that Koer Narain executed the subsequent deed in fraud of the plaintiff, who was, therefore, entitled to recover possession of the whole property. The Subordinate Judge, therefore, modified the decree of the first Court, and gave the plaintiff a decree for 5 cottahs. There was no cross-appeal on the part of the defend-

ant with regard to the half share which had already been decreed to the plaintiff by the first Court.

The defendant Sreenath comes up in special appeal with regard to the share of Koer Narain, and urges that the Lower Appellate Court was wrong in giving the plaintiff a decree for that share. We think the contention is good. The Lower Appellate Court has nowhere held that the defendant's deed of sale was not duly executed, or that consideration did not pass from the defendant to the vendor, or that the defendant had any notice of the previous sale. Then, again, with regard to the question of registration, the law requires that all the parties executing a deed should appear before the Registrar either in person or by their duly authorized agents, and before a deed can be properly registered, all the parties should be before the Registrar, and they must be consenting to the deed. Now, even if we were to admit that the sale of Dino Moyee is a good sale, and that the deed, so far as she is concerned, is properly registered, it is very clear that there was no registration so far as Koer Narain was concerned. We think it very doubtful whether, under the circumstances, any registration did properly take place. But we do not express any opinion on the subject; it is sufficient for us to say that there was no registration on the part of Koer Narain.

The documents before us, being for property of the value of less than 100 rupees, are not required to be registered, it being optional with the parties to register them. But in Section 50 it is said that—"Every instrument of the kinds mentioned in Clauses "1, 2, and 3 of Section 18, shall, if duly "registered, take effect, as regards the property comprised therein, against every "unregistered instrument relating to "the same property, whether such other "instrument be of the same nature as the "registered instrument or not." And in the case of Mohsin Ali *versus* Azmut Ali (9 Weekly Reporter, page 282), there is this observation: "The practical distinction "between the two classes of deeds, *viz.*, "those the registration of which is compulsory under Section 17, and those the registration of which is optional under Section "18, Clauses 1-3, amounts to this—that the "former, if unregistered, cannot be received in evidence at all, while the latter may "be received in evidence notwithstanding "the want of registration, though they "must give way to registered documents of "subsequent dates relating to the same property." And in the case of Ram Chand Kamar *versus* Modhoo Soodun Mojoomdar (7 Weekly Reporter, page 119) it was laid down that, "in order to prevent the operation "of this Section, it is necessary to show "that the registered deed was fraudulently "executed, and that the purchaser was wilfully and intentionally a party to the fraud "of the vendor, or at least that the second "deed was executed without valuable consideration."

Now, so far as the defendant-purchaser is concerned, there is no finding of fraud, or even that he purchased with notice; and from what has been said by the pleader for the respondent, it does not appear that there is any evidence on the record by which fraud can be proved against him.

In disposing of this case, the Subordinate Judge has referred to the fundamental principles of the former registration law, but it was quite unnecessary for him to look beyond the present law. He says that in that law there is no provision to countenance such a fraud as in the present law. But this case having occurred since the present law came into operation, it must be disposed of by that law, and not by anything which was the former law.

In this view of the case, we think that the judgment of the Lower Appellate Court must be reversed, and that of the first Court restored and affirmed. The special appeal is decreed with costs in this Court and in the Lower Appellate Court.

The 13th September 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Written contracts—Parol evidence.

Case No. 675 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 21st January 1870, modifying a decision of the Moonsiff of Santipore, dated the 16th September 1869.

Beharee Lall Dey (Defendant), *Appellant*,

versus

Kaminee Soonduree (Defendant), *Respondent*

Baboos Hem Chunder Banerjee and *Grish Chunder Mookerjee* for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

The rule that verbal evidence is not admissible to vary or alter the terms of a written contract is not applicable where the parties did not intend that the writing should contain the whole agreement between them; and this may appear either by direct evidence or by informality in the writing.

Couch, C. J.—THE only question in this case was whether the Lower Appellate Court was right in refusing to allow interest at the rate of 4 annas per cent. per diem for more than 15 days. The defendant borrowed of the plaintiff 200 rupees, and an entry in the plaintiff's book sealed by the defendant was produced, which is as follows: "Rupees 200 "lent to Kaminee Soonduree Chowdhrain, "interest at the rate of annas 4 per diem per "hundred." The Subordinate Judge found that it was proved from the evidence of some of the witnesses cited by both parties that the loan was agreed to be paid within 15 days, and that this was considered by the Court below to be the fact. It was contended for the appellant, the plaintiff, that the hath-chitta or entry was the only evidence of the contract; and no time of payment being specified in it, the money was payable on demand, and did not become due until demand was made, and the interest was payable at the rate of annas 4 per diem per hundred until then; and the case of Kasheenath Chatterjee *versus* Chundee Churn Banerjee, 5 Weekly Reporter, page 68, before a Full Bench, was quoted to show that the rule that verbal evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake is to be applied in the mofussil. I agree to this, but in applying the rule we must always consider what is the reason of it. The rule is grounded upon this—that the parties to the instrument must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning. Where that appears not to have been their intention, the rule is not applicable. For instance, a defendant gave a verbal warranty of a horse which the plaintiff thereupon bought and paid for, and the defendant then gave him the following memorandum: "Bought of G. P. a horse for the sum of £ 7-2-6—G. P.;" and it was held that parol evidence might be given of the warranty, the Court considering that the paper was meant merely as a memorandum of the transaction or an informal receipt for the money, and not as containing the terms of the contract itself. Allen *versus* Pink, IV. M. and W., page 140.

That the parties did not intend that the writing should contain the whole agreement between them may either appear by direct evidence, as in several cases cited in Leake on Contracts, 103, Note (b), or the writing may be so informal as to show it was not the intention. I think the present case belongs to the latter class. The parties had agreed that the debt should be paid off in 15 days, but the hath-chitta does not mention any time for payment. Where no time is mentioned, a debt is payable on demand; but I cannot think the time here was omitted in order to make the money payable on demand. I think the entry was only intended as a memorandum of the loan of the Rupees 200 and of the rate of interest, and it was not intended to fix the time of payment by it. Consequently, the rule as to parol evidence not being admissible does not apply, and the decision of the Subordinate Judge is right. The appeal must be dismissed with costs.

Jackson, J.—I wholly concur.

The 13th September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Execution-sale—Irregularity.

Case No. 226 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of East Burdwan, dated the 2nd April 1870.

Khodeja Bibee (Judgment-debtor), *Appellant,*

versus

Moonshee Johad Roheen (Auction-purchaser) and another (Decree-holder), *Respondents.*

Baboo Jadub Chunder Seal for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Where an irregularity in an execution-sale (*e. g.*, a misstatement in the notification) produces a mistake, and the property is consequently sold at an inadequate price, the judgment-debtor is entitled to have the sale reversed.

Jackson, J.—WHEN this case was last before the Court, we adverted to a miscon-

ception as to the matter of enquiry into which the Subordinate Judge had fallen, and we remanded the case in order that he might enquire upon the evidence whether the misstatement or mistake in the notification of sale had led to mistake on the part of purchasers, so that, in consequence of that, the property had been sold at an inadequate price. Of course, in directing an enquiry as to whether bidders had been debarred from attending the sale, we meant substantial bidders and persons of the class who were likely, on their own account or on account of their employers, to pay a fair and adequate price for such a property.

The Subordinate Judge has now dealt, although he has, we think, insufficiently dealt, with that question, and has had evidence produced before him, namely, that of three witnesses who depose that they were instructed by different persons to attend the sale and to make certain bids, which are considerably in excess of the money for which this property was actually knocked down, for the property in question. These persons all show that they came from various distant places expecting or being informed that the sale would take place at 12 o'clock at noon; and on arriving at the Court-house at different times between the hours of 10 and 12 o'clock, they found that the sale had already taken place.

Now, this evidence might, perhaps, have been easily displaced. The purchaser might have been able to show that those persons were not the agents of the parties by whom they represented themselves to have been employed, or that, although the proclamation announced 12 o'clock as the hour of sale, it was perfectly notorious that sales during that particular time of the year took place at an earlier hour, and that other sales had so taken place, although the notification stated 12 o'clock—or the witnesses might have been discredited. But, in point of fact, the purchaser has done nothing of this sort. The Subordinate Judge has not really addressed himself to the testimony of the witnesses. He has contented himself with making a general observation that he finds there were seven bidders in attendance, and therefore he seems to take no account of the evidence. It might have been shown that those bidders were substantial bidders which it does not appear that they were. The mere fact of seven bidders being present, when there are scores of persons in attendance in the Court on business, would not really tell one way or another.

If evidence of the kind which we have suggested had been given for the purchaser, I (speaking for myself) would not have had much difficulty in believing it, because, being familiar with the practice of the Mofussil Courts in these matters, I could easily believe that the parties had been aware of the temporary departure from the ordinary rule in respect of the sitting of the Court, and holding such sales as this; but no evidence of the sort was given. The Subordinate Judge, in short, seems to consider that an error of the sort described in the proclamation is a very trifling and insignificant matter; that it may be assumed that the error went for nothing; and that the parties really understood what was intended to be sold, and when. But this cannot be so. The rights and interests of suitors are not to be dealt with in this rash way.

But beyond this, we are for another reason dissatisfied with the judgment of the Court below. We are inclined to think that the judgment of the Court is warped by the view which the Subordinate Judge took of the matter before him, because he seems to be under some impression that an attempt was made to dictate to the Court by the course which the parties took. If the fact had been that two lots of the property of the judgment-debtor had been disposed of in the same sale, and the judgment-debtor had come before the Court and said: "I claim that the sale in respect of these two lots should be set aside; but as it so happens that one of the lots has been sold for an adequate price, I elect to stand by that, and claim to set aside the sale of the other which has been sold for an inadequate price," he would have been entitled to do so; but it appears that the judgment-debtor in this case had the same ground of objection upon both the lots, and did not insist on it, but the purchaser had paid up a sufficient sum to make up for inadequacy of price, and so satisfied the judgment-debtor, who has withdrawn his claim in respect to that lot; but in respect to the other lot, we see no reason why the judgment-debtor should not insist on his right. He has made out that there was an irregularity. There was evidence to show that the irregularity produced a mistake, and consequently the property had been sold at an inadequate price. That evidence is in no way displaced. We think the judgment-debtor is entitled to have the sale reversed. The purchaser will receive back his purchase-money. We make no order as to costs.

The 14th September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Limitation—Cause of action—Clause 16, Section 1, Act XIV. of 1859.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Ranaghat, dated the 16th August 1870.

Shumboo Chunder Mullick (*Plaintiff*)

versus

Pran Kristo Mullick (*Defendant*).

In a suit to recover certain ornaments (or their value) which had been obtained by defendant from plaintiff's ancestor with a view to borrowing money on them, limitation was held to be governed by Clause 16, Section 1, Act XIV. of 1859, and the cause of action to arise when defendant set up an adverse claim in respect of the ornaments.

Reference.—THE question in this case is the period of limitation applicable. Defendant induced a deceased ancestor of plaintiff to let him have some ornaments for a while with a view of borrowing money on them. He has not returned them, and is now sued for them or their value by plaintiff. The transaction took place more than six years before the plaint was filed; and such being the case, it is, I think, barred by limitation, but plaintiff's pleader contends that defendant must be looked upon in the light of a trustee or depositary, in which case the limitation would be governed by Clause 15, Section 1 or Section 2 of the Limitation Act. I think the transaction between plaintiff's ancestor and defendant was simply in the nature of a *commodatum* as defined by the law-books, and that, in a suit for the recovery thereof, being in the nature of a suit for moveable property, the proper limitation is, under Clause 16, six years.

The judgment of the High Court was delivered as follows by—

Jackson, J.—This seems to be a very clear case, and upon the showing of the Judge himself as to the application of the Section to which he would refer the present suit, the suit appears to be within time. The Judge proposes to apply the provisions of Clause 16, Section 1, Act XIV. of 1859. The terms of that Section are: "To all suits for which no other limitation is hereby expressly provided, the period of six years from the time the cause of action arose." The question then would be, at what time did the cause of action in this suit arise?

It is very clear, we think, that the cause of action in this case did not arise at the time when the ornaments were deposited with the defendants, but at the time when, as alleged by the plaintiff, the defendant set up an adverse claim in respect of those ornaments, and thereby obliged the plaintiff to take legal means for the recovery of the ornaments. That appears to have taken place in the year 1869, well within the period of the limitation of six years. The suit was therefore in time.

The 14th September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Reversioner—Hindoo widow—Fraud.

Case No. 1046 of 1870.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 25th February 1870, reversing a decision of the Subordinate Judge of that District, dated the 23rd July 1869.

Chunder Koomar Gangooly (Plaintiff), *Appellant,*

versus

Rajkishen Banerjee and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Anund Chunder Ghossal for Respondents.

A Hindoo widow being in possession of certain lakheraj land in which she had a life-interest, the zemindar brought a suit against a minor reversioner and others to resume the land, obtained an *ex-parte* decree, and whether, under color thereof or not, afterwards obtained possession. The widow who was then dispossessed brought a separate suit to recover the property in which the reversioner, who had meantime come of age, was joined as a co-plaintiff. Owing to a petition presented by the widow, this suit was treated as having come to an end.

HELD that in the circumstances, and the consequent jeopardy to the title of the reversioners, the reversioner above referred to was competent, without showing fraud on the part of the widow, to bring a suit to have the land reduced to his possession, and to prevent the zemindar from acquiring title by adverse possession.

Jackson, J.—THE facts of the case are that one Bidya Bhoosun Banerjee in his lifetime was entitled to and held 22 beegahs of lakheraj land. He had a son Bipro-

d

Dass Banerjee, and another named Pittamber, who predeceased him, and also a daughter, whose son is the present plaintiff, Chunder Koomar Gangooly. Bidya Bhoosun, on his death, was succeeded by Bipro Dass, and Bipro Dass by his widow Bhowanee who held possession, and, according to the plaintiff's statement, is still entitled for her lifetime to the property in question.

While Bhowanee was holding the property, the zemindar commenced a suit against Hurosoonduree, the widow of Pittamber, the second son of Bidya Bhoosun, and against Chunder Koomar, who was then a minor, and represented as being under the guardianship of Hurosoonduree. It appears that a brother of Chunder Koomar was also a defendant in that suit. Hurosoonduree did not defend the suit, and the zemindar obtained a decree *ex parte*, and, whether under color of that decree or not, does not precisely appear, but the zemindar appears to have afterwards got possession.

The widow Bhowanee, who was then dispossessed, did not take any steps in the execution-proceedings, but in 1866 she brought a separate suit in which this plaintiff was joined as co-plaintiff, having in the meantime come of age, for the recovery of the property.

Pending the suit, Bhowanee presented a petition, admitting that she had no title, and withdrawing from the suit; but, subsequently, before the suit had been finally disposed of, she presented a further petition, in which she alleged that she had been moved to present the first petition by a proposal emanating from the zemindar, but that the proposal then made had not been carried out, and she prayed to be allowed to resume the conduct of the suit. This prayer was disallowed, and eventually the suit was treated as having come to an end.

An appeal was made to this Court, but the decision come to below was affirmed. and the plaintiff now brings this suit as probable reversioner, and having an interest in the property, praying that the right of himself and other reversioners may be declared, that the property may be restored to his possession or the possession of the family. and also that the decree for resumption obtained by the zemindar may be got rid of.

He got a decree in the Court of first instance, but that decree has been reversed by the Zillah Judge, who holds in the first place that the plaintiff has no right to maintain the suit. He says: "I think the plaintiff's cause of action does not accrue until "Bhowanee's death, and that he has entirely "failed to prove the alleged fraud whereby "alone he could have acquired a right to "sue for possession." The Judge then adverts to the merits of the case, and upon that part of it also he considers the plaintiff fails to prove a lakheraj title.

On the first of these points, it seems to us there is a mistake. It is not necessary, we think, for the purposes of this suit, to show absolute fraud on the part of the widow Bhowanee. The Full Bench decision in 9 Weekly Reporter, page 508, indicates under what circumstances the reversioner may come into Court during the lifetime of the widow to obtain the necessary relief; and it seems to us that in the circumstances disclosed in this case, upon the failure of the suit brought by Bhowanee, in which this plaintiff was, we think, irregularly made a party, and the consequent jeopardy to the title of the reversioners themselves, the plaintiff had a sufficient interest, and was competent to bring a suit to have the land reduced to his possession, and to prevent the zemindar from acquiring a title by way of limitation from 12 years' adverse possession.

We think, therefore, it was necessary to go into the merits of the case.

Then, upon the merits, we are also of opinion that the Lower Appellate Court has miscarried. It seems to us that, in the circumstances stated, if the plaintiff once got rid of the decree obtained by the zemindar for resumption of the land (and it seems to us that he was entitled to have that decree set aside), he would not be under the necessity of proving a lakheraj title, but it would lie upon the defendants, the zemindars, on the other hand, to show by what right they maintained possession of this land which the ancestors of the plaintiff had held, and from which they were dispossessed as the sequel of the resumption-decree obtained by the zemindars.

We do not think the case is in such a condition that we can go into the evidence and dispose of it upon the merits, but the case must go back to the Lower Appellate Court to be re-tried under the directions we have stated.

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The 14th September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Instalments—Interest—Execution.

Case No. 261 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of East Burdwan, dated the 29th April 1870.

Surno Moyee Dassee (Decree-holder), *Appellant,*

versus

Kishen Coomaree Bibee and another (Judgment-debtors), *Respondents.*

Baboo Romanath Bose for Appellant.

Baboo Oopendro Chunder Bose for Respondents.

Where a decree ordering payment by instalments does not provide for the payment of interest, the Court executing it is bound to refuse giving interest, upon objection being taken thereat, even though on particular occasions interest has been claimed and allowed. Where interest is objected to in such a case, and the decree-holder is subjected to serious loss by delay in satisfying his claim, he is entitled to proceed at once against any property which may be liable under the decree to attachment and sale on default of payment of any of the instalments.

Jackson, J.—It seems to us that the order made by the Subordinate Judge in this case is inequitable.

The transaction out of which this appeal arose included the decree-holder and the original debtor, and also the surety, who had made herself answerable to satisfy the claim of the plaintiff.

The decree which the plaintiff obtained contains a stipulation that certain property of the surety which had been hypothecated for the payment of the debt should be liable to attachment and sale upon the default of the judgment-debtor to satisfy any of the instalments by which the amount was ordered in the decree to be paid. The decree, it seems, contained no provision for interest. Default has occurred in the payment of the instalments, and the decree-holder applied for execution of her decree as provided therein by the attachment and sale of the surety's property. She also applied that, interest should be added to the amount due, and she contended that she was entitled to interest on account of certain previous occurrences, which undoubtedly showed that on particular occasions interest had been claimed and allowed; but the Court below held, and as we think rightly, that, however that may have been, the decree did not provide for the payment of interest; and upon the objection being taken, it was bound to refuse giving interest on this occasion. That being so, and the decree-holder, being manifestly subject to a serious loss every day that satisfaction of the decree was delayed, because interest did not run, was surely entitled, whatever claims to consideration the judgment-debtor may have had, and however equitable it may have been to appoint a receiver in order to the most efficient use being made of the property which the judgment-debtor had at her disposal, the decree-holder, we say, had a clear right to insist upon the speedier means of recovering the amount due by proceeding at once against the property of the surety. The Subordinate Judge, in refusing to proceed in that way, appears to have overlooked this obvious consideration.

The matter has been laid before us in this special appeal by the zemindar, and the vakeel who appears for the surety admits that he has no argument to oppose to this representation. We think, therefore, that the order of the Subordinate Judge, so far as he refuses execution against the sureties, must be set aside, and the Court below must be directed to proceed as requested by the attachment and sale of the property of the sureties.

We make no order as to the appointment of a receiver to the property of the judgment-debtor. The appellant is entitled to her costs.

The 15th September 1870.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Sale—Fraud.

Case No. 920 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 17th February 1870, reversing a decision of the Moonsiff of that District, dated the 21st August 1869.

Choonee Sahoo (Plaintiff), *Appellant,*

versus

Munnoo Lall and others (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboos Onoocool Chunder Mookerjee* and *Mohendro Lall Mitter* for Appellant.

Mr. C. Piffard and *Baboos Romesh Chunder Mitter, Kalee Kishen Sein,* and *Boodh Sein Singh* for Respondents.

In a suit to set aside an execution-sale on the ground of fraud, it is not sufficient for a Court to find that the mode of making the attachment and proclamation was according to law, but it is necessary to consider the surrounding circumstances.

Loch, J.—THE plaintiff in this case, Choonee Lall, brought an action against the defendant Munnoo Lall, for the possession of 5 annas and some gundahs share of the property in question, and on the 12th March 1866 he obtained a decree in the Moonsiff's Court for 2 annas and odd gundahs with costs in proportion. An appeal was preferred, and on the 29th June 1866 the Subordinate Judge decreed the whole of the plaintiff's claim; but, on appeal to the High Court, the decree of the Subordinate Judge was set aside, and that of the Moonsiff was affirmed on the 1st February 1867, and that decree gave the parties costs in proportion. An application for review of judgment was filed by Choonee Lall, which was rejected with costs on the 3rd January 1868. On the 5th March 1868, the defendant Munnoo Lall took out execution for the costs awarded to him in the four decrees; and after the issue of attachment and sale-proclamation caused the rights and interests of Choonee Lall in the property to be sold on the 28th April 1868, and the property was purchased by one Mokund Lall. After the sale was confirmed, Choonee Lall presented a petition to set aside the sale, but it was rejected, and he now brings the present suit to set aside the sale on the ground of fraud, alleging, among other things, that he was not aware of the attachment and sale-proclamation; that Mokund Lall and Munnoo Lall are one and the same person; and that Munnoo Lall himself was the real purchaser in the name of Mokund Lall; further that no notice, as required by Section 216 of the Code of Civil Procedure, had been served upon him, though three of the decrees that were sought to be executed bore dates more than a year previous to the application for execution.

The first Court found that the proceedings of the defendant Munnoo Lall were tainted with fraud, and that the sale, therefore, must be set aside, but it thought it was unnecessary to enquire whether Mokund Lall and Munnoo Lall were one and the same person. An appeal was preferred to the Subordinate Judge, who reversed the decision of the first Court, holding that the sale had been properly conducted, and that it was the plaintiff who was anxious to defraud his creditor by not paying him his just debt.

We think the Subordinate Judge has not looked into the case properly. He has confined his attention only to what he considers the irregularities in the conduct of the sale, and being satisfied from the evidence of the witnesses on the part of the defendant that there was no such irregularity committed in the conduct of the sale as is contemplated in Section 259, he held that the plaintiff had no ground of complaint; and with regard to the absence of the service of notice under Section 216, the Subordinate Judge held that that is not an irregularity for which the sale can be set aside. But the Subordinate Judge has not come to any decision on the real question put before him by the plaintiff, *i. e.*, whether the acts of the defendant were tainted with fraud.

It may be admitted with regard to the attachment that the mode of making the attachment and proclamation of sale was according to law. But in determining the case put before him by the plaintiff, the Subordinate Judge has to consider the surrounding circumstances. He has to consider first what was the effect of the absence of the notice required by Section 216; he has to consider the circumstances of the property being in the possession of the defendant when the attachment was made and

the sale-proclamation issued; he has to consider the mode in which the sale was conducted; he has also to consider the value of the property as well as the price fetched for it; he has to consider who was the real purchaser; and lastly he has to consider, though it was not urged in the plaint nor in the Court below, but has been brought to our notice for the first time, whether there was really any debt due to the judgment-creditor by the judgment-debtor, plaintiff, at the time when the execution was sued out by Munnoo Lall. All these things may be indicative of fraud, and the Subordinate Judge will take all these things into consideration, and then draw his conclusion whether, in his opinion, they are sufficient to indicate fraud on the part of Munnoo Lall, and to pass a fresh judgment.

The case is, accordingly, remanded to the Subordinate Judge, and the costs will follow the result of the trial.

Jackson, J.—I am of the same opinion. I think the Subordinate Judge should in this case look, not, as he has done, so much to the question of the regularity of issue of notice of attachment and sale-proclamation, as to the real question before him—whether the whole of the proceedings in execution were secretly carried out with the express intention of keeping him in ignorance that such execution was going on—whether, in fact, the whole circumstances prove fraud on the part of Munnoo Lall. It is true that, however irregular may have been the service of notice of attachment and sale, the plaintiff may have been kept in ignorance of all such proceedings, as the plaintiff was not in possession of the property which was attached and sold, but Munnoo Lall was. If the proper notice under Section 216, Act VIII. of 1859, had been served, notice of these proceedings would have been given to him. The fact, therefore, of non-service of this notice becomes most important. But even this alone might not be considered evidence of fraud.

It will be for the Subordinate Judge to come to his conclusion after taking into his consideration all the circumstances of the case whether that notice was not deliberately omitted from the execution-proceeding by the plaintiff. It is true that the law says that the Court shall issue the notice, but it is for the decree-holder to see that all such legal notices are issued. In the face of the application for execution of decrees, some of which were two or three years old, some officer of the Court has reported that there is no necessity for issuing any notice. The decree-holder, being about to issue processes upon property which was in his own possession, was, we think, more particularly required to see that the process under Section 216 was really issued. Then the Court must also look to the manner in which these execution-proceedings were carried on. They were begun on the 3rd March, and the property was sold on the 28th April. Within two months, the property for which these parties had been fighting for three years and in three different Courts was sold for a trifling debt of about 68 rupees.

The Subordinate Judge will have to consider also whether, in reality, this property was not sold, although there was *no debt whatever* in existence. It was the business of the Court before issuing these execution-proceedings to have put into force the provisions of Section 209 of Act VIII. of 1859. The execution was sought for costs, and on that point there were several cross-decrees between the parties, and it is said here that, if those cross-decrees were set off, not only is it a case that there will be no money due to Munnoo Lall, but that there was some money due from him to Choonee Lall at the time when the execution was sought. How far this may be correct I cannot say, because I have not gone into the point. But I think that it is a point to which the Subordinate Judge should pay his strict attention, especially with reference to his finding that it was the present plaintiff who was defrauding the party by not paying his costs.

There is another point on which both the Courts seem to me to have made a mistake—that they have not tried the question whether Mokund Lall was only a benameedar for Munnoo Lall. It seems to me that this is a most important point in the case. The question is whether the whole of these proceedings were carried on by Munnoo Lall in order that he might defeat the rights that Choonee Lall might have in the property against him. The Section of the Act VIII. of 1859 to which both the Courts referred have nothing whatever to do to try the fact which they have to try. They must try the question and decide whether Munnoo Lall has carried out these proceedings secretly and fraudulently behind Choonee Lall's back with the aim of recovering the property which Choonee Lall had sued him for, and had obtained a decree

for, and whether, looking to all the circumstances, fraud is proved or not. To my mind the evidence, even as far as I have heard it, teems with badges of fraud.

The 16th September 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Arbitration-award—Interlocutory order—Appeals.

Case No. 924 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 3rd March 1870, reversing a decision of the Moonsiff of Pursa, dated the 30th April 1869.

Mothooranath Tewaree (Plaintiff), *Appellant,*

versus

Brindabun Tewaree (one of the Defendants), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondent.

An order of a Civil Court setting aside an arbitration-award, being an interlocutory order, is not open to an appeal immediately; but when the Court sets aside the award on the ground of misconduct on the part of the arbitrator, and, after hearing the case on its merits, makes its decree in favor of the plaintiff, it is competent to the defendant to appeal against that decree.

Couch, C. J.—As gathered from the Judge's decision the facts of the case seem to be these: That a suit having been brought by the appellant for the piece of land in dispute, and a defence being set up that the land claimed was not comprised in a certain bill of sale, the case was referred to arbitration. Then after the award had been made, and upon an application to the Moonsiff to set it aside on account of the misconduct of the arbitrator, it was set aside. The award being set aside, it became necessary to hear the suit, and the Moonsiff after hearing the case on the merits decided for the plaintiff. Then the case went before the Judge, and the Judge being of opinion that the evidence with regard to the misconduct of the arbitrator did not justify the decision of the Moonsiff setting aside the award, he reversed that decision, and as the consequence of that was again to set up the award, he did not go into the merits of the case.

It is true that no appeal is allowable against an interlocutory order, and that the order of the Moonsiff setting aside the award being an interlocutory order was not open to an appeal immediately, but when the Moonsiff had made his decree in the suit in favor of the plaintiff, it was competent for the defendant to appeal against that decree. He did so, and then he was at liberty to question the propriety of any interlocutory order which had been made, provided that the error in that order was such as to affect the merits of the case. We do not see how it can be said in this case that the error in the interlocutory order of the Moonsiff was one which did not affect the merits of the case, for if the award was a proper award and one that ought not to have been set aside by the Moonsiff, the setting it aside would be an act which would necessarily affect the merits of the case, as the award was upon the very subject-matter of the suit and determined it. Therefore, when the case came before the Judge on an appeal from the Moonsiff's decree, it was quite competent for him to deal with the interlocutory order which set the award aside; and if that order was passed improperly, or if he found that upon the evidence adduced before the Moonsiff, he was not justified in setting aside the award on the ground of misconduct on the part of the arbitrator, the Judge acted quite correctly in setting aside that order and restoring the defendant to the position in which he was entitled to be, namely, of having an award in his favor.

We do not see that there was any proceeding by the Judge beyond his jurisdiction. He was perfectly competent to entertain this question when the appeal came before him, and whether he has come to a right conclusion or not upon the evidence as to there having been any misconduct on the part of the arbitrator is not a matter which we can look into in special appeal.

The decree of the Lower Appellate Court must be confirmed with costs.

The 16th September 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, *Judge.*

Section 9, Act XVI. of 1868—Appeal.

In the Matter of
Shoshee Kishen Mookerjee, *Petitioner.*

Baboo Motee Lall Mookerjee for Petitioner.

A party whose appointment by a Subordinate Judge or Moonsiff is disallowed by a Zillah Judge, on the ground that he is not qualified for the appointment, has no right of appeal to the High Court against the Judge's order.

Couch, C. J.—SECTION 9 of Act XVI. of 1868 says that "all Ministerial Officers of "the Courts of Subordinate Judges and "Moonsiffs shall be nominated and appointed by these Courts respectively, subject "to the approval of the District Judge "within whose jurisdiction such Courts are "situate."

Now, this petitioner appears to have been nominated to a permanent office on the 1st of October 1869, and the Judge, no doubt, after some delay, disallows that nomination, because he finds upon examination into his qualifications and from his antecedents that the candidate is not fitted for the appointment; and he adds also a remark to the effect that he appears to have followed the present Subordinate Judge about from district to district. That is an additional observation which the Judge makes; but the reason which he gives for disallowing the nomination is a very substantial one, namely, that on examination into his qualifications, and from his antecedents, he found him not fitted for the appointment. Now, we do not see that the petitioner has any right to appeal to this Court, and to ask this Court to enquire into the merits of his case, and to determine if the Judge was or was not right in making the order disallowing the appointment. The law says that the appointment is to be made subject to the approval of the District Judge; so that undoubtedly a certain discretion is vested in him with regard to it. No doubt, there may be cases such as those that have been referred to where the Court may interfere. Where, for instance, the proceedings have been conducted in a manner which the law does not allow; or, if the Judge were to refuse to confirm a nomination arbitrarily, and without considering the qualifications of the person appointed, possibly the Court would interfere. The two cases quoted appear to be of this description. In the case reported in the 7th Weekly Reporter, page 224, Mr. Justice Louis S. Jackson says that if a person who was in any way disqualified from being appointed had been chosen, the Judge might probably have refused to confirm his appointment; or if the rules prescribed by this Court for making appointments to the public service had been disregarded by the Principal Sudder Ameen, the Judge might rescind the appointment, and require the Principal Sudder Ameen to make a fresh appointment after the observance of the rules. There the learned Judge says that, if a person is disqualified from being appointed, the Judge might refuse to confirm the appointment; and then he goes on to say that in respect of the case before him it is quite clear that if the time allowed in that case for candidates to present themselves had been such as, in the opinion of the Zillah Judge, prevented candidates from coming forward, he might at once have annulled the proceedings, instead of allowing the appointment to stand for nine months, and then displacing the petitioner on the ground that another person was a preferable candidate. What was done there apparently, and what Mr. Justice Louis S. Jackson says ought not to have been done, was not merely that the sanction to the appointment was refused after it had been allowed to stand for nine months, but also that the applicant was displaced simply because another person was considered a preferable candidate. It is not a sufficient reason for disqualifying a man fit for an appointment which he has filled satisfactorily for some time that there is some one else who is thought entitled to the preference. That is what we understand Mr. Justice Louis S. Jackson to determine there. No doubt, he goes on to make some observations showing that the petitioner was fully qualified, and therefore ought not to have been displaced in that way in favor of some one else who was probably not so well qualified for the appointment, and he also remarks on the hardship of allowing the petitioner to stand appointed to an office for nine months, and then suddenly displacing him on such grounds, but the case of hardship alone is not made the ground for setting aside the decision of the Judge.

Then in Volume XIII., page 197, the decision was this: It recognizes that Act XVI. of 1868 leaves it to the Zillah Judge to approve or disapprove of the appointment, and then Mr. Justice Louis S. Jackson holds that the refusal of sanction must be based on grounds personal to the appointee, and that the District Judge must not interfere and control the selection of persons so as to influence the inferior Judge towards the appointment of a particular candidate. The refusal here is on grounds which are personal to the appointee, namely, that, upon examination into his qualifications and from his antecedents, he is not fitted for the appointment.

This case does not at all show that what the Judge has done can be made the subject of an appeal to this Court, and certainly we cannot see upon this act that there is any right for a person whose appointment by a Moonsiff has not been sanctioned by the District Judge to come to this Court, and ask us to enter into the merits of his case, and to see whether the Judge was justified in refusing his sanction to the appointment. These matters are far better left in the hands of the District Judge, and we must presume when, as in this case, there is nothing to show the contrary, that he has properly exercised the discretion vested in him, and that the Judge would not say that, after examination into the qualifications of the appointee and from his antecedents, he was not fitted for the appointment unless he was quite satisfied that such was the case. The application must therefore be rejected.

The 16th September 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Cross-decrees—Appeal to Privy Council—Stay of execution.

Cases Nos. 17 and 18 of 1870.

Applications for review of judgment passed by the Hon'ble Sir Richard Couch, Kt., Chief Justice, and the Hon'ble F. B. Kemp, on the 6th June 1870, in Miscellaneous Appeals Nos. 108 and 109 of 1870.

Dwarkanath Roy (Decree-holder), *Appellant, Petitioner,*

versus

Wooma Soonduree Dossia (Judgment-debtor), *Respondent, Opposite Party.*

Baboo Mohinee Mohun Roy for Petitioner.

Baboo Bungshee Dhur Sein for Opposite Party.

Procedure where there is an order of Court to stay the execution of a decree obtained by a party who has appealed to the Privy Council from another decree against himself, if the holder of the decree which is appealed against attempts to execute it.

Couch, C. J.—THIS is not a case for a review. The order of the Court is to stay the execution of the decree obtained by Dwarkanath Roy, who has appealed to the Privy Council from the decree obtained against himself, until the result of the appeal is known or until further order; and the proper course to be taken, if the party who has obtained the decree which is appealed against to the Privy Council attempts to execute it, is to bring the order before the Division Court to which the application is made to execute that decree, and then the Court, under the provision "until further order," may say that, if she insists upon executing that decree, the order shall be modified, and the restraint placed upon the opposite party withdrawn. The parties will then be put upon proper terms, and it may be done upon the application which we understand is now pending.

The order of this Court is framed so as to meet the case of an attempt to execute the other decree, and there is no ground for reviewing it.

This application must be rejected with costs.

The 16th September 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Reversioner's heir—Execution of decree—Succession.

Case No. 374 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 28th May 1870.

Brijo Bhookun Lall Abustee (Decree-holder), *Appellant,*

versus

Bechun Dobey and others (Objectors), *Respondents.*

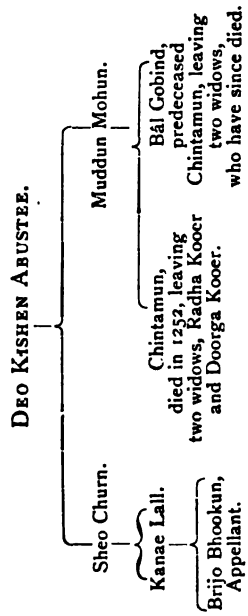
Baboos Onookool Chunder Mookerjee and *Mohesh Chunder Chowdhry* and *Moonshee Mahomed Yusuf* for Appellant.

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Nil Madhub Sein* for Respondent.

A reversioner obtained a decree declaring that he was then the nearest heir to certain ancestral property, and would be entitled to succeed on the death of two widows of his cousin who were in possession. That event having occurred, it was found that the reversioner had become insane, and was, therefore, incapacitated by Hindoo Law from inheriting. Upon this, his son, who had been appointed manager on behalf of his father under Act XXXV. of 1858, applied for execution of the above-mentioned decree as his representative.

HELD that it was necessary to look to the status of the heir at the time the succession opened out to him, and that the applicant, in the capacity of representative of the reversioner (who was not the heir of the widow's husband), was not entitled to execute the decree.

Kemp, J.—THIS is an appeal on the part of Brijo Bhookun Lall Abustee, whose application to execute a decree, passed so far back as in April 1848, has been unsuccessful. The past history of this case is briefly as it follows. The family-tree stands thus, and is not disputed :



In 1847, Kanae Lall brought a suit against Radha Kooer and Doorga Kooer, claiming the estate of their husband Chintamun on the allegation that the family was joint, and that he, Kanae Lall, was the nearest heir of Chintamun, and, as such, entitled to the immediate possession of the estate left by him, the right of his widows being limited to the receipt of a fitting maintenance.

The two widows of Chintamun, Radha and Doorga, defended the suit, stating that a separation had taken place between Sheo Churn and Muddun Mohun, and therefore that they, the widows, and not Kanae Lall, were entitled to succeed to their husband's estate.

The Principal Sudder Ameen, without deciding the question which was at issue between the parties,-*viz.*, whether the family was joint or separate, held that, even admitting the separation, the two widows were entitled to only a life-estate, and that, as Kanae Lall had established that he was at "*that time*" the nearest heir to Chintamun, he would be entitled to possession of the estate of Chintamun after the death of both the widows who were to remain in possession during the term of their respective lives, without power to alienate.

Kanae Lall remained content with this decree, which postponed his right, and made it entirely contingent on his surviving the widows.

The widow Radha died first, but Doorga, the co-wife, survived her husband for many years, and died very lately, or in 1277 Fuslee.

When she died, Kanae Lall, who had obtained the decree, the substance of which has been already stated, was not, under the Hindoo Law, entitled to inherit the estate of Chintamun, inasmuch as he had become insane.

The Subordinate Judge, being of opinion that the decree of 1848 was a declaratory decree, and that the status of the heir at the time the succession opened out to him must be looked to, and not the position of the parties at the time the decree was passed, held that the appellant, who had been appointed manager on behalf of his father Kanae Lall under the provisions of Act XXXV. of 1858, was not entitled to execute the decree.

It may also be observed that the objectors, respondents, are in possession of the property in dispute as purchasers of the rights and interests of the widow Doorga Kooer in execution of a money-decree against her.

We are of opinion that the Subordinate Judge's decision is correct, and that the appeal ought to be dismissed. We consider it unnecessary to discuss the points mooted

in argument by the pleader for the respondents, which we may observe were not raised in the Lower Court, as we hold that the decree obtained by Kanae Lall in 1848 cannot be executed by his son in his representative capacity. It has been pressed upon us that our duty is purely ministerial, and that we are bound to carry out the letter of the decree of 1848, however erroneous that decree may be. We think this a very limited view of the question and of our functions, which are to see the due execution of the decree, *i. e.*, according to law.

It is clear to us that the two widows of Chintamun set up a separation, and it was only on their being able to establish that allegation that they could succeed in remaining in possession of their husband's estate; for, failing proof of that allegation, they were entitled to nothing more or less than bare maintenance. The decision of the Principal Sudder Ameen must, in my opinion, be considered to be a declaratory decree. It permitted the widows to remain in possession as life-tenants without power to alienate. Now, the position of a Hindoo widow as a life-tenant is ordinarily that of a person who is entitled to enjoy the estate; but, except under legal necessity, she is not entitled to alienate or to waste it so as to destroy or threaten the destruction of the corpus of the estate. The decree of the Principal Sudder Ameen simply left the widows in that position. It further declared that, as the plaintiff Kanae Lall had established that he was then, as he undoubtedly was, the nearest heir to Chintamun, he would, as reversioner, be entitled to possession when the two widows were dead. As that event has occurred, we must look to the position of Kanae Lall now that the succession opened out to him. But it is the estate of Chintamun which is in question, and we have, therefore, to see who is his heir. Now, it is beyond all dispute that, when the succession opened out to Kanae Lall, he was disqualified, being insane, and he, therefore, cannot inherit the estate of Chintamun. Whether his son can inherit or not is a question which we are not called upon to decide in this case. The son who is the appellant does not apply to execute the decree of 1848 as heir of Chintamun, but as representing Kanae Lall, and in the latter capacity (Kanae Lall not being the heir of Chintamun) his application must necessarily fail.

We dismiss this appeal with costs.

The 9th November 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble W. Markby *Judge.*

Small Cause Court at Rangoon—Act XI. of 1865—Recorder's Act.

Reference to the High Court by the Recorder of Rangoon, dated the 21st February 1870.

Ko Shoay Doon, *Plaintiff,*

versus

Shoay Gan, *Defendant.*

There is nothing in the Recorder's Act (XXI. of 1863) to justify the conclusion that the Small Cause Court at Rangoon is not properly constituted.

The words "Local Government" in Act XI. of 1865 were not intended to include a Chief Commissioner.

Case.—THE short point of the case is whether the Small Cause Court, now established, or assumed to be established, in Rangoon, is legally constituted?

On the 10th of March 1863, Act XXI. of 1863 was passed "to constitute Recorders' Courts for the towns of Akyab, "Rangoon, and Moulmein in British Burmah, "and to establish Courts of Small Causes "in the said towns."

By Section 10 of that Act, it was declared that the Recorders to be appointed under the Act should exercise civil jurisdiction, within territorial limits, to be from time to time fixed as therein prescribed; and the same Section further enacted as follows: "And, save as in this Act provided, "no Court other than the Recorder's Court "shall have or exercise any civil jurisdiction "whatever within the limits for the time "being fixed as aforesaid."

By Section 31 of the same Act, power was given to the Governor-General in Council to appoint a Registrar to each Recorder's Court, and the Registrar so to be appointed was invested by Section 35 with the powers of a Small Cause Court Judge in suits of the nature of those described in Act XLII. of 1860 (the Small Cause Court Act then in force), where the value of the claim should not exceed Rupees 200, with power, nevertheless, for the Governor-General in Council to increase the jurisdiction to claims not exceeding Rupees 500.

Under these Sections (31 and 35), the Governor-General in Council, on the 15th of April 1864, appointed a Registrar to the Court of the Recorder of Rangoon, and invested him with power to hear suits not exceeding Rupees 500 in amount or value. The Registrar so appointed continued to act until October 1866, when he was removed, and since then no Registrar has been appointed by the Governor-General in Council.

Act XI. of 1865 (the Small Cause Court Act), after reciting that it was expedient to consolidate and amend the law relating to Courts of Small Causes beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature, and declaring that in every part of British India, in which the Act operates, the words "Local Government" should denote the person authorized to administer the Executive Government in such part, enacted (Section 3) that the Local Government might, with the previous sanction of the Governor-General of India in Council, constitute, for the trial of suits under that Act, Courts of Small Causes at any places within the territories under such Government, with power to fix the territorial limits of such Courts. The suits cognizable by such Courts were specified in Section 6 of the Act, and were thereby limited to the amount or value of Rupees 500, with power, nevertheless, for the Local Government (Section 7) to extend the jurisdiction to an amount not exceeding Rupees 1,000; and by Section 12 it was provided that, whenever a Court of Small Causes should be constituted under that Act, no suit cognizable by such Court should be heard or determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes. By Section 13 the Judge was to be appointed by the Local Government.

By the same Act (XI. of 1865), Act XLII. of 1860 was repealed; but by Section 50 of the repealing Act, when in any previous Act reference is made to Act XLII. of 1860, such reference is to be read as applying to Act XI. of 1865.

That Act was passed on the 15th of March 1865, and on the 26th of January 1866 an Act was passed to confer certain increased powers on the Registrars of the Recorder's Courts in British Burmah, and such increased powers were actually exercised by the Registrars until October 1866.

Upon the removal of the Registrar of the Court of the Recorder of Rangoon in October 1866, the Recorder exercised civil jurisdiction both in suits above and in suits below Rupees 500, but suits under Rupees 500 continued to be heard separately in what was called the Small Cause Division of the Recorder's Court, though, properly speaking, there was no Small Cause Court, and there was no authority for the distinction.

In the *Gazette of India* of the 4th September 1869 notifications of the Home Department (Judicial), dated the 1st September 1869, appeared as follows:—

"No. 1256.—*Appointment.*—Mr. Donald "Grant Macleod, B.A., LL.B., Barrister-"at-law, to be Judge of the Small Cause "Court of Rangoon."

"No. 1261.—The Governor-General in "Council is pleased to extend the provi-"sions of Act III of 1864 to the Province "of British Burmah.

"The Governor-General in Council is "also pleased to invest the Chief Commis-"sioner of British Burmah with the powers "conferred upon a Local Government by "the said Act.

"(Sd.) E. C. BAYLEY,

"*Secretary to the Govt. of India.*"

On the 1st October 1869, Mr. Macleod assumed charge of the office of Judge of the Court of Small Causes, Rangoon, as appears by the *British Burmah Gazette* for 9th October 1869.

In the *Gazette of India* of the 9th of October 1869 appeared the following notification by the Home Department (Judicial), dated "Simla, the 2nd October 1869."

"No. 1467.—Under Section 3 of Act XI. "of 1865, the Governor-General in Council "is pleased to sanction the establishment "of a Court of Small Causes in the city "of Rangoon for the hearing of suits cog-"nizable by such Courts under the provi-"sions of the said Act.

"Under Section 7, the jurisdiction of "the said Court is extended, in suits of the "nature described in Section 6, to an "amount not exceeding one thousand rupees. "The territorial jurisdiction of the Court "will be co-extensive with that of the

"existing Small Cause Court jurisdiction of "the Recorder's Court at Rangoon.

"(Sd.) E. C. BAYLEY,

"*Secretary to the Govt. of India.*"

On the 7th of the present month, February 1870, a plaint was presented in the Recorder's Court for Rupees 600, though the nature of the suit was such as a Small Cause Court duly constituted under Act XI. of 1865, with jurisdiction up to Rupees 1,000, would have had power to entertain.

The plaint was presented in the Recorder's Court for the express purpose of raising the question now propounded, and the Advocate for the plaintiff (the Government Advocate of Rangoon), in presenting it, argued—

First—that Section 10 of Act XXI. of 1863 was not repealed by Act XI. of 1865 either expressly, for it was not mentioned in it, nor by necessary implication, for the latter Act is neither contrary to, nor inconsistent with, the provisions of the earlier Act.

Secondly—that the words "save as in this Act provided" in Section 10 of the Recorder's Act had reference to the subsequent Sections under which the Registrar was invested with the powers of a Small Cause Court Judge, and, consequently, the meaning of the Section is that, except the Small Cause Court of the Registrar, no Court other than the Recorder's Court should have civil jurisdiction within the prescribed limits.

Thirdly—that provision having been made by the Recorder's Act for special jurisdiction in Small Causes (notwithstanding that Act XLII. of 1860 was then in force) showed the intention of the Legislature that no Small Cause Court, except the Small Cause Court thereby constituted, should exercise jurisdiction within the local limits of the Recorder's Court, the reason for this being apparent on the face of the Act itself, by which the Recorder was placed in the same position with regard to the Registrar that the High Court stands in with regard to Judges of Small Cause Courts constituted under Act XI. of 1865.

Fourthly—that, at the time when Act XI. of 1865 was passed, the Small Cause Court, constituted under Sections 31 and 35 of the previous Act, was sitting in Rangoon, and continued to sit and to hear cases not exceeding Rupees 500 in value until October 1866, and was not superseded or affected by Act XI. of 1865, and ceased only upon the removal of the Registrar.

Fifthly—that if Act XI. of 1865 did not repeal Section 10 of the Recorder's Act, no notification of the Home Department or of the Governor-General in Council or of the Local Government could repeal it.

Sixthly—that the Governor-General in Council was not, on the 2nd October 1869, *the Local Government* within the meaning of Act XI. of 1865; but that the Chief Commissioner was "*the person authorized to administer the Executive Government*" in British Burmah, if not before, at any rate since the notification in the *Gazette of India*, of the 4th of September 1869, investing him with the powers of a Local Government; and that, therefore, even if Section 10 of the Recorder's Act were no impediment to the establishment of a Small Cause Court under Act XI. of 1865, it has not been established by the proper authority, and has no legal status.

Seventhly—that the appointment of Mr. Macleod to be Judge of the Small Cause Court on the 1st of September 1869, when there was no such Court in existence, was not effective; for the Court should have been first duly constituted, and then the Judge duly appointed, and that, that not having been done, there is no properly constituted Judge, even if there be a properly constituted Small Cause Court.

The point upon which the Advocate for the plaintiff chiefly relied was that Section 10 of the Recorder's Act is still in force; and, therefore, no Small Cause Court can be constituted under Act XI. of 1865 with civil jurisdiction within the local limits of the jurisdiction of the Recorder's Court.

On the other side, it has been pleaded in bar to the jurisdiction of the Recorder's Court that Act XI. of 1865 can stand together with Act XXI. of 1863, and the Governor-General has power to make an appointment under that Act; that this Court is bound to take judicial notice of the orders of the Governor-General appearing in the *Gazette*, and to assume that what thereby appears to have been done has been rightly done; and that consequently, under Section 12 of Act XI. of 1865, the Recorder's Court has no jurisdiction in suits not exceeding Rupees 1,000 in value, and

cognizable by a Court of Small Causes established under that Act.

I deem it right to submit the question raised for the decision of the High Court, inasmuch as, if the contention of the plaintiff be correct in law, as I consider it to be, legislative action will be needed.

The judgment of the High Court was delivered as follows by—

Norman, C. J.—We have been placed in some difficulty from the mode in which this case has been sent up, and have not had the advantage of hearing it argued by Counsel.

Therein, however, nothing in the case as stated or in the Act referred to which would seem to justify the conclusion that the Small Cause Court is not properly constituted.

On reference to Section 1 of Act III. of 1864, and the notification No. 1261 in the *Gazette of India*, of the 4th of September 1869, it is clear that the Governor-General in Council treats the Chief Commissioner, not as "the person authorized to administer the Executive Government," but as the "Chief Executive Authority."

There is nothing in Act XI. of 1865 to show that the word "Local Government," as used in that Act, were intended to include a Chief Commissioner.

Markby, J.—I concur.

The 14th November 1870.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Reviews—Sections 376 and 378, Code of Civil Procedure — Stamps — Agreements — Art. 3, Schedule A, Act X. of 1862.

Case No. 117 of 1870.

*Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and Dwarkanath Mitter, on the 25th July 1870, in Special Appeal No. 768 of 1870.**

Choonee Mundur and another (Defendants), *Petitioners,*

versus

Chundee Lall Dass (Plaintiff), *Opposite Party.*

* *Ante*, p. 178.

Mr. J. W. B. Money for Petitioners.

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Opposite Party.

HELD (Mitter, J., *dissentiente*) that in cases of review Judges are not required to re-adjudicate points which were considered and adjudicated when brought before them by a pleader then employed, although they may be better argued, and put in a different light, by another pleader subsequently; but are to be guided in their admissions of reviews in Indian Courts by the definite terms of the Sections (367 and 378) of the Code of Civil Procedure.

In a suit for payment of rent for use and occupation of land, where the basis of plaintiff's claim was for a kubooleut, the agreement produced as evidence of the contract, not being the deed of contract itself, was held to be not liable to be stamped under Article 3, Schedule A, Act X. of 1862.

Bayley, J.—THIS is an application for a review of our judgment in special appeal No. 768 of 1870. The application is signed by Choonee Mundur and Girdharee Mundur by their pleader Mr. R. E. Twidale, but has been argued by Mr. Money.

The first ground taken in the petition of review is precisely the same that was argued and decided by us in our judgment of which review is now sought, namely, that the petition asking for the lease which we have held to be evidence of the contract, and therefore not to require a stamp "does require a stamp, whether it be treated as a lease or as evidence of contract."

The second ground is that the said petition ought to have been registered. This ground also was taken, and adjudicated by us in the same judgment.

* * * * * * *
* * * * * * *

In regard to the first and second grounds, we are pressed with the argument that we are bound to take them now on quite a different view of the law to that placed before us by another pleader who argued before us in the special appeal, *viz.*, that the petition should be stamped under Article 3, Schedule A of Act X. of 1862.

The learned Counsel has quoted the following authorities in support of his propositions: 7th Moore's Indian Appeals, page 384,* 11th Moore's Indian Appeals, page 498,† 10th Weekly Reporter, page 54. Mills and Creagh's Reports, pages 210 and 211, and 3rd Volume of the same Reports, page 624. Now, all these are authorities substantially to the effect that, when a Judge is satisfied on general principles that he has made a judgment inconsistent with law or justice, it

* 3 W. R., P. C., p. 45.

† 9 W. R., P. C., p. 23.

is his duty to re-consider that judgment. Mr. Justice Markby and I have already in a judgment in review held that, under the terms of Sections 376 and 378 of the Code of Civil Procedure, we are not required to re-adjudicate points considered and adjudicated when brought before us by the pleader then employed, although they may be better argued and put in a different point of view by another pleader subsequently, and we then fully entered into the reasons for this view. I still think that we are to be guided in our admissions of reviews in Indian Courts by the definite terms of the Sections of the Indian Civil Procedure Code. The English Law laid down by the high authorities above quoted for the purposes of these English cases is, of course, to be followed in such cases.

Now, what is pressed upon us in this petition of review is to say that, whether this be a lease—which we held it was not, and it is urged it is—or whether it be an evidence of contract—which we held it was, and the learned Counsel says it was not, but a lease; in either case the document should be stamped—if as a lease, under Schedule A, Article 40, of Act X. of 1862—if as an evidence of contract, under Article 3.

I am of opinion that this agreement is not liable to be stamped under Article 40 as a lease, simply because it is *not*, in our view, a lease. I think, too, it is not liable to be stamped in this case under Article 3. It is put in as evidence of a contract. The basis of the plaintiff's rent-claim is for a kubooleut without which the tenants, it is alleged, cannot lawfully hold the land; and the suit is one for payment of rent for use and occupation of the land.

The agreement, therefore, would still only be evidence of the contract, and not the deed of contract. The contract on which the occupancy would lie would be the kubooleut.

In this view, therefore, I do not think that there is any error in law in our judgment; but irrespective of that, if there be an error, I do not think we can allow the application. It is no error affecting the decision on the merits. Even without that petition, the plaintiff could have sued and got a decree.

And, lastly, the objection was never taken by the defendant at the first hearing, and both parties went to trial without any such objection to the admissibility of the deed as is now raised.

The same remarks equally apply to the second ground as to registration.

For these reasons, I would reject this application.

Mitter, J.—I am sorry that I cannot concur with my learned colleague in the views expressed by him on the general subject of reviews. But I do not think it necessary to enter into any discussion on this subject, inasmuch as I am of opinion that the grounds of review urged in this case are not good upon their merits.

I also would reject this application with costs.

The 16th November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Butwarrah—Questions of title—Jurisdiction—Regulation XIX. of 1854.

Case No. 968 of 1870.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 9th May 1870, reversing a decision of the Subordinate Judge of that District, dated the 5th April 1869.

Muddun Mohun and another (Plaintiffs), *Appellants,*

versus

Kartick Nath Panday and others (Defendants), *Respondents.*

Baboo Onookool Chunder Mookerjee for Appellants.

Baboo Juggodanund Mookerjee for Respondents.

When in the preparation of a butwarrah under Regulation XIX. of 1854, it is ascertained that the parties are at variance on a question of title, the Collector's proper course is to stay proceedings until all such questions are decided by a competent Court, the Revenue Authorities not having authority under the law to decide them finally.

Jackson, J.—I do not agree with the Judge in the view which he has taken of Sections 19 and 20, Regulation XIX. of 1854. It is clear to me that the objections alluded

to in those Sections of the butwarrah-law, upon which it is directed that the Collector shall decide, and that the subsequent orders of the Commissioner and Board of Revenue shall be final, are objections relating to the partition. They do not refer to objections relating to the title of the parties to portions of the estate under partition.

In this case the proprietors of Tuppa Bhorsha applied for a butwarrah. The plaintiff, as the proprietor of 4 annas of mouzah Bhorsha contained in that Tuppa, joined in the application. When the butwarrah was under consideration, a dispute arose regarding mouzah Oodoypore. The plaintiff alleged that it was a dakhilee village belonging to mouzah Bhorsha, and that, as proprietor of 4 annas of mouzah Bhorsha, he was also entitled to 4 annas of mouzah Oodoypore. The defendants, on the otherhand, alleged that mouzah Oodoypore was one of the several separate villages contained in Tuppa Bhorsha, and had no connection with mouzah Bhorsha. The Collector rejected the plaintiff's claim, and ruled that Oodoypore was a separate village. The Commissioner concurred with him. It is said that there was also an appeal to the Board of Revenue, who refused to pass any decision upon the points, and referred the parties to the Civil Court, where a suit had already been instituted. The butwarrah was completed as if Oodoypore was separate from mouzah Bhorsha. The civil suit preferred by the plaintiff was decreed by the Subordinate Judge of Bhaugulpore, as upon enquiry he found that Oodoypore was a dakhilee village of mouzah Bhorsha. The Judge has held that the decision of the Revenue Authorities on the question of Oodoypore was final, and has dismissed the plaintiff's suit.

I would reverse that finding, and remand the case to the Judge to be tried upon the merits. It is true that there is no distinct rule laid down in Regulation XIX. of 1854 as to what course the Collector is to pursue when, in the preparation of a butwarrah, it is ascertained that the parties are at variance on a question of title. But it seems to me that his proper course is to stay proceedings as in the case alluded to in Clause 2, Section 4, until all such questions of title are decided by a competent Court. The Collector has not authority to decide such questions unless special power is given to him by the law. All matters regarding the partition are directly placed under his special decision. But not only is no direct authority given to him to try disputed questions of title, but no mode is laid down for enquiry into such questions. In the present case, it does not appear that the Revenue Authorities made any real investigation into the question in dispute. No issues were laid down, no documents of title were called for, no evidence, oral or documentary, was demanded or received. A summary decision by the Collector was passed on the ground that mouzah Oodoypore had been separately surveyed from mouzah Bhorsha.

It seems to me that the Revenue Authorities had not authority under the law to decide finally any question of title, and that the Judge must, therefore, try the plaintiff's claim upon the merits as raised before him in appeal.

Bayley, J.—I concur.

The 16th November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Summons—Service.

Case No. 1005 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 16th February 1870, affirming a decision of the Moonsiff of Mudhepoora, dated the 30th November 1869.

Dowlut Mundur (Plaintiff), *Appellant,*

versus

Omrao Singh Rana (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Debendro Narain Bose for Respondent.

When there is no return of service to a summons, the law gives a Court full discretion either to issue a second summons, or to take, or not take, stronger measures. It is not imperative on one Court to take measures to expedite the service in another Court; but it is the business of the party interested to move the Court to do what is necessary.

Bayley, J.—THIS special appeal must be dismissed with costs, as there is no ground of law whatever to justify our interference in special appeal with the judgment of the Lower Appellate Court.

A summons was sent to Purneah on the 9th July 1869 upon two witnesses of the plaintiff, named to prove the necessity for alienation and the separation of the family. Up to the 25th November no return of service having apparently been made, the special appellant asked for a second summons.

The Lower Court held, for reasons given by it in its order, that the evidence of those two witnesses was not material in the case, and, under the circumstances, did not think it expedient to adopt other measures to enforce their attendance in Court.

On the 29th November, the special appellant made another petition, alleging that the witnesses were material, as they would prove the necessity for the sale and the separation.

The Lower Court decided the case against the plaintiff on the 30th November.

We are now pressed with the argument that it was the duty of the Lower Court either to ask the Purneah Court to expedite the service of the summons, or delay its judgment till its return, or issue a second summons.

We think this objection is quite futile. The law does not contemplate the issue of a second summons; at any rate, it gives the Court a full discretion either to issue a second summons when the first fails, or to take stronger measures provided by the law, or not take them at its discretion. It is not imperative on one Court to take measures to expedite the service in another Court. It is the business of the party to move the Court to do what is necessary for his case, but no request was made by the plaintiff in this case between 9th July and 29th November 1869 to the Court to address the Purneah Court to expedite the service of the summons.

In this view of the case, we dismiss this special appeal with costs.

The 16th November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Death of defendant—Section 104, Code of Civil Procedure.

Case No. 1116 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 30th March 1870, reversing a decision of the Moonsiff of Tegrah, dated the 28th December 1869.

Monee Lall (one of the Defendants), *Appellant,*

versus

Kazee Fuzul Hossein (Plaintiff) and another (Defendant), *Respondents.*

Mr. R. E. Twidale and *Moonshee Mahomed Yusuf* for Appellant.

Baboo Debendro Narain Bose for Respondents.

A suit having been dismissed, plaintiff appealed from the decision; and although the defendant's death was notified to the Court, and the plaintiff did not attempt, under Section 104, Code of Civil Procedure, to bring in the heirs of the deceased, or have the deceased in any way represented, the Court tried the appeal, and passed a decree.

HELD that the decision of the Lower Appellate Court was incorrect in law.

Jackson, J.—WE think that the decision of the Subordinate Judge of Bhaugulpore on this appeal cannot stand, and must be set

aside. The decree, on appeal, has been passed against the estate of one Bunwaree Lall, who was defendant in the original case, but died before the appeal was heard, and in the absence of his heirs or representatives. The case, when instituted in the first Court against Bunwaree Lall, was dismissed. The plaintiff appealed from that decision; and although Bunwaree Lall was dead, and his death had been notified to the Court, it does not appear that the plaintiff attempted, under Section 104, to bring in the heirs of Bunwaree Lall, or have him in any way represented during the trial of the appeal. Notwithstanding this, the Subordinate Judge went on to try the appeal, and passed a decree against Bunwaree Lall's estate. This is objected to in special appeal, and it is clear that the decision, under the circumstances, is incorrect in law. The case must be remanded to the Subordinate Judge in order that he may see that the appellant bring in the representatives of Bunwaree Lall in Court, and re-try the case in their presence.

It appears that this point was brought to the notice of the Subordinate Judge in an application for review, and certain facts were stated in that application, which, if they were correct, and could be substantiated, would altogether relieve the heirs of Bunwaree Lall from the liability which the Subordinate Judge has placed upon them. Had the Subordinate Judge entertained the review, and made further enquiries which the facts of the case would seem to have required, there would be no necessity for this special appeal; but he appears to have simply rejected the application, and we are in consequence obliged to set aside his original decision, and direct a re-trial of the case. We think that, in the course of the re-trial, the Subordinate Judge should consider the facts stated in the petition for review.

Baboo Hurdeo Narain Singh, who has been unnecessarily made a respondent in this special appeal, will obtain his costs of this special appeal from the appellant; but, in re-trying the case, if the Subordinate Judge finds that he is liable for any portion of the money, a decree may be passed against him.

The appellant will obtain his costs of this special appeal from the special respondent, plaintiff in this suit.

The 17th November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Contract.

Case No. 780 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 8th February 1870, affirming a decision of the Moonsiff of Gurbetta, dated the 20th May 1869.

Ram Tunoo Koondoo (Plaintiff), *Appellant,*

versus

Mullicka Dossee and another (Defendants), *Respondents.*

Baboo Nullit Chunder Sein for Appellant.

Baboo Nil Madhub Sein for Respondents.

In a suit to enforce delivery of a kobala where plaintiff was found not to have acted up to the original terms of the contract, inasmuch as he failed to pay a part of the consideration-money as agreed upon, and did not offer to pay up the remainder until the suit was brought:

HELD that defendant was no longer bound to deliver over or ratify the document which it was intended should be executed between them.

Jackson, J.—THIS was a suit to enforce the delivery of a kobala. The plaintiff alleges that, at the time that the kobala was executed, he agreed to pay Rupees 300 as part of the consideration-money in satisfaction of a decree against the vendor; that he paid down the money as agreed upon; that he was now ready to pay the balance Rupees 499, and prays that the Court might direct the delivery of the kobala to him.

The Courts below have found that the plaintiff himself broke the contract in the very commencement, that he never paid the Rupees 300, and it is admitted that he did not offer to pay the remaining Rupees 499 to the vendors until the suit was brought. Under such circumstances, the Courts below have dismissed the plaintiff's suit.

In special appeal it is said that, if the plaintiff pays the sum of Rupees 499, he should be held entitled to obtain the kobala.

We think, however, that, as the plaintiff himself did not act up to the original terms

of the contract, he broke the contract, and the defendant was no longer bound to deliver over to him or ratify the document, which it was intended should be executed between them. The Lower Courts seem to be quite right in dismissing the plaintiff's suit.

We dismiss the special appeal with costs.

The 18th November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Criminal charge—Damages—Evidence.

Case No. 531 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 28th December 1869, reversing a decision of the Moonsiff of Kytee, dated the 13th September 1869.

Aghorenath Roy (Plaintiff), *Appellant,*

versus

Radhika Pershad Bose (Defendant), *Respondent.*

Baboo Rajendronath Bose for Appellant.

Baboo Rash Beharee Ghose for Respondent.

In a suit for damages on account of a charge brought by defendant in a Criminal Court, which charge was ultimately dismissed, plaintiff must prove in the Civil Court that there was no reasonable cause for bringing the accusation; the proceedings in the Criminal Court are not evidence in the Civil Court.

Bayley, J.—We think this special appeal must be dismissed with costs.

The plaintiff sued for damages, in that the defendant prosecuted him in a Criminal Court for misappropriation of certain ornaments alleged to have been entrusted to him, which charge was ultimately dismissed. In this case, the plaintiff brought no evidence to show that the charge was unfounded, or that the ornaments were not entrusted to him, or that he was in another place at the time. The defendant, on the other hand, brought witnesses who deposed that the properties were entrusted to the plaintiff's care.

The first Court decreed and the Lower Appellate Court has dismissed the plaintiff's suit.

In special appeal, two cases—one reported at page 30, Volume VI., and the other at page 43, Volume IX., Weekly Reporter—have been cited to show that in this particular case the plaintiff ought to have a decree in his favor.

We find, however, that in the case reported at page 30, Volume VI., Weekly Reporter, it is clearly stated that the charge was *unfounded.* In the present case, the Criminal Court merely states that there was no sufficient evidence to convict the prisoner. The case at page 43, Volume IX., Weekly Reporter, has no analogy to the present case at all. It is then pressed on us that the words "acquitted" and "discharged" are sufficient to show that the charge was unfounded, so as to bring the case within the ruling cited from Volume VI.; but the plaintiff must prove that there was no reasonable cause for bringing the accusation. In the Civil Court he has given no evidence to show this, and the proceedings in the Criminal Court are no evidence to prove his allegations in the Civil Court.

We, therefore, see no reason to interfere with the Lower Appellate Court's decision, and we therefore dismiss this special appeal with costs.

The 18th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Summary order—Regular suit—Section 246, Code of Civil Procedure—Execution—Joint family—Presumption—Decree—Mitakshara—Right of action—Limitation—Act XIV. of 1859—Disability—Minors.

Cases Nos. 164, 165, 169, 170, 224, 234, 235, 237, 238, 239, 240, 243, 244, and 245 of 1866.

Regular Appeals from decisions passed by the Subordinate Judge of Sarun, respectively, dated the 27th and 29th March and 9th April 1866.

Case No. 164 of 1866.

Sudaburt Pershad Sahoo (Defendant), *Appellant,*

versus

Lotf Ali Khan (Plaintiff) and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Juggodanund Mookerjee* for Appellant.

Baboo Mohendro Lall Shome and *Moulvie Syud Murhumut Hossein* for Respondents.

Case No. 170 of 1866.

Mussamut Phoolbas Kooer (Plaintiff), *Appellant*,

versus

Lall Juggessur Sahi (Defendant) and others, *Respondents*.

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Appellant.

Messrs. G. C. Paul and *R. T. Allan* and *Baboo Onookool Chunder Mookerjee* for Respondents.

Case No. 238 of 1866.

Bikramajeet Lall (Defendant) and another, *Appellants*,

versus

Mussamut Phoolbas Kooer (Plaintiff), *Respondent*.

Baboo Nil Madhub Sein for Appellants.

Baboos Chunder Madhub Ghose and *Kedar Nath Chatterjee* for Respondent.

Case No. 244 of 1866.

Ram Dhyan Koonwar (Defendant), *Appellant*,

versus

Mussamut Phoolbas Kooer (Plaintiff), *Respondent*.

Baboo Kally Kishen Sein for Appellant.

Baboos Chunder Madhub Ghose and *Kedar Nath Chatterjee* for Respondent.

And the other causes.

After the death of a member of a Hindoo family, his widows were sued in their representative capacity, and decrees were obtained in respect of debts incurred by him in his lifetime on his own account.

HELD that the decrees could only be executed against that property which passed from the deceased to his widows in their own right, and not against other portions of the joint-family property.

A *regular* suit to set aside a *summary* order is against general principles, and only lies when the power to bring such a suit is expressly conferred, as under Section 246, Code of Civil Procedure. A party who is unsuccessful in his attempt to obtain execution against any particular property has only the remedy provided in Section 246; and failing to take advantage of that, his only alternative is to make a fresh application for execution.

Where a family is joint, it cannot be presumed that all the property in the hands of any member is joint.

It is inconsistent with the strict principles laid down in the Full Bench decision of the 30th July 1869 for a member of a Mitakshara family to sue separately for his share of the joint-family property.

Quære.—Is a mere signification of intention on the part of a member of a joint Hindoo family sufficient to constitute a separation, without an actual partition by metes and bounds?

The rules contained in Act XIV. of 1859 as to disability are of general application, and are not confined to the period of limitation provided for by that Act.

Under Act XIV., the disability of a minor is to be considered absolute, and any benefit which the minor is to have accrues to him, not during his disability, but when his disability ceases.

Markby, J.—No. 164—IN this case, it appears that a decree was obtained by one Meer Mahomed Bakir, against Ajoodhya Pershad, in the year 1247. That decree having come into the hands of the plaintiff, after Ajoodhya's death, he applied for execution; but as this application and the order upon it have not been laid before us, I am not able to state exactly in what terms the application was made, or how it was dealt with. But it appears to have been an application under Section 210 of the Code of Civil Procedure, in which Sudaburt Pershad was pointed out as legal representative of Ajoodhya, and it also appears that, on the opposition of the plaintiff, further proceedings in execution were stopped by an order made by the Court on the 24th December 1863.

It also appears that this is a suit brought in effect to get rid of this last-mentioned order, and to obtain such a decree as will compel the Court in which the decree against Ajoodhya was given to execute that decree by the sale of this property, and the plaintiff has, in fact, obtained a direction from the Court below, that he shall be at liberty to bring to sale some of the property which another Court, on the application in execution, had refused to allow him to sell.

Some difficulty arises from the imperfect information which we have as to the nature of the proceedings already taken. If the object of this suit is to get rid of an order rejecting an application under Section 210, then, in my opinion, no such suit could possibly lie. The only way in which the order of a Court of competent jurisdiction can be questioned is by appeal, unless, of course, it can be shown to have been obtained by some fraud practised upon the Court. Probably in this case, though I have not looked into that matter, the decision of the Court

to which the application was made is not subject even to appeal.

The somewhat curious proceeding of (what is called) a *regular* suit to set aside (what is called) a *summary* order is not unknown in this country, but I apprehend that such suits are against general principles, and would only lie when the power to bring such a suit is expressly conferred, as, for instance, under Section 246 of the Code of Civil Procedure, some doubt was indeed raised in this case whether this was really not such a suit. It was suggested that possibly the application was granted under Section 210, and the property subsequently released under Section 246 upon the application of Sudaburt Pershad, but I am not satisfied that this was so. Even, however, if this be the correct view of the facts, the plaintiff must still fail, because the suit under Section 246 must be brought within one year from the order complained of, which this suit was not.

It was contended by the respondents, however, that this was not really a suit to set aside or get rid of any order at all either under Section 210 or Section 246, but a wholly independent suit to have the plaintiff's right declared to execute his decree against the property in question. I am still at a loss to understand how such a suit can lie independently of the provisions of Section 246. The party whose property is wrongfully seized has always a cause of action as soon as his rights as owner are invaded, but the party who is unsuccessful in his attempt to obtain execution against any particular property has only that peculiar and anomalous remedy provided by Section 246; and if he fails to take advantage of that, his only course would appear to be to make a fresh application for execution.

For these reasons, without reference to any other point, I think the decision of the Lower Court in this case was wrong, and that it ought to be set aside, and the suit, so far as relates to the property comprised in this appeal, dismissed with costs in this Court and in the Court below.

No. 165.—The appeal in this case was argued on the question of costs only. It was agreed at the former hearing that the appellant was entitled to his costs in the Court below, but that he must pay the costs of Juggessur Roy, who was unnecessarily made a party to this appeal. The appellant will get his own costs of this appeal from the plaintiff.

No. 169.—It has been agreed by the pleaders on both sides that this case will be governed by the decision in No. 164. The suit, so far as relates to the property comprised in this appeal, will be dismissed with costs in this Court and in the Court below.

No. 237.—In this case, the defendant Gopal Lall is the appellant. It is asserted with some considerable show of truth that the appellant's case has been overlooked in the confusion occasioned by lumping all these claims into one suit. In the Court below, when this part of the case is disposed of, reference is made to the plea of limitation alone. But the facts of the case are, I believe, different from those in the other cases. It relates to mouzahs Momenpore and Mustafurpore. It is admitted by the plaintiff, respondent, that these mouzahs were conveyed to an ancestor of the defendant, appellant, by Bhugwan Lall, and that the appellant is in possession. The appellant denies that these mouzahs were part of the joint property. The plaintiff must, therefore, prove his title to recover. He has given no evidence whatever so far as has been shown to us; but his pleader relies on the alleged presumption that, as this was a joint family, all the property in the hands of any member of the family is presumably joint. But this is not a joint family absolutely. It is only so as to some of the property of its members, and not as to the rest. The very sweeping presumption, therefore, which is contended for cannot be made. Even the date of the acquisition of this property has not been proved, and Sudaburt's attempt to recover any portion of it is shown to have been ineffectual. The plaintiff's suit, therefore, as to this property must be dismissed with costs in this Court and in the Court below.

No. 170.—In this case, as in all the other cases now under consideration, only a very small portion of the papers has been translated, and the facts have only been stated in a very meagre manner. There has been also great confusion between the different appeals which raise very distinct questions. As far, however, as I can gather, the facts which it is necessary to consider in disposing of this appeal are as follows:—

Ajoodhya Pershad and his four cousins (sons of his uncle) were a joint Hindoo family governed by the Mitakshara Law. In the

year 1846, the family made an arrangement by which all property acquired subsequently to that year was to be considered as acquired separately, but all property which had been previously acquired remained precisely as before. The property to which this appeal relates is part of the property acquired previously to 1846. Ajoodhya Pershad died without issue, leaving a widow. Of the four cousins, Dukhun Sahoo, the eldest, left one son Sudaburt Pershad; Sheo Gobind Pershad, the second, left one son Bhugwan Lall Sahoo, who died without issue, leaving two widows, Mohasee Kooer and Parbutty Kooer; Kashee Nath Sahoo, the third cousin, left a widow Phoolbas Kooer, and one son Hureenath Pershad, the plaintiff in this suit; the fourth cousin, Mukhun Sahoo, died without issue.

Bhugwan Lall died some time after 1846, and upon his death Sudaburt Pershad and Hureenath Pershad as sole survivors became jointly entitled to the whole of the family property acquired prior to 1846, which is admitted to have rested in them as joint-family property under the Hindoo Law of the Mitakshara school.

This appeal relates to a share in the mouzah Chatowlee.

As to the exact time, mode, and date of the acquisition of Chatowlee by the family, nothing definite has been stated, but it seems to be admitted to have been purchased prior to 1846.

After the death of Bhugwan Lall, this mouzah came into the possession of his widows. Bhugwan Lall had died indebted to one Ruggonundo, and after his death Ruggonundo brought a suit, and obtained a decree against the widows as representatives of Bhugwan for the amount of this debt; and in execution of that decree, this mouzah was put up for sale, and purchased by one Golab Chand Lall, who sold it to Mr. Cosserat.

It is admitted that the debt in respect of which this decree was recovered was not incurred for the benefit of, or on behalf of, the joint family; and also that the sale-certificate purported to convey to the purchaser the right and interest of the widows of Bhugwan Lall only.

In the year 1862, Sudaburt and Hureenath being still joint, Sudaburt brought a suit in his own name to recover possession of his own share in all the joint-family property. Though his claim was contested by the holders of the property, no objection was raised as to the form in which the suit was brought. Hureenath Pershad, being then a minor, was represented as a defendant in that suit by his mother, and his title to a 4-annas share was admitted by Sudaburt.

The great contention in that suit was whether the family generally was joint or separate in estate.

The result of that suit was a decision that the family was, as above stated, joint as to all property acquired prior to 1846, and separate as to property acquired since that time; and a decree for a 4-annas share of the joint property taken on this footing was given to Sudaburt.

This line of demarcation is accepted in all the suits now before the Court; and mouzah Chatowlee is, therefore, as already stated, admitted to be part of the joint-family property.

This present suit is brought by Hureenath's mother and guardian to recover possession on his behalf of his share of mouzah Chatowlee and other mouzahs. The allegations of the plaint are extremely indistinct, but the point principally discussed has been whether the purchase of mouzah Chatowlee by Golab Chand Lall under the decree against the widows can be maintained.

In the Court below, the plaintiff obtained a decree which is not before us, but which I understand to be a decree for possession, and against this decree the defendant, Mr. Cosserat, has appealed. The plaintiff Hureenath is still a minor, and brings this suit by his guardian.

This appeal and all the others now before us were first argued before Mr. Justice Kemp and myself in January 1867. It was then considered desirable, in consequence of conflicting decisions, to refer two points which, more or less, affect these appeals to the Full Bench. It was then arranged that all the cases should stand over until the decision of the Full Bench was given. That decision was given on the 30th July 1869,* and the cases have now come on for final disposal.

* 12 W. R., F. B., p. 1.

The first question referred to the Full Bench was as follows :—

"Bhugwan Lall, member of a Hindoo "family, living under the Mitakshara Law, "and having joint-family property, died "entitled to an undivided share in such "property, and leaving two widows Mussa-"mut Mohassee Kooer and Parbutty Kooer "him surviving.

"After the death of Bhugwan Lall, his "widows were sued in their representative "capacity in respect of debts incurred by "him in his lifetime, on his own account, "and not for the benefit of the joint family, "and decrees were obtained against the wi-"dows in that capacity.

"In execution of one or more of these "decrees, an interest in certain portions of "the joint-family property, to the extent of "the share to which Bhugwan Lall was "entitled in his lifetime, has been sold by "auction, and the purchasers have taken "possession.

"Can the nephew of Bhugwan Lall, who "is one of the surviving members of the "joint family, recover from the purchasers "possession of the interests which they "have purchased or any part of them?"

This question was disposed of upon a point which it undoubtedly raises, but which was not argued before us on the former occasion. The Full Bench held that, whether this property could in any way be made chargeable with the debts of Bhugwan Lall or not, it could only be so made chargeable by a suit brought against those who were now actually the owners of it, and that it could not be seized in execution of a decree obtained against Bhugwan Lall's widows.

There can be no doubt of the correctness of this decision; and had it been raised before us, the necessity of a reference to the Full Bench on this point might have been avoided, because, as far as I am aware, it is entirely in accordance with previous decisions of this Court.

The result is that only that property which passed from Bhugwan Lall to his widows in their own right is vested in Mr Cosserat under his purchase, and not any part of that which, at the death of Bhugwan, was joint-family property; and therefore Mr. Cosserat's proof of his title to mouzah Chatowlee, which was part of the joint-family property, has failed.

No. 224.—The appellant in this case is the defendant Juggessur Sahoy. He purchased a mouzah called Saleempore in execution of a decree under circumstances similar to those stated with reference to the purchase of mouzah Chatowlee in appeal No. 170. The circumstances under which Saleempore was acquired by the family have, however, been stated a little more fully. It appears that an 8-annas share in it was purchased by Bhugwan Lall after 1846. That share was, therefore, his separate property. This appeal relates only to the other 8-annas share which was acquired before 1846, and which is admitted, therefore, to be part of the joint-family property. It was purchased by the appellant at a sale in execution of a decree obtained against the widows by one Hur Gobind. No claim or objection under Section 246 was made on behalf of the plaintiff.

I am not quite able to understand how the Principal Sudder Ameen dealt with this case. It has been argued before us on precisely the same grounds as appeal No. 170. And the result of the decision of the Full Bench, on the first question referred to it, is that the appellant's title is defective.

No. 234.—The appellants in this case are the defendants Saligram Sahoy and Ram Ruchee Sahoy.

It appears that, on the 9th December 1859, Bhugwan Lall executed in favor of these persons a zur-i-peshgee lease of a property described in the plaint as Goolmanpore Bahadoor. The plaintiff seeks to set aside this deed, and to recover what he calls his share of the property, on the ground that Bhugwan Lall had no power thus to dispose of joint-family property. It is admitted that this was joint-family property, and it was on this point that the second question was referred by us to the Full Bench. That question was as follows :—

"Bhugwan Lall in his lifetime executed "an ordinary zur-i-peshgee mortgage in "respect of his undivided share in a portion "of the joint-family property, in order to "raise money on his own account, and not "for the benefit of the family.

"Can the nephew of Bhugwan Lall recover from the mortgagee, without redeeming the same, possession of the mortgaged share or any portion of it?"

The Full Bench did not answer the exact question put, not considering that it had full materials for doing so, but held that Bhugwan Lall could not, without the consent of his co-sharers, mortgage his undivided share in a portion of the joint-family property in order to raise money on his own account, and not for the benefit of the family.

As no objection was made to the reference to the Full Bench, I think we ought to accept its decision for the purposes of this case, and to hold that the appellants have failed to establish their title.

No. 235.—It was admitted on the last occasion that this appeal would be governed by the decision of No. 224.

No. 239.—In this case, the defendant Juggessur Sahoy is appellant. The facts of this case are, as far as I have been able to gather them, precisely the same as in appeal No. 170, and the points argued were the same; the same decision will therefore apply.

No. 243.—In this case, as far as I can discover, the appellant is Bundhun Sahoo, a defendant in the Court below, and he is in possession of mouzah Telna Khoord together with its Deara and Oopurwar or high land, which he claims to hold under a zur-i-peshgee lease executed by Mukhun Sahoo, a member of the joint family. He says that he was ousted, but on the 21st May 1863 he obtained a decree for the money lent on this security. That decree was obtained against the widows of Bhugwan Lall, and under it this property was sold in execution, and purchased by this appellant. I cannot find this property mentioned in the judgment of the Court below, but for some reason the plaintiff got a decree for it with the rest. It was admitted that this was joint-family property, and applying the decision of the Full Bench the defendant would seem to have a bad title, but I have great difficulty in seeing how the facts of this appeal really stand. It was, however, I think, assumed on the argument that the decision in appeal No. 170 would govern this case also; and I do not see how it can be distinguished.

No. 244.—In this appeal, Ram Dyan Kowar, one of the defendants in the Court below, is the appellant. From his written statement, he appears to be in possession of mouzahs Goodrya and Kurunpoora. I am not able to identify these with any of the properties claimed in the plaint. The respondent claims to hold these mouzahs under a purchase at a sale in execution of a decree obtained by one Mussamut Gobindee as mother and guardian of Nundo Lall Sahoo against (as the respondent alleges) Bhugwan himself, but which was, in reality, against his widows. It also was not denied that this was joint-family property. This defendant's title, therefore, cannot be maintained.

I have now to consider what decree should, in my opinion, be drawn in the appeals No. 170, No. 224, No. 234, No. 235, No. 239, No. 243, and No. 244.

In these seven cases, the defendants have failed to prove their titles. And as the properties claimed are all portions of the joint-family property, and the plaintiff's titles to a 4-annas share in the family-property is not disputed, the plaintiff claims a decree for possession to that extent.

But it seems to me that the answer given by the Full Bench to the second of the two questions which we propounded precludes us from giving any such decree. As I have said, whether or no I concur in the principles laid down by those answers, I feel bound to apply them to the cases before us. And so doing, it seems to me impossible to give the plaintiff the decree which he claims, which is a separate decree for possession for his 4-annas share. I do not see how it is possible, if that decision be correct, that such a decree should be executed. And I think that, if the Full Bench decision be right, to attempt to execute it would be to do the very thing which the Full Bench say cannot be done, namely, to create a separation otherwise than by a partition.

Had Hureenath been of age when this suit was brought, the fact that his brother had been joined in it, and had assented to the claim, might have been taken as creating a partition by consent. I do not say this would be so. Even that might hardly be consistent with the Full Bench decision, but it is unnecessary to consider it, because Hureenath being a minor, no such arrangement can be inferred. There has been no enquiry

whether a partition would be for the benefit of the minor; nor indeed was it ever suggested until the last moment that such an inference was possible.

The truth appears to me to be that this suit has been brought just as Sudaburt's suit was brought under the notion that a member of a Mitakshara family, like a member of a Bengal family, may act to a certain extent independently in reference to his share. Whether or no such a notion is correct, I think, at any rate, it has been not uncommon to bring such suits as the present one, that is to say, for one member to sue separately for his share. But this is obviously inconsistent with the very strict principles laid down by the Full Bench.

I arrived at this conclusion upon an independent consideration of the answer of the Full Bench to the second question. And I am confirmed in thinking that I have rightly applied that decision, by a case reported at page 83 of Volume XII. of the Weekly Reporter, decided very shortly after it.

There Peacock, Chief Justice (who also delivered the judgment in the Full Bench case), says: "The plaintiffs, as two only of the "members of a joint family which does not "appear to have been separated, and as two "only of the owners of the joint property "which does not appear to have been parti-"tioned, are not entitled to any definite "share for which they can sue alone. The "right of action has been misconceived, and "the proper persons have not been made "parties. The suit should have been brought "by all the joint owners to set aside the "deed as to the charge created by Oodit, as "well as to the charge created by Jeetun; "and the suit should have been brought by "all the members of the joint family, and "not by two of them alone who, before "partition, have no definite share. If the "deed were to be set aside, it would be "impossible by the decree to define the share "which the plaintiffs are entitled to recover." I cannot distinguish this from the present case. The plaintiff here also sues separately to recover possession of his share, and it seems to me just as impossible to define the plaintiff's share in this case as it was in that. As I have said before, it again comes to this. It would only be possible to execute the decree which is asked for, either by treating this suit as constituting a partition or by treating the plaintiff as having at least *some* independent rights over his share; but according to the Full Bench decision, there not having been a partition according to one of the modes known to the law, this cannot be done.

It seems to me, therefore, that applying consistently the decision of the Full Bench, the plaintiff cannot have the decree which he asks for so far as the properties are concerned to which Appeals No. 170, No. 224, No. 234, No. 235, No. 239, No. 243, and No. 244 relate.

As regards No. 170, No. 224, No. 235, No. 239, No. 243, No. 244, the several defendants had, as shown in the answer to the first question submitted to the Full Bench, clearly no title, and the plaintiff has only failed, because his suit is wrongly framed. Considering, however, that many suits (for instance, Sudaburt's in this very family, see 6 Weekly Reporter, page) have been brought in this form without objection, I think that, as regards properties comprised in these appeals, the suit ought to be dismissed as against the respective defendants claiming those properties without costs, either in this Court or in the Court below.

As regards the property to which Appeal No. 254 relates, I think the suit ought to be dismissed with costs, both of this Court and of the Court below; because I think that, though it has been held that these defendants have failed to prove a good legal title to the property which they held, yet they are in a position in which they have a perfect right to take advantage of every technical objection to defeat the plaintiff's claim.

I must, however, repeat, in order to be understood, that I arrive at my conclusion in these seven appeals by the application of principles in which I cannot concur. Quite apart from the other and far more difficult question, as to what is the true condition of the members of a modern Hindoo family in regard to ownership, a question which I fear it is beyond the power of judicial argument and construction satisfactorily to solve, it appears to me that the decisions of the Madras and Bombay Courts, upon the point involved in the second question referred to the Full Bench, are the more correct. It appears to me that, when once you have arrived at the point of holding that a mere signification of intention is sufficient to constitute a separation without an actual partition by metes and bounds, and you couple

that with the acknowledged principle that any one member has a right to insist on a separation, it follows, almost as a direct logical consequence, that an unequivocal signification to that effect on the [illegible] member constitutes him a [illegible] share. As the Courts [illegible] are divided in opinion on this [illegible] I feel myself at liberty [illegible] which recommends itself [illegible] I also think, though here I [illegible] greater diffidence, that one of [illegible] evils of the Hindoo family system [illegible] fostered by the view of the law [illegible] by the Full Bench. It will, I fear, leave each member of the family as free, or almost as free, as he has hitherto considered himself, to deal with his share exclusively as his own. But the property will still remain joint, as it will almost always be impossible in a numerous family and where there are almost sure to be minors, to prove even the implied assent of all to a separation. The rules of inheritance of joint-family property, therefore, will still remain applicable to it; and whenever any of the family-property is attacked by a creditor, or other person claiming through the acts of any one or more of the owners less than all, the principle laid down by the Full Bench will afford a complete protection. I should hardly venture to put this view in opposition to that of the Judges with far greater experience than mine who formed the Full Bench; but this point does not appear to have been considered; and I must own that the history of this very family, which has been long before this Court, seems to me to afford a flagrant example of the evils which I indicate.

I do not pretend that all the frauds which are perpetrated under the protection of the Hindoo joint-family system would be avoided, if each member were able, as in parts of Bengal and as in the districts under the Courts of Madras and Bombay, to dispose of the joint-family property to the extent of his share. But I think those evils would be greatly lessened, if in the Mitakshara districts of Bengal also legal effect were given to what I believe to be the almost universal practice.

I do not think it necessary that I should express any opinion on the cross-appeal of Mr. Paul on behalf of Mr. Cosserat in No. 170. The facts are not before us, and at present I see no necessity why they should be investigated.

The objection taken that the suit, so far as it relates to the properties comprised in these seven appeals, is barred by the operation of the limitation-clause in Section 246 of the Code of Civil Procedure, was argued, but does not arise in respect to any of them. The properties to which these appeals relate were sold at the instance of execution-creditors without any claim or objection having been made on the part of the present plaintiff. He, therefore, brings this suit, not under the special provisions of Section 246, but on the ground that his property has been illegally attached and sold. That itself is a cause of action, and it has been frequently held that on such a cause of action a suit is not barred until the lapse of 12 years.

I now proceed to dispose of appeal No. 238 of 1866.

In this case, the defendants Lalla Bakir, Majeet Lall, and Joy Perkash Pandey, are said to be the appellants, and the property which is sought to be recovered from them appears to bear the same name as that claimed from Saligram Sahoy and Ram Rucha Sahoy, which claim is the subject of appeal No. 234.

It is stated that, in execution of a decree obtained against Bhugwan's widows, under circumstances precisely similar to the decrees already mentioned, this property was sold to the appellants It is admitted to have been joint-family property.

So far, therefore, the plaintiff has made out that the title of those appellants is defective. But the appellants have in this case also argued that the suit is barred by the limitation-clause of Section 246 of the Code of Civil Procedure, and this is the first of the appeals upon which that question really arises upon the facts. I might avoid deciding this point; but as it has been argued and the facts are all before us, I think I ought to express my opinion on it.

The property to which this appeal relates was sold in execution of a decree obtained by one Nundo Lall Bhuggut. Whilst the property was under attachment, and before sale, the plaintiff, through his present guardian, filed a claim under Section 246, and that claim was rejected on the 6th April 1864.

This suit was not commenced until more than a year had elapsed from that date, and

it is contended that it is consequently barred by the concluding words of Section 246.

It seems to have been finally adopted as the view of this Court that a person who considers his property has been wrongly seized and sold in execution has the choice whether he will make a claim under Section 246 or not. If he makes no claim, he can bring his suit to recover the property at any time subject to the general law of limitation; but if he does make a claim, and his claim is heard and rejected, then he must bring what is called his regular suit to establish his title within the year. In other words, by making the claim under Section 246, he lays himself open to the special law of limitation.

This view of the law was not contested by the pleader for the plaintiff, respondent, but he relies on the fact that the plaintiff, when the claim under Section 246 was filed, was and still is a minor. He, therefore, claims the benefit of Sections 11 and 12 of Act XIV. of 1859, and contends that, by the operation of that Section, the minor will have one year after he comes of age to bring his suit under Section 246; and he argues that, if he may bring the suit after he comes of age, *à fortiori* he may bring the suit before he comes of age, and therefore that he is not barred.

This argument involves several contested propositions; first, that Sections 11 and 12 of Act XIV. of 1859 apply to Section 246 of Act VIII. of 1859; secondly, that the appellant is under disability within the meaning of those Sections; thirdly, that the benefit of those Sections applies as well to the period during which the disability continues, as to the period when the disability has ceased.

With regard to the first proposition, it is to be observed that the terms of Sections 11, &c, of Act XIV. of 1859 are general, and the change of expressions in Sections 13 and 14, where somewhat similar provisions are expressly confined to the periods of limitation prescribed by the Act itself, is remarkable On the other hand, as pointed out, Section 3 provides that, "when by any law "now or hereafter in force, a shorter period of "limitation than that prescribed by this Act "is especially prescribed for the institution "of a particular suit, such shorter limitation "shall be applied notwithstanding this Act." Now, the words "notwithstanding this Act," might be considered to indicate the intention of the Legislature to exclude any effect of this Act whatever in relaxing any special period of limitation elsewhere provided. But they might also be meant only to preserve such special rules of limitation from being by implication altogether repealed, while all rules of limitation, both those under the Act and those existing under any other statutes, were to be subject to such general relaxations as are contained in Sections 11 and 12, or in Sections 9 and 10; for these Sections do not, when properly viewed, give an extended period of limitation, but rather modify the operation of the ordinary rules of limitation.

On the whole, I think that, looking to the general words of Sections 11 and 12, the intention was to lay down for all cases a rule of greater precision with regard to disability than that which is stated by Section 14 of Regulation III. of 1793. It can hardly be contended that this part of the old regulation is now in force, and, if not, this can only be because the provisions of Sections 11 and 12 of Act XIV. of 1859 have been substituted for it. But if so, the argument that these Sections are confined in their operation to Act XIV. itself falls to the ground, and the provisions must be held to be perfectly general. So far, therefore, I think the plaintiff's contention is good, and that the rules contained in Act XIV. as to disability are of general application, and are not confined to the period of limitation provided for by that Act.

The next question is, whether the plaintiff was under disability within the meaning of Section 11. It is said that he was not, because he had a guardian who might have brought the suit. Here again, I think, it is desirable to compare the language of the Section with that of the previous Regulation. Under the Regulation, by the Section already referred to, the plaintiff, in order to avoid the application of the rule, would have to show that "either from minority, or other good and sufficient cause, he had been precluded from obtaining redress." Under Act XIV., a minor would certainly not have to show anything of the kind, but he would be presumably entitled to the benefit of these Sections And the words of Section 12 are such as would seem to make the presumption conclusive, and to preclude all inquiry as to whether, under the particular circumstances of each case, the infant was,

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I now proceed to dispose of appeal No. 238 of 1866.

In this case, the defendants Lalla Bakir, Majeet Lall, and Joy Perkash Pandey, are said to be the appellants, and the property which is sought to be recovered from them appears to bear the same name as that claimed from Saligram Sahoy and Ram Rucha Sahoy, which claim is the subject of appeal No. 234.

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This suit was not commenced until more than a year had elapsed from that date, and

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It seems to have been finally adopted as the view of this Court that a person who considers his property has been wrongly seized and sold in execution has the choice whether he will make a claim under Section 246 or not. If he makes no claim, he can bring his suit to recover the property at any time subject to the general law of limitation; but if he does make a claim, and his claim is heard and rejected, then he must bring what is called his regular suit to establish his title within the year. In other words, by making the claim under Section 246, he lays himself open to the special law of limitation.

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The next question is, whether the plaintiff was under disability within the meaning of Section 11. It is said that he was not, because he had a guardian who might have brought the suit. Here again, I think, it is desirable to compare the language of the Section with that of the previous Regulation. Under the Regulation, by the Section already referred to, the plaintiff, in order to avoid the application of the rule, would have to show that "either from minority, or other good and sufficient cause, he had been precluded from obtaining redress." Under Act XIV., a minor would certainly not have to show anything of the kind, but he would be presumably entitled to the benefit of these Sections And the words of Section 12 are such as would seem to make the presumption conclusive, and to preclude all inquiry as to whether, under the particular circumstances of each case, the infant was,

"Can the nephew of Bhugwan Lall re-
"cover from the mortgagee, without redeem-
"ing the same, possession of the mortgaged
"share or any portion of it?"

The Full Bench did not answer the exact question put, not considering that it had full materials for doing so, but held that Bhugwan Lall could not, without the consent of his co-sharers, mortgage his undivided share in a portion of the joint-family property in order to raise money on his own account, and not for the benefit of the family.

As no objection was made to the reference to the Full Bench, I think we ought to accept its decision for the purposes of this case, and to hold that the appellants have failed to establish their title.

No. 235.—It was admitted on the last occasion that this appeal would be governed by the decision of No. 224.

No. 239.—In this case, the defendant Juggessur Sahoy is appellant. The facts of this case are, as far as I have been able to gather them, precisely the same as in appeal No. 170, and the points argued were the same; the same decision will therefore apply.

No. 243.—In this case, as far as I can discover, the appellant is Bundhun Sahoo, a defendant in the Court below, and he is in possession of mouzah Telna Khoord together with its Deara and Oopurwar or high land, which he claims to hold under a zur-i-peshgee lease executed by Mukhun Sahoo, a member of the joint family. He says that he was ousted, but on the 21st May 1863 he obtained a decree for the money lent on this security. That decree was obtained against the widows of Bhugwan Lall, and under it this property was sold in execution, and purchased by this appellant. I cannot find this property mentioned in the judgment of the Court below, but for some reason the plaintiff got a decree for it with the rest. It was admitted that this was joint-family property, and applying the decision of the Full Bench the defendant would seem to have a bad title, but I have great difficulty in seeing how the facts of this appeal really stand. It was, however, I think, assumed on the argument that the decision in appeal No. 170 would govern this case also; and I do not see how it can be distinguished.

No 244.—In this appeal, Ram Dyan Kowar, one of the defendants in the Court below, is the appellant. From his written statement, he appears to be in possession of mouzahs Goodrya and Kurunpoora. I am not able to identify these with any of the properties claimed in the plaint. The respondent claims to hold these mouzahs under a purchase at a sale in execution of a decree obtained by one Mussamut Gobindee as mother and guardian of Nundo Lall Sahoo against (as the respondent alleges) Bhugwan himself, but which was, in reality, against his widows. It also was not denied that this was joint-family property. This defendant's title, therefore, cannot be maintained.

I have now to consider what decree should, in my opinion, be drawn in the appeals No. 170, No. 224, No. 234, No. 235, No. 239, No. 243, and No. 244.

In these seven cases, the defendants have failed to prove their titles. And as the properties claimed are all portions of the joint-family property, and the plaintiff's titles to a 4-annas share in the family-property is not disputed, the plaintiff claims a decree for possession to that extent.

But it seems to me that the answer given by the Full Bench to the second of the two questions which we propounded precludes us from giving any such decree. As I have said, whether or no I concur in the principles laid down by those answers, I feel bound to apply them to the cases before us. And so doing, it seems to me impossible to give the plaintiff the decree which he claims, which is a separate decree for possession for his 4-annas share. I do not see how it is possible, if that decision be correct, that such a decree should be executed. And I think that, if the Full Bench decision be right, to attempt to execute it would be to do the very thing which the Full Bench say cannot be done, namely, to create a separation otherwise than by a partition.

Had Hureenath been of age when this suit was brought, the fact that his brother had been joined in it, and had assented to the claim, might have been taken as creating a partition by consent. I do not say this would be so. Even that might hardly be consistent with the Full Bench decision, but it is unnecessary to consider it, because Hureenath being a minor, no such arrangement can be inferred. There has been no enquiry

whether a partition would be for the benefit of the minor; nor indeed was it ever suggested until the last moment that such an inference was possible.

The truth appears to me to be that this suit has been brought just as Sudaburt's suit was brought under the notion that a member of a Mitakshara family, like a member of a Bengal family, may act to a certain extent independently in reference to his share. Whether or no such a notion is correct, I think, at any rate, it has been not uncommon to bring such suits as the present one, that is to say, for one member to sue separately for his share. But this is obviously inconsistent with the very strict principles laid down by the Full Bench.

I arrived at this conclusion upon an independent consideration of the answer of the Full Bench to the second question. And I am confirmed in thinking that I have rightly applied that decision, by a case reported at page 83 of Volume XII. of the Weekly Reporter, decided very shortly after it.

There Peacock, Chief Justice (who also delivered the judgment in the Full Bench case), says: "The plaintiffs, as two only of the "members of a joint family which does not "appear to have been separated, and as two "only of the owners of the joint property "which does not appear to have been parti-"tioned, are not entitled to any definite "share for which they can sue alone. The "right of action has been misconceived, and "the proper persons have not been made "parties. The suit should have been brought "by all the joint owners to set aside the "deed as to the charge created by Oodit, as "well as to the charge created by Jeetun; "and the suit should have been brought by "all the members of the joint family, and "not by two of them alone who, before "partition, have no definite share. If the "deed were to be set aside, it would be "impossible by the decree to define the share "which the plaintiffs are entitled to recover." I cannot distinguish this from the present case. The plaintiff here also sues separately to recover possession of his share, and it seems to me just as impossible to define the plaintiff's share in this case as it was in that. As I have said before, it again comes to this. It would only be possible to execute the decree which is asked for, either by treating this suit as constituting a partition or by treating the plaintiff as having at least *some* independent rights over his share; but according to the Full Bench decision, there not having been a partition according to one of the modes known to the law, this cannot be done.

It seems to me, therefore, that applying consistently the decision of the Full Bench, the plaintiff cannot have the decree which he asks for so far as the properties are concerned to which Appeals No. 170, No. 224, No. 234, No. 235, No. 239, No. 243, and No. 244 relate.

As regards No. 170, No. 224, No. 235, No. 239, No. 243, No. 244, the several defendants had, as shown in the answer to the first question submitted to the Full Bench, clearly no title, and the plaintiff has only failed, because his suit is wrongly framed. Considering, however, that many suits (for instance, Sudaburt's in this very family, see 6 Weekly Reporter, page) have been brought in this form without objection, I think that, as regards properties comprised in these appeals, the suit ought to be dismissed as against the respective defendants claiming those properties without costs, either in this Court or in the Court below.

As regards the property to which Appeal No. 254 relates, I think the suit ought to be dismissed with costs, both of this Court and of the Court below; because I think that, though it has been held that these defendants have failed to prove a good legal title to the property which they held, yet they are in a position in which they have a perfect right to take advantage of every technical objection to defeat the plaintiff's claim.

I must, however, repeat, in order to be understood, that I arrive at my conclusion in these seven appeals by the application of principles in which I cannot concur. Quite apart from the other and far more difficult question, as to what is the true condition of the members of a modern Hindoo family in regard to ownership, a question which I fear it is beyond the power of judicial argument and construction satisfactorily to solve, it appears to me that the decisions of the Madras and Bombay Courts, upon the point involved in the second question referred to the Full Bench, are the more correct. It appears to me that, when once you have arrived at the point of holding that a mere signification of intention is sufficient to constitute a separation without an actual partition by metes and bounds, and you couple

that with the acknowledged principle that any one member has a right to insist on a separation, it follows, almost as a direct logical consequence, that an unequivocal signification of intention to that effect on the part of one member constitutes him a separate owner of his share. As the Courts of this country are divided in opinion on this important question, I feel myself at liberty to express the view which recommends itself to my judgment. I also think, though here I speak with far greater diffidence, that one of the worst evils of the Hindoo family system will be fostered by the view of the law taken by the Full Bench. It will, I fear, leave each member of the family as free, or almost as free, as he has hitherto considered himself, to deal with his share exclusively as his own. But the property will still remain joint, as it will almost always be impossible in a numerous family and where there are almost sure to be minors, to prove even the implied assent of all to a separation. The rules of inheritance of joint-family property, therefore, will still remain applicable to it; and whenever any of the family-property is attacked by a creditor, or other person claiming through the acts of any one or more of the owners less than all, the principle laid down by the Full Bench will afford a complete protection. I should hardly venture to put this view in opposition to that of the Judges with far greater experience than mine who formed the Full Bench; but this point does not appear to have been considered; and I must own that the history of this very family, which has been long before this Court, seems to me to afford a flagrant example of the evils which I indicate.

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This argument involves several contested propositions; first, that Sections 11 and 12 of Act XIV. of 1859 apply to Section 246 of Act VIII. of 1859; secondly, that the appellant is under disability within the meaning of those Sections; thirdly, that the benefit of those Sections applies as well to the period during which the disability continues, as to the period when the disability has ceased.

With regard to the first proposition, it is to be observed that the terms of Sections 11, &c, of Act XIV. of 1859 are general, and the change of expressions in Sections 13 and 14, where somewhat similar provisions are expressly confined to the periods of limitation prescribed by the Act itself, is remarkable On the other hand, as pointed out, Section 3 provides that, "when by any law "now or hereafter in force, a shorter period of "limitation than that prescribed by this Act "is especially prescribed for the institution "of a particular suit, such shorter limitation "shall be applied notwithstanding this Act." Now, the words "notwithstanding this Act," might be considered to indicate the intention of the Legislature to exclude any effect of this Act whatever in relaxing any special period of limitation elsewhere provided. But they might also be meant only to preserve such special rules of limitation from being by implication altogether repealed, while all rules of limitation, both those under the Act and those existing under any other statutes, were to be subject to such general relaxations as are contained in Sections 11 and 12, or in Sections 9 and 10; for these Sections do not, when properly viewed, give an extended period of limitation, but rather modify the operation of the ordinary rules of limitation.

On the whole, I think that, looking to the general words of Sections 11 and 12, the intention was to lay down for all cases a rule of greater precision with regard to disability than that which is stated by Section 14 of Regulation III. of 1793. It can hardly be contended that this part of the old regulation is now in force, and, if not, this can only be because the provisions of Sections 11 and 12 of Act XIV. of 1859 have been substituted for it. But if so, the argument that these Sections are confined in their operation to Act XIV. itself falls to the ground, and the provisions must be held to be perfectly general. So far, therefore, I think the plaintiff's contention is good, and that the rules contained in Act XIV. as to disability are of general application, and are not confined to the period of limitation provided for by that Act.

The next question is, whether the plaintiff was under disability within the meaning of Section 11. It is said that he was not, because he had a guardian who might have brought the suit. Here again, I think, it is desirable to compare the language of the Section with that of the previous Regulation. Under the Regulation, by the Section already referred to, the plaintiff, in order to avoid the application of the rule, would have to show that "either from minority, or other good and sufficient cause, he had been precluded from obtaining redress." Under Act XIV., a minor would certainly not have to show anything of the kind, but he would be presumably entitled to the benefit of these Sections And the words of Section 12 are such as would seem to make the presumption conclusive, and to preclude all inquiry as to whether, under the particular circumstances of each case, the infant was,

in fact. disabled. It can hardly be supposed that the Legislature did not advert to the fact that an infant may take proceedings through his guardian, and if it had adverted to that fact, it would surely not have stated the disability of the infant in such absolute terms, and yet have intended that this disability was to be after all only a modified one. Of course, also, the Legislature must have had before it the terms of Section 14 of the Regulation of 1793, which seems to have been framed expressly to meet such cases as the present, and to give to the minor the benefit of a modified disability only. The change of expression seems almost expressly to show that, under the new law, the disability was to be considered absolute. On this point also, therefore, I think the plaintiff's contention is right.

But, I think, his argument falls on the last point. I think that, on one point at any rate, the words of Section 11 are clear and express, namely, that whatever benefit the minor is to have is to accrue to him, not during the disability, but when the disability ceases. Indeed, making the sweeping presumption which, I think, the Legislature has done as to the disability of infants, it could not consistently entertain the notion that any advantage could be taken of its provisions by a minor during his minority In fact, the Legislature has thought fit to lay out of consideration altogether the possibility of an infant bringing a suit by his guardian which the framers of the old Regulation had contemplated. If any consideration arising out of guardianship were to be imported into the construction of these Sections, I fear we should introduce the greatest confusion. Nor does it seem to me that the introduction of such considerations would be decisive in favor of the plaintiff. If we modify the words of Section 11, we must modify the words of Section 12 also, and the question whether a minor who has had a guardian appointed is to be considered under disability will present itself in a very different shape. But I think that, reading the words of the Act in their ordinary and natural meaning, the plaintiff is under disability, but can derive no advantage from that disability till he comes of age.

I have come to the above conclusions on the construction of these Sections of Act XIV. of 1859, chiefly by comparing the terms of the late statute with those of the old Regulation The provisions of this Regulation, with far less pretensions to technical accuracy of expression, and leaning far more to the discretion of the Judge, are considerably clearer and more intelligible than the provisions of the new Act upon which I never gave an opinion without the greatest diffidence and hesitation.

The result is that, as against the defendants who are parties to this appeal, the plaintiff's suit, in whatever way it is disposed of on the other point, ought to be dismissed with costs in both Courts, on the ground that it was not brought within the year prescribed by Section 246. Whether or no the plaintiff will be in a better position on his coming of age, does not now arise, and I express no opinion on it.

No. 240.—In this case, the facts appear to be the same, and the points for decision the same as in No. 238. The same decision will therefore apply.

No. 245.—In this appeal, Nundo Koomar Lall, a defendant, is appellant. He is in possession of mouzahs Bedhya Rutten, Saroy Roy, and Kulyanpore, together with other mouzahs mentioned in his written statement, but this appeal only relates to the three mouzahs here mentioned. I suppose Bedhya is the same as what the plaintiff calls Puddhya. The defendant claims to hold these three mouzahs under a purchase at a sale in execution of the decree of Nundo Lall Bhuggut against the widows of Bhugwan already mentioned in appeal No. 238. I have not discovered on what grounds the plaintiff obtained a decree in the Lower Court. The facts, as far as I can gather, are precisely the same as in appeal No. 238, and I need not repeat the observations I made in disposing of that case. I think the suit as against this defendant should be dismissed, with costs in both Courts, on the ground that it is not brought within the time prescribed by Section 246 of the Code of Civil Procedure.

I have rested my decision in the appeals No. 238, No. 240, and No. 245 on the point of limitation. Had the suit, in my opinion, not been so far barred, then these three cases would have been governed by the decision in No. 170 and the other similar cases. That is to say, the plaintiff's suit would, as regards the properties comprised in them, have been still dismissed, but without costs.

Kemp, J.—I concur in the decrees which my learned colleague proposes to pass in

cases Nos. 164, 165, 169, and 237 for the reasons stated by him. I think that the principle laid down in the Full Bench decision referred to by Mr. Justice Markby, and which governs the remaining cases, is a correct principle.

I do not think it necessary to express any opinion on the question of limitation which is raised in appeals Nos. 238, 240, and 245, as those cases are also governed by the Full Bench ruling.

Appeals Nos. 224, 235, 239, 243, and 244 will be decreed, the suit of the plaintiff as at present framed in respect of the properties comprised in these appeals being dismissed, but without costs either in this Court or in the Lower Court.

Appeal No. 170, preferred by the plaintiff in respect of that portion of the claim dismissed by the Lower Court, will also be dismissed without costs in either Court. The appellant in No. 165 is entitled, as against the plaintiff, to his costs in the Court below. He must pay the costs in this Court of Juggessur Roy, who was unnecessarily made a party to this appeal, and will recover his own costs from the plaintiff.

In appeals Nos. 234, 238, 240, 245, and 237, the decree of the Lower Court will be reversed, and the plaintiff's suit dismissed with costs in both Courts, and in appeals Nos. 164 and 169 the decree of the Lower Court will also be reversed, and the suit of the plaintiff Lutf Ali Khan dismissed with costs, both in this Court and in the Court below.

The 17th November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Ex-parte judgments—Appeal—Section 58, Civil Procedure Code.

Case No. 1002 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 20th February 1870, reversing a decision of the Deputy Collector of that District, dated the 30th October 1869.

Nuseeb Singh (one of the Defendants), *Appellant,*

versus

Ranee Sooneet Kooer (Plaintiff) and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondents.

No appeal lies from an *ex-parte* judgment where the reasons assigned for the absence of the defendant are wholly unsatisfactory.

Jackson, J.—It is unnecessary to consider the point raised, because the judgment passed on the second hearing of this case was passed *coram non judice.* It was passed, under the circumstances spoken of in Section 58, against a defendant *ex parte,* and that defendant appeared before the Court 18 months after the decree, and did not show to the satisfaction of the Court good and sufficient cause for his previous non-appearance. On the contrary, the Deputy Collector expressly states that the reasons assigned by him for his non-appearance were wholly unsatisfactory, and states why they were so, in which view we entirely concur with him. The judgment, therefore, originally passed against this defendant, who did not appear, ought not to have been disturbed, and no appeal lay against that judgment by the terms of Section 58.

The special appeal, therefore, must be dismissed with costs.

The 17th November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Water-course—Rights—User.

Case No. 1084 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 8th February 1870, reversing a decision of the Moonsiff of that District, dated the 27th May 1869.

Maharanee Indurjeet Kooer (Defendant), *Appellant,*

versus

Luchmee Kooer and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan for Appellant.

Mr. R. E. Twidale for Respondents.

The proprietor of a pyne has a right to allow or to deny the use of water flowing through it to other per-

sons unless they have also a clearly defined right enabling them to control the water, and convert it to their own use—a right clearly found to have originated in some grant or valid contract, or to have been exercised for so long a period that such title may be presumed.

Jackson, J.—THE facts of this case appear shortly to be these: The defendant is owner of a mouzah called Sooltanpore, and has a pyne which goes by that name for the purpose of irrigating the lands of his mouzah, which pyne runs through the plaintiff's mouzah of Chuck Sumra. The plaintiff has been used to avail himself of the water running through this pyne, and diverting some of it to his own land by means of an opening called *choyla*, and also by contrivances for lifting the water up, called *daglas*. The defendant, it seems, finding his supply of water unduly restricted by these mechanical contrivances of the plaintiff, has cut them off, and has refused to allow the plaintiff the easement which he previously enjoyed, and the plaintiff, therefore, brought his suit in order to compel the defendant to allow him such easement.

The Moonsiff gave the plaintiff only partial relief, but, on appeal to the Subordinate Judge, that Court has given the plaintiff all that he asked for, excepting only the damages which he claimed, in respect of which the evidence was considered to be insufficient.

The defendant comes up here in special appeal, and contends that plaintiff has not given sufficient or satisfactory proof of the existence of any right which entitled him to withdraw from the defendant's pyne the water-supply which he requires.

The question of how far riparian or other owners of land are entitled to avail themselves of water flowing in channels which pass through their lands has been considered frequently in this Court of late; and there are two cases which were referred to by the pleader for the appellant in the course of the argument, one of which is to be found in 6 Weekly Reporter, page 99, and the other in 7 Weekly Reporter, page 1. The considerations upon which cases like these ought to be decided are set forth in those two cases.

If it appeared that the Subordinate Judge had really had his mind directed to the proper considerations in this case, I do not know that we should be inclined, even if we were competent, to disturb his judgment; but it seems to me that he has not taken the correct view of the rights of the parties. It is alleged by the defendant, and is not denied, in short, is admitted by Mr. Twidale, who appears for the respondent, that the pyne from which the water in dispute has been drawn is, in fact, the property of the defendant. That being so, the defendant has a clear right to allow or to deny the use of water flowing through that pyne to other persons, unless they have also a clearly defined right which enables them to control the water, and convert it to their own use.

Now, in this case, so far as the Subordinate Judge's judgment shows, there is no such clearly defined or ascertained right. He states that several witnesses show that the lands of the plaintiff's mouzah have been "all along," according to "ancient practice," irrigated through a *choyla* by erecting embankments and 5 *daglas*. There is nothing to show here what the origin of that right was, how long it had existed, what its nature was, and to whom it appertained; and from the very short and cursory notice given to the evidence of the witnesses by the Subordinate Judge, and from the much greater attention which he seems to have paid to the contents of certain field-maps and settlement-roobokarees detailed in the judgment, I am inclined to think that he has decided the case more on the basis of those documents than in reliance on the witnesses.

Now, those documents, however trustworthy and valuable evidence they may be so far as they go, are of recent date, that is to say, between the years 1859 and 1861. I do not think it can be contended that a mere recital in such documents as periods not more distant than 8 or 10 years before the suit can be made the foundation of such a right.

I think, therefore, that it was the business of the Subordinate Judge, before he gave the plaintiff a decree so seriously entrenching upon the defendant's proprietary rights, to ascertain clearly from the evidence before him what the nature of the plaintiff's right actually was, what the period of its commencement, and what its origin.

It may very well be that, as the defendant's water-course is constructed in part over the plaintiff's land, there was an understanding or agreement between the parties that, in return for the accommodation afforded to

the defendant by allowing him to construct the pyne, the plaintiff's ancestors were allowed a part of the water-supply. If so, that ought to be easily ascertainable. On the other hand, it may be that the practice of drawing water from the defendant's pyne (of which, by the bye, period of construction has not been ascertained) is so ancient that some grant or some other valid origin of the right ought to be presumed, but that must be clearly stated. It will not do to say that "all along" or "for a long time" the plaintiff has been accustomed to use the water. It must be clearly found that the right originated in some grant or some valid contract, or that the right had been exercised for so long a period that such title may be presumed.

I think, therefore, that the case must go back to the Lower Appellate Court in order that it may be considered with advertence to these observations and to the cases which I have referred to.

Glover, J.—I concur in the order of remand.

The 18th November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Bhikya rents—Jurisdiction—Section 24, Act X., 1859.

Case No. 719 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 25th February 1870, affirming a decision of the Deputy Collector of Howrah, dated the 28th October 1869.

Bholanath Mookerjee (Plaintiff), *Appellant,*

versus

Brijo Mohun Ghose (Defendant), *Respondent.*

Baboo Ubinash Chunder Banerjee for Appellant.

Baboo Jadub Chunder Seal for Respondent.

A sum of money paid (Bhikya) by ryots to the zemindar under compromise, instead of on suits for enhancement, comes within the category of rent; and a suit by a zemindar against a gomashta to recover such moneys comes within the purview of Section 24, Act X. of 1859.

Bayley, J.—I AM of opinion that the judgment of the Lower Appellate Court in this case must be reversed.

It appears that the farmer, having power under the law to sue the ryots for enhancement, came to a compromise with them to the effect that he would refrain from suing for enhancement in full, in consideration of their paying him a certain amount in addition to that hitherto paid; this excess apparently to be collected, as usual, by the agent appointed by him for collecting his ordinary rents.

The agent refused to render an account of this surplus collection, and hence this suit by the plaintiff.

The Lower Appellate Court has dismissed the plaintiff's suit on the ground that the money so collected by the plaintiff's agent was not *rent*, and therefore he was not liable to account for it under Act X. of 1859.

We think the Lower Appellate Court is wrong. A sum of money paid by ryots to the zemindar under compromise, instead of on suits for enhancement of rents, can hardly be said not to come within the category of "rents." The word "Bhikya" may mean something of the same character as abwab or any other cess; but so long as the ryot continues to pay it in consideration of not being sued for enhancement of rent, it can hardly be said to be anything but rent.

In this view I would reverse the judgment of the Lower Appellate Court, and remand the case for the account to be taken. The appellant will get his costs of all the Courts up to this special appeal.

Jackson, J.—I quite concur with Mr. Justice Bayley in the order proposed by him. I think the Lower Court is wrong in saying that the moneys collected by the defendant as Ijardaree Bhikya are not *rents.* They are moneys paid by ryots to the gomashta for the zemindar, and seem to be just as much rent as are all other rents paid to the gomashta for the zemindar. It seems to me that this is a suit by the zemindar against an agent employed by him in the collection of rents, and as such comes within the purview of Section 24, Act X. of 1859.

The 19th November 1870.

Present:

The Hon'ble W. Markby and Dwarkanath Mitter, *Judges.*

Churs—Riparian proprietorship—Section 4, Regulation XI. of 1825.

Case No. 24 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 15th December 1869.

Nobin Kishore Roy (Defendant), *Appellant,*

versus

Jogesh Pershad Gangooly and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter, Kalee Mohun Doss, and *Kashee Kant Sein* for Appellant.

Baboos Onookool Chunder Mookerjee, Sreenath Dass, and *Tarucknath Dutt* for Respondents.

So long as the bed of a navigable river is washed by the ordinary flow of the tide at a season when the river is not flooded, it remains *publici juris;* or if it is vested in any one, is vested in the Crown, not under Regulation XI. of 1825 or for mere fiscal purposes, but as representing, and as it were, a trustee for the public.

A channel which can be crossed on foot only at the extreme ebb of the tide, and probably for some short time before and after, is not "fordable" within the meaning of Clause 3, Section 4, Regulation XI. of 1825.

Markby, J.—THIS was a suit brought to recover possession of 12,000 beegahs of land. The land in question is a chur in the river Megna, a large navigable and tidal river. The particular portion of the Megna where the chur is situated is called the Gogra.

As the case is put before us, the plaintiffs claim this chur on these grounds. They say that it has been a long time in existence, and that, under the various names of Kallygazee, Pangaria, or Saboochea, they have been repeatedly recognized by the Government Officers of Revenue as in possession of, and entitled to, it; that it is now, and has been for sometime, connected with the plaintiffs' acknowledged estate of Ababil by a fordable channel; and that they are, therefore, entitled to it under both branches of Clause 3, Section 4, Regulation XI. of 1825. If it be treated as a chur connected with the main land by a fordable channel, they contend they are entitled to it as riparian proprietors; if it be treated as an island at the disposal of Government, they contend that it has been disposed of by Government in their favor.

The defendants also assert that the chur has been a considerable time in existence; but they deny altogether its identity with either of the churs Kallygazee, Pangaria, or Saboochea. They do not now attempt to make out a title to the chur, but they assert that it has been ever since its formation in their possession.

The Subordinate Judge found that the chur in dispute was that claimed by the plaintiffs in 1859 as chur Saboochea; and that, in spite of the opposition of the predecessors in title of the defendants, the plaintiffs obtained from the Government a recognition of their right to that chur. He finds, however, that the plaintiffs never had possession of that chur, but that the defendants had possession of it in 1866, as found by the Magistrate in a criminal proceeding in that year, though the Subordinate Judge considers that the defendants' possession had been then only recently obtained. There is a great deal in the judgment about the defendants having had *de facto* possession and the plaintiffs having had "symbolical" possession, which I do not precisely understand. The Subordinate Judge, however, expresses a decided opinion that "the witnesses and kubooleuts and "sunnuds produced by the litigants are all "false. Lastly," he adds, that "a glance at "the map prepared by the Civil Court "Ameen in the case of 1866 between these "very litigants, will show that the channel "between the main group (*i. e.*, the plaintiff's acknowledged estate) and the new "formation (*i. e.*, the disputed chur) is "fordable." Accordingly, he gives the plaintiffs a decree.

The Subordinate Judge having disbelieved all the oral testimony (and false to a very considerable extent it undoubtedly was), we are in this Court thrown back entirely on the various proceedings of the Revenue Officers, in which the estate of the numerous churs in this neighbourhood is sometimes directly, sometimes incidentally, described.

I think that we have not been shown the slightest trace of the existence of this chur prior to the year 1859. In that year, an enquiry was made by Mr. Lance, Collector of Bhoolooa, with reference to a chur said to have formed in this part of the river.

I think it may fairly be concluded that this formation was the nucleus of the chur now under dispute. But, for reasons I shall state hereafter, I do not think it was then in a state in which it could properly be described as a chur in the technical sense of the term. The result of Mr. Lance's enquiry was that about 5,000 acres were found "to be visible during the ebb tide, but remained under water during the flood tide." The plaintiffs, on that occasion, claimed this formation as a contiguous accretion to their chur Ababil, but the Collector says he sent a Baboo to enquire, and that the Baboo reported that he himself in a large boat went round the chur, and that large boats and even sloops plied round the chur. The Collector also states that he is informed that this formation lies at a great distance from Ababil, so distant that it (Ababil) cannot be seen. On this information, Mr. Lance decided to take possession of this formation in the name of Government.

The plaintiffs then appealed to the Commissioner, and they succeeded in inducing the Commissioner to come to what appears to me to be a very extraordinary conclusion, namely, that this formation, which the Collector finds to be far away to the south of Ababil, which had scarcely then appeared above water, was identical with an old chur called Kallygazee shown by all the maps to be far more to the north, and to the west of Ababil. The Commissioner does not seem to have made any further enquiry, nor does he show how he arrives at his conclusion: he merely says that there is no doubt about it. I think, however, that I cannot do otherwise than accept the facts accepted by Mr. Lance upon an enquiry carefully made.

There is not the slightest evidence that the plaintiffs took possession of this formation, for I agree with the Subordinate Judge in thinking the parol evidence to that effect unreliable; indeed, it is obvious that, in the state in which the formation then was, it was impossible to do so.

Some time about 1846 a survey-map was made, and in that map this formation was marked as separate from Ababil, and numbered 1032, Ababil being numbered 992. Some objection appears to have been taken to this by the plaintiffs, and an enquiry was made, the result of which was that an officer named Brojo Soondur Mitter went to the spot, and reported that "the portion of this which was out of water during the ebb tide on that date" (and this is admitted to be the date on which this officer went to the spot, that is to say, the 30th of March 1865) "had been measured twice over." Accordingly, an alteration was directed to be made in the revenue-survey.

This would certainly seem to show that this formation was at that time treated by the officers of Government as a chur belonging to the plaintiffs. But it would also show that, on the 30th March 1865, it was still only visible at ebb tide.

The next proceeding which throws any light on the condition of this formation is the report of Baboo Gokool Chunder Roy, dated the 21st August 1865. He was on the spot from the 2nd to the 7th April of that year, for the purpose of ascertaining whether this formation was, as alleged by the defendants who had put forward a claim to it, a re-formation of a chur called Baloomara. One of the points the Baboo was directed to inquire into was the state of the river between this formation and the chur Ababil, and he reports as follows :—

"The river between this new chur and "the re-leased chur Ababil is very large. At "no season of the year this river can be "forded, and it can be crossed only by large "boats either at the time of high water or "low water, and it cannot be crossed in less "than an hour of time. On the 6th April "I went in a boat, and my omlahs accom-"panied me in a second boat, and tried by "various means to ascertain the breadth and "depth of this river by measuring it with "a rope; and yet I failed. The evidence of "Gour Manjee, a second Gour Manjee of "Lakheepore, and Ashkur and Mahomed "Ali of Khidirpore, and Nymuddeen of "Kundokarpore on the eastern side of this "river, proves that the river between this "new chur and chur Ababil has all along "been in existence, that is, from long before "the year 1863, and that large boats, "pinnaces, &c., always pass by it. Dinga "Mallick and Jaggutteer lie in the border "of the large river, and large quantities "of lands of these kismuts have gradually "been, and are still being, washed away by "the river."

The Baboo does not state whether the formation was visible at high water as well as at ebb, but it may be inferred that at that time it was so, because he speaks of the distance between it and Ababil as high water,

which assumes that at least some part of it was then visible. And very soon after that, the defendants must have got into possession of it, for we find that, on the 6th October 1866, the defendants filed a suit for the purpose of obtaining from the Court a declaration of their title, which they followed up, according to the usual tactics adopted in these cases, by an application to the Magistrate under Section 318 of the Code of Criminal Procedure, alleging that a breach of the peace was likely to occur in consequence of the plaintiffs' disturbing them in their possession. The defendants succeeded in obtaining from the Magistrate an order that they should be retained in possession; but Mr. Henry Richardson, the Judge of Tipperah, held in the civil suit that the present defendants, who were then plaintiffs, failed to prove any title to this formation, and this decision was affirmed by this Court on appeal. But there can be no doubt from the finding in this suit and that by the Magistrate under Section 318 that the defendants were then in actual possession of the formation, that it was to some extent continuously above water, and capable of being turned to some account.

Reviewing this evidence, it seems to me that the only inference we can draw from it is that, up to and including the date of Baboo Brojo Soondur's visit in 1864, the land which is the subject of dispute was only a sandbank covered with water at high tide and dry at ebb. That a chur was in course of formation is very probable, but I think that the first evidence that a chur was actually in existence is contained in the report of Baboo Brojo Soondur's visit in April 1865.

Now, I feel bound to express my entire dissent from the doctrine which has been put forward in this case, and which seems to have received some countenance from the Revenue Authorities, that the bed of a navigable river in this state can be the subject of private property. So long as it is washed by the ordinary flow of the tide at a season when the river is not flooded, I think that it remains *publici juris*, or, if vested in any one, that it is vested in the Crown; not under Regulation XI. of 1825 and for mere fiscal purposes, but as representing, and as it were a trustee for, the public. That land in this condition is not subject to private rights of ownership is universally recognized, and it might be most detrimental to the interests of navigation if it were otherwise.

I think, therefore, that we ought to treat the chur in this case as having come into existence some time after April 1864 and before April 1865; and hence it follows that all proceedings of either party or of the Government Officers in reference to the formation prior to that period avail nothing whatever for any purpose connected with this case.

The plaintiffs' title, therefore, must depend wholly on the evidence that the channel between Ababil and the present chur is "fordable" within the meaning of Clause 3, Section 4, Regulation XI. of 1825.

The report of Baboo Gokool Chunder Roy above quoted shows conclusively what the state of the channel was in April 1865: it was then clearly unfordable. In 1866, pending the suit brought by the defendants for a declaration of their title, an Ameen visited the spot, and the map which he made is put in evidence, but not his report. The map shows a line of figures which, we think, we may assume to indicate the depth of the channel along that line, and these figures show a maximum depth of 3 cubits or $4\frac{1}{2}$ feet. Unfortunately this same Ameen is admitted to have been guilty of mal-practices on a subsequent occasion in reference to this very case, so that his figures are not very trustworthy; and we have no information whether his soundings were made at high or low water. At any rate, I think that the conclusion of the Subordinate Judge, based on a glance at this map, is somewhat too hasty.

The only other evidence on which we can, with much safety, rely subsequent to the report of Baboo Gokool Chunder is the report of the Officiating Collector, Mr. Whinfield, of 26th January 1869. That would be the time of the year when the river is at its lowest, and in paragraph 31 he says: "I passed down the channel called "the Gogra about ten days since at about "half ebb, and there saw what appeared to "be a channel at least a mile broad be-"tween Ababil and the disputed chur, and I "felt sure that a channel of such width "could not be fordable; but on afterwards "visiting this channel *at the extreme ebb* "of the tide, I found that the water had "receded, leaving a great extent of sand dry "on both sides, and that it was easily ford-"able. Several men crossed the channel in "my presence at the points marked with "dotted red lines. I had a compass and the

" map with me, and noted this down at the " time. Thus, whatever may have been the " case four or three years ago, the disputed " chur is certainly an accretion to Ababil at " the present time. Boats, and even large " boats, can still pass through the channel at " high water, but at ebb tide even small " boats stick. My panswye, drawing 1½ " cubit, stuck quite at the east entrance of " the channel at low water, though a couple " of hours after I saw a Dacca pulwar " going over the same ground when the " flood tide came."

The question then really is whether Mr. Whinfield was right in his opinion that a channel in the condition which he describes, that is to say, which can be crossed on foot at the extreme ebb, and probably for some short time before and after, is "fordable" within the meaning of Clause 3 of Section 4 of Regulation XI. of 1825.

I have given this question a good deal of consideration because of its importance, and because I differ from the construction put upon the word by Mr. Whinfield. Upon the whole, I have come to the conclusion that the Legislature did not intend to give to the riparian proprietor the property in an island formed in a bed of a navigable river, when the channel which intervenes is, under ordinary circumstances and at the most favorable season, unfordable at least 16 hours out of every 24.

I think, therefore, that the plaintiffs have proved no title to this chur.

A good deal of reliance was placed in the argument for the plaintiffs on the fact that the defendants had been found to have no title, and it was contended that they were, therefore, mere squatters; that their possession was a knavish possession, and that, therefore, every presumption should be made in the plaintiff's favor; and a case was referred to in the 5 Weekly Reporter, page 283, where Sir Barnes Peacock cites a passage from Domat's Civil Law upon this topic. But the principle there, under consideration, has no application whatever to the present case. The defendant does not seek to establish out of his possession any title of his own; he merely claims the right, which all defendants alike have in a Court of law, that no decree should pass against them until the plaintiffs have established their claim. To substitute the plaintiffs for the defendants in the possession of this chur would be to substitute one set of squatters for another.

Moreover, as regards the respective merits of these rival claimants, I think that there is nothing whatever to choose between them. Each party may have considered that they had some claim to this chur, and may have been justified in asserting it. But I cannot help seeing that, in the manner in which they have supported their claim, both parties have been somewhat unscrupulous.

Under these circumstances, we shall reverse the decision of the Court below, and dismiss the suit, but each party will bear his own costs in this Court and in the Court below.

I have only to add that my judgment in this case is given on the construction of Clause 3, Section 4, Regulation XI. of 1825, as the decisions stood at the time of the argument, and without reference to a recent Full Bench decision* which, I understand, would make the case still more favorable to the defendants.

Miller, J.—I am also of opinion that this suit ought to be dismissed without costs.

There is no satisfactory evidence on the record to show that the lands now in dispute are identical, either wholly or even partially, with the chur which was claimed by the Revenue Authorities under the various names of Kallygazee, Pangaria, and Saboochea.

The story of long possession put forward by the plaintiffs is without any foundation whatever. The evidence of the witnesses examined by them is manifestly unworthy of credit. The nature and condition of the property in dispute, together with the other circumstances of the case, clearly show that the defendants were the first persons who took actual possession, although their possession must have commenced shortly before the award made by the Magistrate under the provisions of Section 318 of the Code of Criminal Procedure.

As to the maps prepared by the Revenue Authorities, I am of opinion that they do not throw much light on the question of identity. They were not prepared scientifically, and it would be, therefore, dangerous to rely upon such rough sketches as they are in determining the identity of a mere sandy formation thrown up in the middle of a river like the Gogra, which is constantly shifting its bed.

* 12 W. R., F. B., p. 25.

But even if the plaintiffs had succeeded in showing that the disputed chur, or any portion of it, is identical with the chur designated as Kallygazee alias Pangaria alias Saboochea, they have given no reliable evidence to prove that they were the lawful owners of the latter chur. The Revenue Authorities did not and could not determine any question of title in favor of the plaintiffs, and I do not see any reason to justify the contention that the proceedings by which those authorities abandoned the Government claim to the churs Kallygazee, Pangaria, and Saboochea can be regarded as a transfer of the title of the Government to those churs in favor of the plaintiffs.

But, be this as it may, there can be no doubt that chur Saboochea was visible during ebb tide only up to the 30th of March 1865. This fact is fully established by the roobokaree of the Deputy Collector, Baboo Brojo Soondur Mitter, of that date; and I entirely concur with my learned colleague in holding that a chur in this condition, if it can be called a chur at all, cannot be treated either as the property of the Government or as that of a private individual, under the provisions of Regulation XI. of 1825.

As to the title set up by the plaintiffs under the provisions of Clause 3, Section 4, Regulation XI. of 1825, I am of opinion that it has not been made out. My learned colleague has fully entered into the evidence bearing upon this point, so that any further remarks on my part are unnecessary. I wish to add, however, that it has been recently decided by a Full Bench of this Court that, before a plaintiff can be allowed to maintain a suit under Clause 3, Section 4 of Regulation XI. of 1825, it is incumbent upon him to prove that the channel separating his estate from the chur claimed was fordable at the time when the chur was first "thrown up." No evidence of any kind has been given to prove this fact, and the plaintiffs' claim must, therefore, fail upon all points.

The 21st November 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Half sister by mother—Succession.

Case No. 1270 of 1879.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 30th March 1870, modifying a decision of the Moonsiff of Pubna, dated the 30th April 1869.

Mothooranauth Mozoomdar and another (Plaintiffs), *Appellants,*

versus

Eusuff Ali Khan and another (two of the Defendants), *Respondents.*

Baboos Kallee Mohun Doss and *Issur Chunder Chuckerbutty* for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

A half-sister by the mother is entitled to succeed only when the deceased has left no children.

Mitter, J.—We are of opinion that the Judge is wrong in holding that Peerunissa was entitled to succeed to a 6-annas share of the property left by Bahadoor Khan. A half-sister by the mother is entitled to succeed only when the deceased has left no children. In this case, it is admitted that Bahadoor Khan left a daughter behind him. The daughter and the widow were, therefore, entitled to succeed to the whole estate to the exclusion of the half-sister Peerunissa.

We reverse the judgment of the Lower Appellate Court, and we declare that the plaintiffs are entitled to obtain possession of the whole 16 annas of the lands sued for, with all costs of the litigation in all the Courts.

The 21st November 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Execution—Dispossession—Limitation.

Case No. 1015 of 1870.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 14th February 1870, affirming a decision of the Moonsiff of Pooree, dated the 17th September 1870.

Attotram Doss (one of the Defendants), *Appellant,*

versus

Balunkee Doss (Plaintiff), *Respondent.*

Baboo Mohendro Lall Mitter for Appellant.

Baboo Obhoy Churn Bose for Respondent.

Where the right, title, and interest of a party had been sold in execution, but possession was delivered to the purchaser more than 15 years after the sale, such irregularity was held not to entitle the party first mentioned to a decree in a suit to recover the property, unless he could prove possession for a period of more than 12 years before he was dispossessed.

Mitter, J.—We are of opinion that the judgment of the Lower Appellate Court in this case, affirming the judgment of the first Court, ought to be reversed. It has been laid down by the Privy Council, it is true, that adverse possession for more than 12 years, not only bars the remedy, but creates a title in favor of the person in possession. But before the plaintiff can succeed in this case, it is necessary for him to prove that such possession had been held by him for a period of more than 12 years before he was dispossessed by the defendant under an order passed by the Court in execution of decree. It is admitted by the pleader for the plaintiff that there is no evidence given by his client on this point, and in the absence of such evidence, it is impossible to make out on what ground the plaintiff can maintain this suit after his right, title, and interest in the property have been already sold in execution of a decree passed against him by a Court of competent jurisdiction. The officer who presided in the execution-department might have committed a mistake in delivering possession to the defendant more than 15 years after his purchase; but no irregularity committed by that officer would entitle the plaintiff in this case to a decree in his favor. It is admitted on both sides that the parties who were in actual possession of the property in dispute were certain farmers who had obtained a lease from the plaintiff's predecessor, sometime previous to the sale in execution of the decree. But there is nothing on the record to show that the plaintiff, or his predecessor, continued to receive the rents subsequent to the date of that sale. It cannot be said that the plaintiff had no opportunity to give evidence on this point. An issue was distinctly laid down by the Court of first instance, and it was the fault of the plaintiff if he did not avail himself of the opportunity thereby given to him to, prove his case.

The decisions of both the Lower Courts therefore, are set aside, and the plaintiff's suit dismissed with all the costs of this Court and of the Lower Courts.

The 21st November 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Sub-lessee—Limitation.

Case No. 1354 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 26th April 1870, reversing a decision of the Moonsiff of Pubna, dated the 12th August 1869.

Mohurum Shaikh (Defendant), *Appellant,*

versus

Nowkurree Doss Mohuldar (Plaintiff), *Respondent.*

Baboos Mohinee Mohun Roy and *Taruck-nath Palit* for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

A sub-lessee without title cannot plead any law of limitation against the land-owner either himself or through his lessor.

Bayley, J.—We think the judgment of the Lower Appellate Court in this case must be reversed.

The plaintiff's case was that he received a *dur-jote* lease from one Brojonath Shaha, the zemindar, and held possession under the same until ousted by the defendant; but it appears that Brojonath's title, though disputed, has not been enquired into by the Subordinate Judge, who quite wrongly holds that such an enquiry is immaterial. In proof of the plaintiff's dur-jote lease, it is true, the Subordinate Judge relies upon the evidence of two witnesses one of whom attests the document; but reading the whole judgment, it is difficult to say that he rests his finding on that alone. On the contrary, there seem to be three or four additional reasons, the sum total of which forms the basis of his judgment, and not only are some of these reasons weak in themselves, but incorrect in law. For instance, the inference drawn of the genuineness of the pottah from the fact of its being attested by one witness on the supposition that, had it been a spurious deed, more witnesses might have been easily called to attest it, is certainly not warranted by law or reason. It might as well be argued on the other side from this circumstance that the deed is spurious, and that the object of having one witness to it instead of more was to avoid multiplying the chances of detection. We think, therefore, that the arguments of the Lower Appellate Court are not correct in law, and that both the lessor's title and the legal effect of the evidence in support of the lessee's pottah must be fully gone into.

It is pressed by the special respondent that his client has, under the finding of the Lower Appellate Court, acquired a right of occupancy; but Section 6, Act X. of 1859, which, by the bye, is not mentioned in the judgment, does not refer to lands like those in question in this suit.

On the general point of limitation raised by the special respondent, we have to observe that a sub-lessee without title cannot plead any law of limitation against the landowner either himself or through his lessor. In re-trying the case, therefore, the Lower Appellate Court should also consider the legal effect of the kubooleut of the special appellant. The case is remanded for re-trial with reference to the foregoing remarks.

The 21st November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Reservation in decree — Claimants not parties —Section 230—Civil Procedure Code—Onus probandi.

Case No. 77 of 1870.

Regular Appeal from a decision passed by the Judge of Sarun, dated the 23rd September 1869.

Judoonath Singh and others (Defendants), *Appellants,*

versus

Kalee Pershad and others (Plaintiffs), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboos Onookool Chunder Mookerjee and *Unnoda Pershad Banerjee* for Respondents.

A and his brothers brought a suit against their father B to obtain a declaration of their right to hold their separate shares by partition of certain joint-family property. Certain third parties intervened, alleging themselves to have acquired a mortgage over some of the property from B, and praying that their incumbrance might be recognized and maintained. The Court declined to go into the question of this mortgage, and finally decreed a certain share by partition with a declaration that the plaintiff should get possession only of the property held, and in the same manner as held, by the father. In execution, the decree-holders were put in possession of the whole of their share, and the intervenors were dispossessed. The latter then applied to be restored to possession under Section 230, Civil Procedure Code, under which Section the Court determined the case in favor of the claimants merely on the question of fact as to the mortgage.

Held that the Judge ought to have gone fully into the question of title, and decided all questions between the parties.

Held that the reservation made in the decree was irregular, as being made in favor of parties who were neither plaintiffs nor defendants, and that the claimants were not entitled to take any benefit from it.

Held, also, that the proper construction of the Full Bench Rulings in XIII. W. R., p. 80, is that the plaintiff (or claimant under Section 230) would be at liberty, if that would suit his purpose, to prove possession, and thus throw it on the opposite party to prove that he had a better title than such possession.

Held, further, that the decree-holder, on such a question being raised, was not limited by the terms of his decree, but would be fully competent to go into the whole of his title, and would be bound to do so.

Jackson, J.—It appears to me that in this case the Zillah Judge, acting upon the view which he took of the rights and con-

duct of the parties, has undoubtedly restricted the subject-matter which it was necessary to enquire into, and that consequently his decision is at variance with the law contained in Sections 230 and 231 of the Code of Civil Procedure, the purport of which Sections has been laid down by the decision of the Full Bench which is to be found in 13 Weekly Reporter, page 80, Full Bench Rulings.

The facts are simply that certain persons, Rughoo Nundun Singh and others, who are the sons of a person named Baboo Bhugwan Singh, brought a suit against their father to obtain a declaration of their right to hold their separate shares by partition of certain joint-family property. The petitioners under Section 230 in this case, whom I may call the claimants, intervened in that suit, alleging themselves to have acquired a mortgage over some of the property to which the suit related from Baboo Bhugwan Singh, and they prayed that their incumbrance might be recognized and maintained.

The Court declined to go into the question of this mortgage, confined itself to the question between the plaintiffs and the father, and finally gave judgment for a certain share by partition, but thought proper to accompany that decree by a declaration that the plaintiff should get possession only of the property held, and in the same manner as held by the father. This declaration was undoubtedly intended to protect the intervenors, now claimants, and possibly other persons who might be found to have valid incumbrances upon this property.

Whatever the intention of the Court in making the decree may have been, it seems that in execution the plaintiffs were put into actual possession of the whole of their share, and in the same proceedings these claimants were dispossessed at any rate to the extent of the son's share of that which they held under that mortgage. Being so dispossessed, they came into Court under Section 230, and applied to be restored to possession on the ground that they held the same under a good and valid mortgage from Baboo Bhugwan Singh. The decree-holders, on the other hand, averred that Baboo Bhugwan Singh was not competent to make the mortgage on which they relied, and that they themselves were entitled in virtue of their right and under the decree to actual possession of their shares; and thereupon the Court below refused to enter into the question of right as between the parties, and determined the suit under Section 230 merely upon the question of the mortgage having been actually executed by Baboo Bhugwan Singh, and on that point having found in favor of the claimants decided the suit in their favor.

Now, the contention of the decree-holders who appeal to this Court is that the Zillah Judge ought to have gone fully into the question of title, and decided all questions between the parties. It appears to me that he should have done so. The decision that I have cited lays it down quite clearly. The words of the Chief Justice are: "It appears to me that, looking to "that language," that is, the language of Section 230, "the title may be gone into "in an application under that Section." Further on, the Chief Justice observes: "Looking then at these words, it appears to me "that we may collect that it was the intention of the Legislature in a case of this "kind that, if the Court should be satisfied "that there was a probable ground for the "application, the title should be tried between the parties, and the mode of proceeding provided is that the applicant may "come and show that he was really entitled to the property, and that the decree "obtained by the decree-holder for the recovery of it was obtained against the "wrong person, and was not binding in any "way upon the applicant." The judgment concludes in these words: "The "first question is whether a person who "has been dispossessed of land or fisheries "in execution of a decree against a third "person, not a party to the case, is bound "to prove anything more than he was "really and *bonâ fide* in possession, and "dispossessed in execution of the decree. "Now, it does not follow from the Court "having the power to go into the question "of title that the applicant or the plaintiff "in such a case is bound to prove more "than that he was really and *bonâ fide* in "possession. If he proved that it would "be evidence of title upon which he "might rest his case, and if he did not "choose to go into evidence of his title, "we cannot say that he was bound to do "it."

I think there has been some misapprehension as to the meaning of these words of the Chief Justice, and it has been supposed that the plaintiff or claimant would be at

liberty to prove merely his *bonâ-fide* possession, and thereupon would be entitled to succeed, but that was not the meaning of the learned Chief Justice. He merely meant that the plaintiff would be at liberty, if that would suit his purpose, to prove possession, and thus throw it upon the opposite party to prove that he had a better title than the possession so proved. The Chief Justice proceeds: "Nor, with regard to "the first branch of the second question, "whether the decree-holder can put the "plaintiff to proof of his title, although we "say that the decree-holder can do so, he "cannot insist upon direct proof of title, "and the plaintiff may, if he thinks fit, rely "upon his possession; but as to the latter "branch of that question, whether the "decree-holder can go into evidence of title "in himself, we must say that he can. If "he has a good title, he is at liberty to give "evidence of that title, and to prove that "he is really the person to whom the pro-"perty belongs, and that it should not be "taken in execution of the decree." So that the decree-holder was at liberty to go into his own title, and show that he was entitled to the property, notwithstanding that possession might or might not be *bonâ fide* with the plaintiff.

Then it has been supposed that the title of the decree-holder is limited by the terms of his decree. It seems to me that that is not so. It seems to me that the decree-holder, on the question being raised under this Section, would be fully competent to go into the whole of his title, and is bound to do so, because any future suit between the same parties claiming under them in respect of the same cause of action is taken away by the Section.

I have referred in this case to the judgment of the learned Chief Justice, rather than to the terms of my own judgment, in that case for obvious reasons. But there is much more to be said in support of the view which I have taken. Why should the decree-holders in this case be remitted to a fresh suit to establish their rights? It is said that, by doing so, they would be placed in the condition of plaintiffs, instead of occupying the position of defendants, which they do in the present proceedings, and that they would have to prove their case. The answer to that appears to be very simple. If they brought a fresh suit to recover this property, they would have to start their case in the same manner as in the present proceedings, namely, by showing that they were the sons of Bhugwan Singh and members of a joint Hindoo family under the Mitakshara, having vested interests in the property at the time the incumbrance was created, and thereupon the onus would be thrown upon the mortgagees to establish the validity of their mortgage. It may be that they would be able to show that either the decree-holders had assented to the mortgage, or that the mortgage was created for their benefit or the benefit of the family, but that they would have to do whether the decree-holders brought a suit, or whether the question was decided in the present proceedings.

It has been said that the decree in execution of which the claimants were dispossessed did not provide for the decree-holders being put into actual possession. It seems to me that the reservation which I have referred to in that decree was irregular and unnecessary. It was unnecessary, because the decree, being one between Bhugwan and his sons, manifestly could not affect third parties. It was irregular, because it purported to be a reservation in favor of parties who were not either plaintiffs or defendants, and whose rights had not been enquired into. But whether regular or otherwise, it was a declaration made in a suit to which these claimants were not parties, and as such it seems to me they were not entitled to take any benefit from it.

In any view of the case, it seems to me that the claimants here are between the horns of a dilemma. Either they were dispossessed in execution of decree, or they were not. If they were not, but were dispossessed without color of right, the present is not the suit to which they should have resorted, but to a possessory suit. If they were dispossessed in execution of a decree, then they have themselves brought the case within the provisions of Sections 230 and 231; and according to the ruling of the Full Bench referred to above, the enquiry contemplated by those Sections, namely, the enquiry into the whole question of right between the parties, must be made.

I think, therefore, that the Judge ought to have gone into the question of title. His judgment, therefore, must be set aside, and the proceedings must go back to him for that purpose.

Glover, J.—I concur.

The 22nd November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Appeal—Privy Council—Security—Regulation XVI. of 1797.

Case No. 234 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 15th June 1870.

Ameeroonissa Khatoon (Judgment-debtor), *Appellant,*

versus

A. D. Dunne (Decree-holder), *Respondent.*

Baboo Nullil Chunder Sein for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

When an appeal is preferred to Her Majesty in Council from a decree of the High Court, the security to be taken from the decree-holder must be regulated by Section 4, Regulation XVI. of 1797; the practice being to circulate for an amount sufficient to meet the mesne-profits which are to go to his hands from the date of his obtaining possession to the probable date of the eventual execution of the decree of the Privy Council—which period is generally taken to be 3 years.

Bayley, J.—We see no reason to interfere with the order of the Lower Court in this case.

The property in suit before the Privy Council is a 4-annas share of a certain zemindaree purchased by Mr. Dunne for a lakh of rupees. Mr. Dunne obtained a decree for this property. The opposite party has preferred an appeal to Her Majesty in Council. The question is whether the security accepted is sufficient or not.

Now, the only law relating to security for Privy Council Appeals is Section 4, Regulation XVI. of 1797. The substance of that enactment is that there should be sufficient security, sufficient to meet the eventual judgment of Her Majesty in Council. The words are: "In case of appeal to His "Majesty in Council, the Court of Sudder "Dewanny Adawlut may either order the "judgment passed by them to be carried "into execution, taking sufficient security "from the party in whose favor the same "may be passed for the due performance "of such order or decree as His Majesty, "his heirs or successors, shall think fit to "make on the appeal, or to suspend the "execution, &c., &c." In this case, Mr. Dunne and others are decree-holders, and it must be presumed that the decree passed is right. The ordinary practice in such matters, as we find on consulting some of our colleagues—Mr. Justice Mitter, whose experience both as a vakeel and a Judge is worthy of great respect, and Mr. Justice L. S. Jackson, who has long been in charge of the Loazima Department—is that calculation is made for an amount sufficient to meet the mesne-profits which are to go to the hands of the decree-holder from the date of his obtaining possession to the probable date of the eventual execution of the decree of the Privy Council. That period is generally taken to be three years. In this case, however, the security accepted by the Judge is at four years' estimate. It is contended that the amount ought to have been the total value of the property, but this, as shown above, is opposed to the practice prevalent in this Court.

It is urged that we should look to Section 36, Act XXIII. of 1861, but it has been laid down by the Privy Council that, in matters of Privy Council Appeals, the question of security must be governed by the law regulating such appeals—Regulation XVI. of 1797. Of course, the analogy may be quoted, but that analogy cannot hold so long as it is opposed to the special law of 1797 and the practice of our Courts under it.

The principle, therefore, of taking four years' mesne-profits, as has been done in this case, appears to us not erroneous in law.

It is then urged that Rupees 20,000 is not the value of the dur-putnee of which the reserved rent is only Rupees 1,300, but the real value of the dur-putnee is what it would sell for at the market, and evidence of that is the basis on which any conclusion as to market-value should be arrived at. The evidence on the record of the market-value of the property in question is that it is about 20,000 rupees. It was quite open to the appellant to bring evidence to rebut this; but as he has failed to do so, it hardly lies in him, now that the Judge has on the evidence come to a finding against him, to ask us to interfere with that finding at this last stage.

We reject this appeal with costs.

The 23rd November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Execution—Heirs of judgment-debtor—Section 203, Act VIII., 1859.

Cases Nos. 238 and 239 of 1870.

Miscellaneous Appeals from an order passed by the Judge of Beerbhoom, dated the 1st April 1870, reversing an order of the Sudder Moonsiff of that District, dated the 31st July 1869.

Indro Narain Misser (Decree-holder), *Appellant,*

versus

Kristo Chunder Mahto and others (Judgment-debtors), *Respondents.*

Baboo Kalee Mohun Dass for Appellant.

Baboos Kishen Succa Mookerjee and *Mohesh Chunder Chowdhry* for Respondents.

When a decree-holder wishes to execute his decree against the heirs of his judgment-debtor to the extent of property inherited from the debtor, and not duly applied by the heirs, he must, before he can put Section 203, Act VIII. of 1859, in force, satisfy the Court that no such property of the deceased can be found as he can sell in execution.

Jackson, J.—In the year 1856, the Maharajah of Burdwan obtained a decree against one Sadhoo Churn Panday for a certain sum of money. In the year 1867, this decree was transferred to one Indro Narain, the present decree-holder, and he has now instituted this proceeding to obtain a sum of Rupees 1,231 which is in deposit in the Judge's Court as belonging to one Prosunno Moyee, the daughter-in-law of the said Sadhoo Churn Panday. Prosunno Moyee is also now dead, and the execution-proceedings are being contested by her heirs, who are also the heirs of Sadhoo Churn Panday.

The contest before the Lower Court specially referred to this sum of Rupees 1,231. The heirs alleged that, as this was not money which had come down from Sadhoo Churn Panday, the decree-holder could not attach it, and the Court was satisfied on this point that it was not money with which Sadhoo Churn had any connection, and that it was the special property of Prosunno Moyee. The Judge, on appeal, has distinctly found these facts, and there is no further contest about them. But it was urged before the Judge that, as Prosunno Moyee had inherited from Sadhoo Churn Panday six mouzahs of Lot Kellah, and had received certain profits from those mouzahs, whether this sum of Rupees 1,231 was actually inherited from Sadhoo Churn Panday or not was immaterial, and the decree-holder was entitled to attach and obtain that sum in execution of his decree against Sadhoo Churn Panday. The Judge has rejected this line of argument. He has not rejected it exactly on grounds on which perhaps it ought to have been rejected, but we think, on the whole, that it has been properly rejected. It is on this point that the special appeal has been most strongly urged before us, and it is, in fact, an attempt of the decree-holder to bring the case under Section 203, Act VIII. of 1859. The decree-holder wishes to execute his decree against the heirs of Sadhoo Churn Panday to the extent of the property inherited from him not duly applied by them. Before, however, he can put this special Section in force, he must satisfy the Court that no property of the deceased person can still be found. It is very clear that the Judge was not satisfied on this point, and there seems to be no attempt made to adduce proper evidence to prove this fact. It is admitted that these six mouzahs Kellah were inherited from Sadhoo Churn Panday by Prosunno Moyee, against whom the proceedings had commenced, but it is argued that, as the decree-holder has attempted to take out execution against these mouzahs, and has failed in bringing them to sale, he may now seek to attach other property in lieu of those inherited mouzahs. We are told that these properties are not still available for the decree, but we cannot act upon this mere statement. It was for the decree-holder to satisfy the Lower Court that no such property of the deceased, in the words of the law, could be found as he could sell in execution of his decree. When this is done, Section 203 can be properly put in force; but as the case stands at present, we are of

opinion that Prosunno Moyee's separate property cannot be sold in execution of decree against Sadhoo Churn Panday's heirs, and that this Rupees 1,231 accordingly, which is in deposit, cannot be made over to the decree-holder.

We dismiss the appeals with costs.

Bayley, J.—I concur in the judgment delivered. I would only add that, in regard to the so-called admission by the opposite party, that property worth Rupees 3,000 had descended to Prosunno Moyee, and the contention based upon it, that the Judge has erred in law in holding as a fact that no such property came to her. It appears that the parties were reversioners to the property of Prosunno Moyee, and not connected with the property of Sadhoo Churn. The admission, therefore, would in no way affect the finding of the Judge in relation to Prosunno Moyee's inheritance from Sadhoo Churn.

The 23rd November 1870

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Section 272, Act VIII. of 1859—Jurisdiction.

In the Matter of

Brojonath Shaha, *Petitioner,*

versus

Kanhya Lall Sein, *Opposite Party.*

Baboo Boykunt Nath Paul for Petitioner.

Mr. R. E. Twidale for Opposite Party.

B, who had obtained a decree under Section 23, Act XX. of 1866, having attached in execution the property of his judgment-debtor, objection was made by another party (K) who held a decree of subsequent date against the same judgment-debtor. Upon this the Moonsiff (being the same officer who had given B the decree) proceeded to inquire under Section 272, Act VIII. of 1859, and although finding that there had been no fraud, held that, inasmuch as B had sued the representatives of one of the original obligors, who was dead at the time, on a stamp of one-fourth of the value prescribed, his decree should not be satisfied before K's decree.

HELD that a mere error of the description alluded to did not come within the meaning of the words "improper means" in Section 272, Civil Procedure Code, which contemplate some misconduct on the part of the decree-holder, and that the Moonsiff's proceedings were without jurisdiction.

Kemp, J.—ON the 22nd of July last, the petitioner Brojonath Shaha obtained a rule in this Court for the opposite party Kanhya Lall Sein to show cause why the order of the Sudder Moonsiff of Hooghly, dated the 4th of July last, should not be set aside. There was a further order that the hearing of the rule should stand over, the parties consenting to its being heard afterwards before Mr. Justice Kemp and some other Judge. I may mention that the reason for this order was that the learned Chief Justice, Sir Richard Couch, considered it probable at the time that he would not be present in Court when it would again come on for hearing. The case has, therefore, been heard by this Bench.

The petitioner states that he obtained a decree in the Sudder Moonsiff's Court of Hooghly, apparently, although he does not so state in his petition under Section 23, Act XX. of 1866, the new Registration Law, against Mohendro Nath, one of the original obligors, and against the representatives of Pitambur, another of the original obligors, who died previous to the suit being brought. The petitioner took out attachment in execution of that decree. The opposite party appears to have obtained a decree against Mohendro Nath Shaha, one of the judgment-debtors of the petitioner, in the Small Cause Court of Hooghly. This decree was subsequent to the decree of the petitioner. Kanhya Lall Sein also took out execution, and obtained an order from the Small Cause Court of Hooghly for execution of his decree by the Moonsiff of the said zillah.

The Moonsiff subsequently, under Section 272 of Act VIII. of 1859, proceeded on the objection of Kanhya Lall Sein to enquire whether the decree obtained by the petitioner under which the property had been attached by him was obtained by fraud or other improper means. From the decision in the vernacular filed by the petitioner, dated 4th July 1870, it is clear that the Moonsiff, who was the same Moonsiff who had passed the decree in the original case, found distinctly that there was no fraud, but he held that, inasmuch as the petitioner had sued the representatives of one of the original obligors, who was dead at the time he brought the suit, on a stamp of one-fourth of the value prescribed for a plaint in such suits, the decree had been obtained by improper means. He, therefore, passed an order on the objection of Kanhya Lall Sein to the effect that Kanhya Lall's decree was to be satisfied first.

This Court has been moved to set aside this order as passed without jurisdiction. We have, therefore, to consider whether the order of the Moonsiff under Section 272 was passed without jurisdiction. Now, there can be no doubt that fraud is not an element in the case at all, for the Moonsiff finds distinctly that no fraud was committed. We have then to see whether any improper means were taken by the petitioner to obtain this decree, and we are of opinion that a mere error of the description alluded to in the decision of the Moonsiff, namely, an error in suing the representatives or heirs of the deceased obligor, is not obtaining a decree by improper means. We, therefore, think that the Moonsiff had no jurisdiction under Section 272, and that his proceedings under that Section, being without jurisdiction, must be set aside.

The order of the Court, therefore, is that the order of the Moonsiff passed under Section 272 on the 4th of July 1870 be set aside, and that the petitioner be declared entitled under his decree and prior attachment to satisfy his decree in the first instance. The costs of this application will be paid by the opposite party.

Ainslie, J.—I think the only question that we have before us for consideration in this case is the meaning of the word "improper" in Section 272 of Act VIII. of 1859, and reading in that Section the words "fraud or other improper means" together, I think that it implies that there must be some misconduct on the part of the decree-holder in order to invalidate his decree under that Section, and not a mere error in procedure on his part or on the part of any pleader employed by him.

I concur in the judgment which has been delivered by Mr. Justice Kemp.

The 23rd November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Limitation—Section 246, Act VIII., 1859—Caste—Jurisdiction.

Case No. 954 of 1870.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 24th February 1870, reversing a decision of the Subordinate Judge of that District, dated the 24th September 1869.

Roghoonath Doss Mohapattur (one of the Defendants), *Appellant,*

versus

Bydonath Doss Maharatha (Plaintiff), *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboos Obhoy Churn Bose and *Mohendro Lall Mitter* for Respondent.

The law of limitation under Section 246, Act VIII. of 1859, cannot apply to a person who comes in too late to be made a party to the proceedings under that Section.

On questions of caste a Lower Appellate Court has a right to come to a finding based on history or the custom of the country.

Bayley, J.—We are of opinion that this special appeal must be dismissed with costs.

The first ground urged is that limitation bars the suit, as it was not brought within one year of the date of the order under Section 246. Now, there was no order under Section 246 passed against the plaintiff in his character of being a party to the proceedings under that Section, because, as a matter of fact, the gist of the order was that the plaintiff could *not* be made a party to the proceedings under that Section, as he came in too late. Therefore, in fact, there was no order as regards him as a party under Section 246 to whom the law of limitation under that Section would apply.

A case has been cited from Wyman's Reports, Volume I., page 240 * which, so far from being in the appellant's favor, is, we think, against his case. In that case, the claimant had been actually made a party. Issues were drawn, and he had only to adduce evidence thereon; but for six months he did nothing of the kind. According to the ordinary rules and practice of the Court, therefore, as where a party is called upon to give evidence and fails to do so, his case was dismissed; but in the present case, there was no party, there was no issue, there was no evidence called for, and no trial.

The next ground is that, if there was no order under Section 246, there is no cause of action to the plaintiff to set aside that order. This objection is partly answered by the preceding remarks; but we have further to observe that this objection is not taken in the petition of appeal, nor was it taken in either of the Courts below. The special appellant, therefore, cannot urge it without our permission, which, however, under the circumstances, we decline to give at this last stage; for if this plea had been a valid plea, it obviously is one which ought to have been taken in the Courts below.

It is next said that there was a prayer in the plaint that the proceedings in execution might be set aside. Even if it were so, which we understand from the special respondent's pleader was not the case, it must be construed as to the effect that, as the other party had got a verdict under Section 246, that adjudication might be no detriment to the title of the plaintiff.

To proceed to the case: The Lower Appellate Court has, in an elaborate judgment, after considering all the facts of the case, come to a finding of fact that the title and possession of the lands were with the plaintiff.

It is urged that there is no evidence to show any distinction between Pandays and Dosses in caste. On such questions of caste, however, the Judge has a right to come to a finding based on history or the custom of the country; and there is nothing shown to us as wrong on this point in the judgment of the Lower Appellate Court. We, therefore, cannot interfere in special appeal.

On all these grounds we dismiss this special appeal with costs.

* 5 W. R., Civ. Rul., p. 175.

The 23rd November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Pre-emption—Right of sharer.

Case No. 2843 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 8th September 1869, affirming a decision of the Moonsiff of Nubeegunge, dated the 21st June 1869.

Gobind Chunder Goopto (Plaintiff), *Appellant,*

versus

Raj Kishore Sein (Defendant), *Respondent.*

Baboo Debendro Narain Banerjee for Appellant.

Baboo Bama Churn Bose for Respondent.

In order to establish a right of pre-emption on the part of a sharer, it is not necessary that the property sold should be actually separated or defined.

Ainslie, J.—The plaintiff, special appellant in this suit, is the owner of a 2-annas share in three talooks comprising a large number of villages, said to be nearly a hundred. Out of these villages he has sold his rights and interests in eight or ten to other parties. The special respondent has purchased the half of a 2-annas share which has descended by inheritance to the vendor, defendant. The special appellant now claims by right of pre-emption to take that half share. His claim has been rejected by the Lower Court on points of law; firstly, that, as the property sold is not separate and defined, there can be no claim of pre-emption; secondly, that with reference to the extent of the estate, a claim of pre-emption will not lie; and, thirdly, that the sale being a conditional one, the plaintiff's title falls to the ground.

Objection is taken to the decision of the Lower Court on all these points.

We are of opinion that actual separation or definition of the property sold is not necessary, and with reference to the second point we find that the question has already been settled in a Full Bench decision of the 8th July 1870 in the case of Shah Mahomed Hossein *versus* Shah Mohsun Ali,* where it

* 14 W. R., F. B., p. 1.

is ruled that a partner in a considerable estate has a right, according to Mahomedan Law, to pre-emption when one of his co-sharers in such estate sells his share to a stranger.

On the 3rd point, we hold that the sale is not one to which an option of cancelment is annexed, and that the provision that was made was simply that, on failure of the purchaser to obtain possession by a suit in Court, he was to be at liberty to resort to his vendor for a refund of the purchase-money; but this gives him no option of throwing up the bargain without attempting to enforce his right by applying to the Courts.

It has been contended, with reference to the 8 or 10 villages that have been sold by the plaintiff to other parties, that no right of pre-emption will lie, but it is admitted that each of the talooks is in itself held jointly, and that there is no separate assessment of the villages, so that, in the event of any arrears of revenue accruing in respect of these villages which have been sold by the plaintiff, the entire talook would be liable to sale; and we, therefore, hold that the plaintiff has still remaining an interest throughout the entire talooks without reference to the sale of these villages.

As there has been no trial upon the merits, the case must go back to the Lower Court to be tried upon the facts. Costs to follow the result.

The 24th November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Mahomedan women—Benamee purchase—Presumption.

Case No. 1105 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 10th March 1870, modifying a decision of the Sudder Moonsiff of that District, dated the 21st June 1869.

Mussamut Kudeerun (one of the Defendants), *Appellant,*

versus

Mussamut Lallun (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Respondent.

Where property is acquired by a Mahomedan lady living in a state of wedlock, and also by the daughter of such parents, a very small amount of evidence would suffice to dispose of the presumption arising from the fact of the title-deeds being with the lady, against the supposition of a *benamee* purchase.

Jackson, J.—It appears to me that the special appellant in this case has no grievance.

The plaintiff claimed as the heir of her father to recover possession of property which came under different denominations, and which the defendant claimed to hold under different titles. One of the titles set up by the defendant was, as to part of the property, that she held it in satisfaction of her mother's claim for dower. I think the Subordinate Judge has fully disposed of that question, and he has done so in concurrence with the Court of first instance. He has held that there was no such claim of dower, and that it was imaginary and untrue.

Then as to the property which came from the mother, I think there is a sufficient answer to that, namely, that the father of this plaintiff was one of the heirs of the mother, and he was found to have had possession of property coming from the mother, after her death, and it was properly presumed that he held that possession in the quality of heir.

There seemed at first sight to be more reason in the special appellant's objection as regarded the third class of property, namely, that which the plaintiff claimed to have been acquired by her father by way of benamee in the name of the mother and daughter; but upon enquiry, it seems that the Subordinate Judge had evidence to support his finding upon that part of the case, although I do not think we should go to the full length of concurring with him in the general principles which he has laid down as to this part of the case. He states as a general rule that females in this country have no means of acquiring property, and therefore it is incumbent upon persons who claim property under their right to show that purchases of that description were not *benamee.* We would not affirm this proposition; but, no doubt, where property is acquired by a Mahomedan lady living in a state of wedlock and also by the daughter

of such parents, a very small amount of evidence would suffice to dispose of the presumption arising from the fact of the title-deeds being with the lady. In this case, there was such evidence in regard to two items of the property which are different shares of one mouzah. The vendor of one of the shares gave evidence as to both the purchases. He deposed that the property was really sold to Nyamut, although the name of the daughter was used. As to a third portion of the property, the daughter of the plaintiff, Moneerun, gives evidence to the same effect, namely, that the property was acquired by the father *benamee*. It is objected that she is an interested witness, inasmuch as she has claims similar to those of the plaintiff. This is, of course, a circumstance to be taken into consideration, but it does not appear that her evidence is untrue. On the contrary, the Court below has described her as truthful and honest, and has characterized her statements as throwing full light upon the case.

Then we are told that this does not apply to the whole of the property held in *benamee*, but the appellant is unable to state what the other property so described is. If there had been anything in this part of the case, I presume that the vakeels for the appellant would have got up their cases so fully as to enable us to say what the real grievance of their clients consisted in.

Under the circumstances, I think the decision of the Court below is right, and that the special appeal ought to be dismissed with costs.

Glover, J.—I am of the same opinion.

The 24th November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Section 246, Act VIII. of 1859—Limitation.

Case No. 1370 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 20th April 1870, reversing a decision of the Moonsiff of Buddergunge, dated the 10th December 1869.

Luckhee Prea Debia (Plaintiff), *Appellant,*

versus

Khyroollah Kazee and another (two of the Defendants), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Khettur Nath Bose for Respondents.

Where, notwithstanding that a claim under Section 246, Act VIII. of 1859, was rejected, the claimant, who was in possession, continued in possession until the execution-proceedings were struck off for default and subsequently revived, and her property was sold under a second attachment:

HELD that the claimant was not bound to sue within one year of the order rejecting her claim, which was, in reality, no decision under Section 246.

Jackson, J.—THIS was a suit brought by the plaintiff to establish her right in 18 beegahs 4½ cottahs of lakheraj lands which were sold in execution of a decree against her husband in the year 1868. The plaintiff alleged that the said land was purchased by her with her stridhun, that she was always in possession of it, and that her husband had no connection whatever with it.

The defendant, the purchaser in execution of that decree, in his first objection against the plaintiff's case, contended that the suit was barred by the law of limitation as contained in the final Clause of Section 246, Act VIII. of 1859, *viz.*, that when the execution-proceedings were being carried on against her husband in the year 1866, the plaintiff came in and preferred a claim under Section 246, objecting to the sale of this particular land, that her claim was heard and decided, and rejected in December 1866, that she was bound to bring her suit to establish her title to the land within one year of the date of the order, whereas she has allowed more than two years to elapse without doing any such thing.

The first Court decided that the order passed under Section 246 was no bar to the plaintiff's suit, as the plaintiff proved that, notwithstanding that order, she remained in possession down to the time of a subsequent sale in August 1868 and ousted in July 1869, and also because the proceedings which took place in 1866 were not carried out so as to result in the sale of the land, but were struck off the file on default of the decree-holder to carry them on, and were subsequently revived, a second attachment was made, and a sale thereupon held. The first Court, accordingly, went into the merits of the case, found

that the plaintiff purchased the property with her own stridhun, and that she was therefore entitled to a decree.

The Subordinate Judge of Rungpore has reversed that decision, and held that the plaintiff was bound to bring the suit within one year of the decision under Section 246. This special appeal has been brought on this point, and it is urged on two grounds: *Firstly*, that the Court which decided the objection of the plaintiff under Section 246 passed no order under that Section, that the decision did not refer to the question of possession, but solely went into the question of title, and that, therefore, it cannot be considered to be an order within the meaning of that Section; and, *secondly*, that the proceedings in execu ion against which objection was taken in the first instance were not carried out, but were struck off and subsequently revived.

No doubt, there is something peculiar in the case, but we think there is some force in the argument that there was no decision as to possession in the order passed on the plaintiff's claim under Section 246. Whether the plaintiff was then able to prove that the property was purchased by her stridhun or not, if she had proved that she was in possession, the property could not be sold. Here it has been found by the first Court that she was in possession, and continued in possession for two years and a half after the order was passed. The order was not acted upon, the property was not then put up to sale, and under all the circumstances of the case we think that the plaintiff was not bound to sue within one year of the decision, said to be a decision under Section 246, but which, in reality, was no decision at all under that Section.

We, therefore, set aside the decision of the Subordinate Judge, and remand the case for trial on the merits. The costs of this appeal will follow the result of the su.

The 24th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Measurement—Section 10, Act VI. (B. C.) of 1862.

Case No. 158 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 30th September 1869, affirming a decision of the Officiating Collector of that District, dated the 19th August 1868.

Khugendronath Mullick (Plaintiff), *Appellant,*

versus

Kantee Ram Paul and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Motee Lall Mookerjee* for Appellant.

Baboos Bama Churn Banerjee and *Rajendro Nath Bose* for Respondents.

A party applying under Section 10, Act VI. (B. C.) of 1862, is entitled to measure only such lands as are comprised in his estate, and for which he is entitled to receive rent; he is not entitled under cover of that Section to measure lands not comprised in the estate which he has purchased.

Kemp, J.—This is a case under Section 10 of Act VI. of 1862, Bengal Council. The special appellant is the proprietor of an estate which he has apparently purchased by auction. He applied under the aforesaid Section to the Collector to measure the land comprised in that estate. Certain parties, who are very numerous, objected to the measurement, stating that they were independent holders, and that they were not parties from whom the special appellant was entitled to receive rent. The Collector found that the special appellant, the petitioner before him, was attempting to get his neighbours', and not his ryots', lands measured, and that the objectors were not shikmeedars or parties paying rent to the petitioner. He, therefore, directed the measurement to be discontinued.

On appeal to the Judge, the Judge in the first instance, on the representation of the pleaders, and without, as the Judge admits, referring to all the papers of the case, found that the objectors were shikmeedars; and reversed the order of the Collector.

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On an application for review, a review was granted, and the Judge admits that he was entirely misled by the pleaders who argued the case, that it was now manifest to him that his order must simply be entirely cancelled. that he held on an assumption of facts entirely wrong in the first instance that the objectors were shikmeedars, but that now on review he found them not to be shikmeedars or hazâns, that they were parties holding under an independent title, and that therefore the Collector's order directing the measurement to cease as regards these objectors ought to be upheld.

In special appeal, Mr. Allan, the pleader for the special appellant, contended, first, that there had been no enquiry or investigation as to how far the objections of the opposite parties were well-founded or otherwise, and that therefore the order of the Appellate Court was erroneous in law; secondly, that both Courts were bound to determine the objections of the opposite parties, and that, in place of so doing, they have held *ex parte*, on the representations of these parties, that the lands held by them were not included in the petitioner's estate.

There can be no doubt, we think, that a party applying under Section 10 of Act VI. of 1862 is entitled to measure only such lands as are comprised in his estate, and for which he is entitled to receive the rent; he is not entitled under cover of that Section to measure lands not comprised in the estate which he has purchased.

In this case, although the Judge has not come to a very distinct finding on the objections of the opposite parties, we think that he has substantially found that they are parties who are holding on a separate and distinct title independent of the special appellant; for, in the first instance, when he held that they were shikmeedars or parties holding subordinately to the special appellant, he held that on an assumption of facts, which he afterwards on review admitted to be utterly wrong, and he also refers to the fact that he has looked into all the papers of the case. although, in the first instance, he had not carefully considered all those papers. When we find a Judge on review altering his judgment and coming to the conclusion that his former finding on the facts was utterly wrong, we must infer that he has given the case full consideration, and has considered the case on the whole of the evidence.

Mr. Allan also objects that there has been no finding as to the possession of the opposite parties. Now, the very fact of the Judge having found in the first instance that they were shikmeedars under the special appellant disposes of that question, inasmuch as it must have been on the assumption that they were in possession that the Judge passed such an order.

The special appeal will, therefore, be dismissed with costs payable by the special appellant.

Ainslie, J.—I concur with Mr. Justice Kemp.

The 24th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Sharers—Defaulter—Right of action.

Case No. 944 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 22nd February 1870, affirming a decision of the Moonsiff of Panchpookurreah, dated the 30th April 1869.

Gouree Komul Bhuttacharjee (one of the Defendants), *Appellant,*

versus

Raj Kristo Nath and another (Plaintiffs), *Respondents.*

Baboo Nuleet Chunder Sein for Appellant.

Baboos Bama Churn Banerjee and *Sreenath Banerjee* for Respondents.

A suit by a sharer to set aside a sale having been dismissed on the ground that plaintiff being a defaulter the suit would not lie, plaintiff brought a second suit to claim possession of his share of the dur-putnee talook, on the ground that the sale must be inoperative, inasmuch as the purchaser, a co-sharer, was also a defaulter.

HELD that, until the sale was set aside, plaintiff was not in a position to claim possession of his share.

Kemp, J.—THIS is a suit by the plaintiff, special respondent, to recover possession of a one-pie share in a certain dur-putnee talook. The first Court decreed the claim; the plaintiff to get possession of the disputed share. On appeal, the Subordinate Judge raised three points for con-

sideration as stated by him; *1st*, whether the suit was barred under Section 2 of Act VIII. of 1859; *2ndly*, whether it was barred by the Limitation Laws, special or general; and, *3rdly*, whether Gouree Komul bought the shikmee *bond fide*, or whether it was purchased by the defaulter under a fictitious name. The Subordinate Judge says that the 2nd and 3rd issues were waived by the pleaders, and that their case would stand or fall upon the 1st issue.

Upon that question, the Subordinate Judge found that, although the parties in the former suit and in the present suit were the same, the issues were not the same; that the High Court had not cancelled the sale, because the plaintiffs were defaulters, and the actual purchaser Kristo Komul was likewise a defaulter; and moreover, the Subordinate Judge remarks, the High Court did not adjudicate upon the question whether the plaintiffs can recover possession of their share from the defaulter. He, therefore, held that Section 2 of Act VIII. of 1859 did not apply. He then proceeds to observe that the sale was not cancelled, as virtually it was no sale; and it being so, the relation of the litigants to the property must necessarily be the same as it was before that quasi sale which *per se* was null and void, the plaintiffs at that time being the owners of a one-pie share; and therefore, says the Subordinate Judge, their coparcener, who was a defaulter himself, cannot withhold that share. For these reasons, the Subordinate Judge decreed the case, and the appeal was dismissed with costs.

In special appeal, the main point urged before us is that the plaintiffs, being defaulters, are not competent to maintain this action, and that their suit ought to have been dismissed.

On reading the plaint, it is very clear that the plaintiff claims a one-pie share in the dur-putnee talook, on the ground that, although, under the decision of the High Court, the plaintiff's former suit to set aside that sale was dismissed, inasmuch as the plaintiff, being a defaulter, was not in a position to bring such a suit, still the sale itself, although it has not been set aside by the High Court, and still remains uncancelled, must be considered as inoperative, inasmuch as the purchaser, the special appellant, was also a defaulter, and therefore that the plaintiff is entitled to recover from the special appellant as a co-sharer his one-pie share of the dur-putnee. On referring to the decision of the High Court, published in Volume V. of the Weekly Reporter, dated 16th February 1866,* we find that the special respondent before us was the plaintiff in that case, and in that case he also sued for possession and to set aside the sale. The High Court held that such a suit on the part of a defaulter to set aside a sale would not lie, and that, although they concurred with the Judge in holding that Gouree Komul, the co-sharer of the plaintiff in the dur-putnee, was also a defaulter, and therefore not entitled to purchase at an auction-sale, they did not set aside that sale, nor hold it to be null and void, but they distinctly declared that the plaintiff's suit, he being himself a defaulter, would not lie. The plaintiff is, therefore, in this position that, until that sale be set aside, and it is clear that it cannot be set aside in a suit brought by him, he is not in a position to claim possession of his one pie share in the dur-putnee as co-sharer in the talook, the said talook having passed to the special appellant under a sale, which has not been pronounced to be invalid, and which has not been set aside by any decree of Court, that talook being now the property of the special appellant, not as a co-sharer with the plaintiff, but in his own right.

The plaintiff's suit must, therefore, be dismissed, and the decision of the Subordinate Judge reversed with costs payable by the plaintiffs, special respondents.

The 24th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Remand—Limitation—Estoppel—Special Appeal.

Case No. 626 of 1870.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 8th December 1869, reversing a decision of the Subordinate Judge of that District, dated the 11th February 1868.

Mussamut Judoobunsee Kooer (Plaintiff), *Appellant,*

versus

Mussamut Asman Kooer and others (Defendants), *Respondents.*

* Civil Rulin page 106.

Baboos Romesh Chunder Mitter and *Mohesh Chunder Chowdhry* for Appellant.

Mr. R. E. Twidale and *Baboo Unnoda Pershad Banerjee* for Respondents.

In a case which was remanded to be tried on its merits, the remanding Judges being of opinion that it was not barred, the Additional Judge of the zillah adhered to his former opinion that the plaintiff's claim was barred by limitation, but found, as a fact, that she had been a party to a solehnamah and other acts by which she was estopped from her present claim.

HELD that the Additional Judge was wrong in entering again into the question of limitation; but that his finding of fact could not be interfered with in special appeal, and that the plaintiff was barred by the solehnamah from maintaining this suit.

Case distinguished from Bhugwan Deen Dobey *vs.* Myna Baee, 9 W. R., *Privy Council* p. 23.

Kemp, J.—THIS case was remanded by a Bench of this Court on the 12th of July 1869.* The remanding Judges were of opinion that the suit of the plaintiff was not barred, and directed the Judge to try the case on the merits. After the remand, the Additional Judge of Tirhoot, observing that, in his opinion, this Court had been misled as to the facts of this case, and also that this Court have come to a wrong conclusion on the question of limitation, adhered to his former opinion that the plaintiff's claim was barred by the statute of limitation, but, further, found as a fact upon the evidence "that the plaintiff was a party "to an arrangement or solehnamah in the "year 1861, by which she was to receive a "certain sum of money as subsistence-al-"lowance in lieu of possession over any por-"tion of the estate of her late husband; "that she was bound by her act and estop-"ped from her claim to set that act aside."

In special appeal, several grounds are raised complaining of the conduct of the Judge below in deciding the case again on the question of limitation which had already been disposed of by this Court, and taking objection to there being no finding by the Judge on the merits of the case.

In this Court, the question of limitation has been argued at some length, but the pleader for the respondent, Mr. R. E. Twidale, informed the Court that, with the approval of his co-pleader, Baboo Unnoda Persnad Banerjee, he would not press that point; and we are of opinion that, the question of limitation having already been disposed of by this Court, the Judge was wrong in entering into that question again.

With reference to the question whether the Judge has entered into the merits of this case or not, we are of opinion that, looking to the latter portion of the decision of the Judge, it is clear that he refers to evidence adduced by the defendants to the execution by the plaintiff of the solehnamah in 1861, and the arrangement by which the widows of Lall Beharee, that is to say, the plaintiff, and Foolessuree, the senior widow, were to receive subsistence-allowance, and second, to the receipt by the plaintiff of her share of the said subsistence-allowance. The Judge then proceeds to state that "although the Lower Court questions "the truth of that evidence, he saw no "reason to doubt it." He further observes that, "the plaintiff living with Foolessuree, "and receiving, as she acknowledges she "did receive, her subsistence-allowance from "Foolessuree, it is impossible to believe "that the latter did not communicate to the "plaintiff what negotiations were going on, or "what arrangements were being made." The Judge also disbelieves "that the plaintiff "was not herself a party to the solehnamah "which she now seeks to avoid." He, therefore, as already observed, found as a fact on the evidence that the plaintiff was bound by that solehnamah, and that, therefore, her suit must be dismissed.

Baboo Romesh Chunder Mitter, the pleader for the plaintiff, special appellant, contended that the plaintiff was in no way bound by the solehnamah of 1861, and he cited in the course of his argument a decision of the Privy Council to be found at Volume XI., Moore's Indian Appeals, page 487, in the case of Bhugwan Deen Dobey, appellant, *versus* Myna Baee, respondent.* The pleader laid some stress upon a passage in that judgment in which their Lordships observe "that they agree generally in that "part of the first judgment of the Sudder "Court which ruled that the respondent, "because she originally acquiesced in the title "set up by Hunwunt Pershad, had not lost "any rights which accrued to her as one of "the co-heirs of her husband, when that "claim was decided to be untenable. Nor "do they think that her alleged alienation of "her share can be urged against her by the ap-"pellant as a bar to the present suit."

It appears to us that the Baboo has not studied this case sufficiently, and that he has relied more upon the above incidental passage

* 12 W. R., p. 158.

* 9 W. R., P. C., p. 23.

in it than upon the whole case. Referring to the case, we find that the plaintiff in that case was one of the wives of one Rae Dinonath. She sued to recover possession of her moiety of the estate of her late husband, and to set aside certain testamentary dispositions executed by Doola Baee, her co-wife, under which she had bequeathed her moiety of the estate of her husband to her father and brother. The plaintiff also sued to set aside, or to render inoperative, an order passed by the Judge under Act XIX. of 1841, which upheld the possession of the legatees under the will of Doola Baee. Their Lordships in that case observe that the Judge, under Act XIX. of 1841, had no jurisdiction to determine any question of title, and that he could only deal with the right of possession; and it was, therefore, difficult to see how such a partition, namely, a partition made by an order of the Judge under Act XIX. of 1841, by which Doola Baee was maintained in possession of an 8-annas share, could enlarge Doola Baee's estate so as to give her a disposition which she would not otherwise have had against the next heirs of her husband. Their Lordships went on to observe that the question in that case was whether the plaintiff had not, by the partition made under the order of the Judge, lost her right by survivorship, but they held that there was no proof of any contract to make a partition, and that there was no jurisdiction in the Court to make a complete partition "in invitam," and that the transaction seemed to have been merely an arrangement for separate possession and enjoyment, leaving the title to each widow unaffected; and that, therefore, the acquiescence of the widows in the Judge's proceedings could not have done more than bind each not to disturb the other's possession.

Now, the case before us is a very different case altogether. In this case there was a regular suit in which all the heirs of Lall Beharee were before the Court, and amongst them the plaintiff herself. In that case a compromise was come to whereby the plaintiff gave up all title to the estate of her husband Lall Beharee, and consented to receive maintenance from his daughters who were also parties to that suit. The Judge has found as a fact on the evidence that she was a consenting party to that arrangement; that she received consideration for that arrangement; and that for many years she received maintenance from parties who are not the nearest heirs to her deceased husband, namely, from his daughters. We, therefore, think that, on this finding of fact on the evidence by the Judge, we cannot interfere with his decision in special appeal.

We dismiss the special appeal with costs payable by the appellant.

Ainslie, J.—I concur in this judgment.

The 24th November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Sale for arrears of revenue—Benamee purchaser—Act I. of 1845.

Case No. 1120 of 1870.

Special Appeal from a decision passed by the Judge of Patna, dated the 9th March 1870, affirming a decision of the Subordinate Judge of that District, dated the 22nd September 1869.

Brijo Beharee Singh (Plaintiff), *Appellant,*

versus

Shah Wajed Hossein and others (Defendants), *Respondents.*

Baboo Khettur Nath Bose for Appellant.

Mr. C. Gregory for Respondents.

The ruling of the Full Bench in 11 W.R., p. 16, F.B.R., that a *benamee* purchaser is debarred from setting up his title in opposition to a certified purchaser, was held not to apply in a suit in which the plaintiff was a certified purchaser who had bought at a sale for arrears of revenue under Act I. of 1845.

It is not a principle of law that the issue to be framed in such cases is—From what source the purchase-money came; though that is an excellent criterion and test for determining the character of the purchase.

Jackson, J.—This was a suit to recover possession of immoveable property brought by Brijo Beharee Singh as representative of the certified purchaser, Tilukdharee, who purchased at a sale for arrears of revenue under Act I. of 1845. The property in question had been attached, and was afterwards sold by the Civil Court in execution of a decree against one Parikhit, grandson of the previous owner Lutchmee Narain.

The Courts below went into the evidence produced on either side, and came to the conclusion that, notwithstanding that the name of Tilukdharee had been used, the property was, in fact, purchased on behalf of the real owner, and that Parikhit was the person really

entitled, and consequently the sale of his right, title, and interest was valid.

In special appeal, the plaintiff relies chiefly upon the right he considers that he has under the 21st Section of the Sale Act; and we are referred to a decision of the Full Bench of this Court reported in 11 Weekly Reporter, page 16, Full Bench Rulings, in which the Court, upon an analogous provision of the Civil Procedure Code, held that a *benamee* purchaser was debarred from setting up his title in opposition to a certified purchaser in a suit brought by the latter to recover the property.

That case was decided by a majority of four Judges, and of course must be looked upon as the settled law in all cases to which it exactly applies. It is right to observe, however, that the learned Chief Justice, in delivering the judgment of the majority of the Full Bench, said expressly that his judgment was not founded entirely upon Section 260 of the Procedure Code, but that, in his opinion, the defendant was debarred by the general provisions of the Act, the Civil Procedure Code, which, as well as the provisions of Section 260, must be looked at in arriving at a conclusion as to what are the real intentions of the Legislature. That precedent, therefore, will not exactly apply in enabling us to decide under the provisions of Act I. of 1845.

I am not inclined to carry that decision further than it goes. I do not find that, as a matter of law, the plaintiff is entitled to rely upon the provisions of Act I. of 1845, nor does it appear that he did rely upon the Act. There is nothing in the judgment of the Court below to indicate that, when the question was taken up, it was looked at as other than a question of fact; and it is as a question of fact that the Lower Courts have decided that, although the name of Tilukdharee was used, the property was acquired for the benefit of and by Lutchmee Narain. I think we are not called upon to interfere with that finding.

It is also complained that the Zillah Judge has not applied what is the proper criterion in cases of this description, namely, where the purchase-money came from.

It is not a principle of law that the issue to be framed in such cases is, from what source the purchase-money came. That, no doubt, is an excellent criterion and test in such cases; and if the case were before us in regular appeal, and we found that this test had not been applied by the Court below in dealing with the question of fact, we might have been inclined to take a different view of that question. As the case is before us in special appeal, I do not think we are in a position to interfere with the decision complained of.

I think, therefore, that the special appeal must be dismissed with costs.

Glover, J.—I concur in dismissing the appeal with costs.

The 25th November 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Ameen's investigation—Evidence—Contribution.

Case No. 1250 of 1870.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 22nd March 1870, affirming a decision of the 2nd Subordinate Judge of that District, dated the 29th November 1869.

Bholanath Chatterjee (Defendant), *Appellant,*

versus

Indur Chand Doogur (Plaintiff), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboos Hem Chunder Banerjee and *Debender Chunder Ghose* for Respondent.

An investigation as to mesne-profits made by a Civil Ameen in execution of a decree is no evidence against a party who was absent therefrom; and if his name was not mentioned in the petition for execution, no presumption can arise that he was a party thereto.

A claim for contribution should distinctly set forth the amounts due by each party sued, failing which the plaint should be rejected.

Loch, J.—THIS is a suit for contribution. The facts, as stated to us, are these:—

One Radhanath Banerjee obtained a decree for possession of certain properties with mesne-profits and costs against the plaintiff and the defendant in this suit and others. In execution of his decree, Radhanath after having had the amount of mesne-profits ascertained through an Ameen, realized the whole sum from the plaintiffs in this case, Indro Chand Doogur and another; and

the plaintiff has now brought the suit against his co-defendants for contribution.

The plaint does not, as it should, specify the amount due by each of the co-defendants; but it asks to recover the difference between the sum for which the plaintiff considers himself liable under the decree and the amount that he has paid.

The first Court, in disposing of this case, after rejecting the pleas urged by the defendant, special appellant, has held the defendants liable, according to the Ameen's investigation made in execution of the decree of Radhanath, to pay 700 and odd rupees. The defendant, special appellant, appealed to the Judge, urging among other things that the Ameen's report could not be used as evidence against him, because it was made behind his back, and he was no party whatever to it. But the Judge, under the impression that possession and the investigation as to the amount of mesne-profits took place at the same time, rejects the plea on the ground that "the appellant must have "had notice of the execution of the decree, "inasmuch as he was ousted by it from the "possession of his purchased share of the "premises."

Now, on referring to the record, we find that, on the 15th May 1868, an application was made to the Court on the part of the decree-holder, who took out execution against four of his judgment-debtors; but among them the defendant, special appellant, is not named; and he asked that an investigation might be made as to the amount of the mesne-profits. And as far as we are able to ascertain, it was upon this investigation that the amount of mesne-profits was ascertained, which was realized by the decree-holder. From the circumstance that the name of the special appellant before us is not included in that petition for execution, we think no presumption can arise that he was a party to the investigation made by the Ameen. If he were not so, anything that might have been recorded by the Ameen in his absence cannot be used as evidence against him. Looking at the answer of the defendant, special appellant, in the original case which was an admission of the claim, it is quite possible that, though the decree for possession was made against him jointly with others, he might have been able to show that he had at once delivered the separate property in his sole possession to the decree-holder, and that in consequence the amount of mesne-profits payable by him might be very small or nothing at all. At any rate, he cannot be made liable for the amount of mesne-profits that was ascertained in an enquiry that was made behind his back.

Then, again, we are unable to ascertain from the record how the sum now decreed against the special appellant has been found to be due. It is certainly stated in the judgment of the first Court that reference is made to the Ameen's investigation; but the Ameen's report is not on the record, and it is quite impossible to say from the record as it stands, whether supposing that investigation could be used as evidence against the special appellant, he is liable for the amount decreed. A claim for contribution should distinctly set forth the amounts due by each of the parties, which the present plaint does not; and there being that defect in it, it ought to have been rejected. But as the case has now gone on so far, we think it will be sufficient to remand it to the first Court, and allow the defendant, special appellant, to show that he was no party to the Ameen's investigation; and should he be able to show this, the investigation cannot, as we have said before, be used as evidence against him, and the claim for contribution must be ascertained in some other way than it has been done.

We reverse the decisions of both the Courts below, and remand the case to the first to be disposed of in the manner above indicated.

Costs of this special appeal will follow the final result of the suit.

Mitter, J.—I concur.

The 25th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Mahomedan family—Ancestral property—Self-acquisition—Onus probandi.

Case No. 1011 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 30th March 1870, reversing a decision of the Moonsiff of that District, dated the 12th June 1869.

Mahomed Afak (Defendant), *Appellant,*

versus

Ekram Ali (Plaintiff), *Respondent.*

Baboos Kalee Mohun Doss and *Rash Beharee Ghose* for Appellant.

Mr. C. Gregory and *Baboo Kashee Kant Sein* for Respondent.

In a suit by a member of a Mahomedan family to recover possession of a share in landed property alleged to be ancestral, where defendant claimed the same as his separately acquired property:

HELD that it was not necessary for defendant to show that he had funds sufficient to enable him to obtain the property, and that the burden of proving that the property was acquired for and enjoyed by the whole family jointly was upon the plaintiff.

Ainslie, J.—THE plaintiff sues to recover possession of a one-third share in three talooks and in a howla in right of his wife, Aftab Bibee. The defendant, who is the brother of Aftab Bibee, claims the howla as his own separately acquired property, acquired subsequently to the death of their father, and the three talooks as purchased by him on the 27th of Assar 1274 from his sister Aftab Bibee, and pleads limitation as barring the plaintiff's claim in respect of the howla. The first Court, in a very well-considered judgment, dismissed the plaintiff's suit. On the case coming before the Subordinate Judge, he lays down perfectly correctly the two points that have to be tried, but it appears to us that his judgment thereon is altogether defective.

On the point of limitation, he says that the whole family lived in commensality, that there has not been any division of the ancestral property between the brother and sister, and therefore that the action is not barred. He further observes that there is no evidence that the defendant had the means to acquire the talook No. 18 and the howla, and therefore that the presumption was that the said talook and howla also belonged to the family. In the first place, we would point out that there was no acquisition of a talook No. 18 at all, but simply of a howla within that talook which appears to have been acquired by the defendant from the zemindar on an annual rent of Rupees 5. Thus it does not appear to us that it was at all necessary to show that the defendant had funds at command in order to enable him to obtain this howla. As to the other part of the judgment on this issue, it may be perfectly true that the family lived together, but it does not follow that members of a Mahomedan family could not acquire separate property on their own account, and the burden of proving that this property was acquired for and enjoyed by the whole of the family jointly, was upon the plaintiff. This question does not appear to have been considered at all.

On the other question as to the three talooks Nos. 3, 5, and 15, the judgment of the Subordinate Judge appears to us to be founded solely upon conjecture. He says that, because the date of the bill of sale of the defendant was also the date of the sister's wedding day, the sale, therefore, could not be a *bond-fide* one, observing that a sister's wedding day is not altogether a fit time to purchase her paternal portion, rather on such a day the brother ought to give her something from his own portion. This is not a ground upon which a judgment can properly be founded.

Then as to the evidence about the deed of sale, the Judge says that the defendant's witnesses have not been quite definite and precise in their testimony of the sale. He does not say that the witnesses are untrustworthy, or that they do not prove the sale, but taking the day of sale into consideration, and biassed by the presumption which he drew from that fact, he has overruled the decision of the Lower Court. It appears to us that in doing so he has not properly considered the evidence on the record, and that the grounds on which he bases his judgment are merely conjectural, and not to be accepted as legal grounds for a finding of fact.

For these reasons, we think that the suit ought to be remanded for re-trial, and we, accordingly, direct that it be remanded to the Court of the Judge of Tipperah to be disposed of by him. Costs to follow the result.

The 25th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Act XVI. of 1868—Moonsiffs—Jurisdiction.

Case No. 1059 of 1870.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 23rd March 1870, reversing a decision of the Officiating Sudder Moonsiff of that District, dated the 25th January 1869.

Bungshee Buddun Dey and others (Plaintiffs), *Appellants,*

versus

Tarinee Churn Dey and others (Defendants), *Respondents.*

the plaintiff has now brought the suit against his co-defendants for contribution.

The plaint does not, as it should, specify the amount due by each of the co-defendants; but it asks to recover the difference between the sum for which the plaintiff considers himself liable under the decree and the amount that he has paid.

The first Court, in disposing of this case, after rejecting the pleas urged by the defendant, special appellant, has held the defendants liable, according to the Ameen's investigation made in execution of the decree of Radhanath, to pay 700 and odd rupees. The defendant, special appellant, appealed to the Judge, urging among other things that the Ameen's report could not be used as evidence against him, because it was made behind his back, and he was no party whatever to it. But the Judge, under the impression that possession and the investigation as to the amount of mesne-profits took place at the same time, rejects the plea on the ground that "the appellant must have "had notice of the execution of the decree, "inasmuch as he was ousted by it from the "possession of his purchased share of the "premises."

Now, on referring to the record, we find that, on the 15th May 1868, an application was made to the Court on the part of the decree-holder, who took out execution against four of his judgment-debtors; but among them the defendant, special appellant, is not named; and he asked that an investigation might be made as to the amount of the mesne-profits. And as far as we are able to ascertain, it was upon this investigation that the amount of mesne-profits was ascertained, which was realized by the decree-holder. From the circumstance that the name of the special appellant before us is not included in that petition for execution, we think no presumption can arise that he was a party to the investigation made by the Ameen. If he were not so, anything that might have been recorded by the Ameen in his absence cannot be used as evidence against him. Looking at the answer of the defendant, special appellant, in the original case which was an admission of the claim, it is quite possible that, though the decree for possession was made against him jointly with others, he might have been able to show that he had at once delivered the separate property in his sole possession to the decree-holder, and that in consequence the amount of mesne-profits payable by him might be very small or nothing at all. At any rate, he cannot be made liable for the amount of mesne-profits that was ascertained in an enquiry that was made behind his back.

Then, again, we are unable to ascertain from the record how the sum now decreed against the special appellant has been found to be due. It is certainly stated in the judgment of the first Court that reference is made to the Ameen's investigation; but the Ameen's report is not on the record, and it is quite impossible to say from the record as it stands, whether supposing that investigation could be used as evidence against the special appellant, he is liable for the amount decreed. A claim for contribution should distinctly set forth the amounts due by each of the parties, which the present plaint does not; and there being that defect in it, it ought to have been rejected. But as the case has now gone on so far, we think it will be sufficient to remand it to the first Court, and allow the defendant, special appellant, to show that he was no party to the Ameen's investigation; and should he be able to show this, the investigation cannot, as we have said before, be used as evidence against him, and the claim for contribution must be ascertained in some other way than it has been done.

We reverse the decisions of both the Courts below, and remand the case to the first to be disposed of in the manner above indicated.

Costs of this special appeal will follow the final result of the suit.

Mitter, J.—I concur.

The 25th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Mahomedan family—Ancestral property—Self-acquisition—Onus probandi.

Case No. 1011 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 30th March 1870, reversing a decision of the Moonsiff of that District, dated the 12th June 1869.

Mahomed Afak (Defendant), *Appellant,*

versus

Ekram Ali (Plaintiff), *Respondent.*

Baboos Kalee Mohun Doss and *Rash Beharee Ghose* for Appellant.

Mr. C. Gregory and *Baboo Kashee Kant Sein* for Respondent.

In a suit by a member of a Mahomedan family to recover possession of a share in landed property alleged to be ancestral, where defendant claimed the same as his separately acquired property :

HELD that it was not necessary for defendant to show that he had funds sufficient to enable him to obtain the property, and that the burden of proving that the property was acquired for and enjoyed by the whole family jointly was upon the plaintiff.

Ainslie, J.—THE plaintiff sues to recover possession of a one-third share in three talooks and in a howla in right of his wife, Aftab Bibee. The defendant, who is the brother of Aftab Bibee, claims the howla as his own separately acquired property, acquired subsequently to the death of their father, and the three talooks as purchased by him on the 27th of Assar 1274 from his sister Aftab Bibee, and pleads limitation as barring the plaintiff's claim in respect of the howla. The first Court, in a very well-considered judgment, dismissed the plaintiff's suit. On the case coming before the Subordinate Judge, he lays down perfectly correctly the two points that have to be tried, but it appears to us that his judgment thereon is altogether defective.

On the point of limitation, he says that the whole family lived in commensality, that there has not been any division of the ancestral property between the brother and sister, and therefore that the action is not barred. He further observes that there is no evidence that the defendant had the means to acquire the talook No. 18 and the howla, and therefore that the presumption was that the said talook and howla also belonged to the family. In the first place, we would point out that there was no acquisition of a talook No. 18 at all, but simply of a howla within that talook which appears to have been acquired by the defendant from the zemindar on an annual rent of Rupees 5. Thus it does not appear to us that it was at all necessary to show that the defendant had funds at command in order to enable him to obtain this howla. As to the other part of the judgment on this issue, it may be perfectly true that the family lived together, but it does not follow that members of a Mahomedan family could not acquire separate property on their own account, and the burden of proving that this property was acquired for and enjoyed by the whole of the family jointly, was upon the plaintiff. This question does not appear to have been considered at all.

On the other question as to the three talooks Nos. 3, 5, and 15, the judgment of the Subordinate Judge appears to us to be founded solely upon conjecture. He says that, because the date of the bill of sale of the defendant was also the date of the sister's wedding day, the sale, therefore, could not be a *bonâ-fide* one, observing that a sister's wedding day is not altogether a fit time to purchase her paternal portion, rather on such a day the brother ought to give her something from his own portion. This is not a ground upon which a judgment can properly be founded.

Then as to the evidence about the deed of sale, the Judge says that the defendant's witnesses have not been quite definite and precise in their testimony of the sale. He does not say that the witnesses are untrustworthy, or that they do not prove the sale, but taking the day of sale into consideration, and biassed by the presumption which he drew from that fact, he has overruled the decision of the Lower Court. It appears to us that in doing so he has not properly considered the evidence on the record, and that the grounds on which he bases his judgment are merely conjectural, and not to be accepted as legal grounds for a finding of fact.

For these reasons, we think that the suit ought to be remanded for re-trial, and we, accordingly, direct that it be remanded to the Court of the Judge of Tipperah to be disposed of by him. Costs to follow the result.

The 25th November 1870.

Present :

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Act XVI. of 1868—Moonsiffs—Jurisdiction.

Case No. 1059 of 1870.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 23rd March 1870, reversing a decision of the Officiating Sudder Moonsiff of that District, dated the 25th January 1869.

Bungshee Buddun Dey and others (Plaintiffs), *Appellants,*

versus

Tarinee Churn Dey and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Appellants.

Baboo Rash Beharee Ghose for Respondents.

A suit, of which the subject-matter did not exceed in amount or value Rupees 1,000, instituted one day after Act XVI. of 1868 received the assent of the Governor-General in Council, was held to be cognizable by the local Moonsiff, and not by the Sudder Moonsiff of the District.

Kemp, J.—THIS is a suit instituted by the plaintiff on the 25th of April 1868, or one day after Act XVI. of 1868 received the assent of the Governor-General in Council. Under Section 13 of that Act, Moonsiffs are empowered to try all original suits cognizable by the Civil Courts of which the subject-matter does not exceed in amount or value Rupees 1,000. Therefore, this suit, on the 25th of April 1868, was cognizable by the local Moonsiff or by the Moonsiff of Bohur, and not by the Sudder Moonsiff of Dacca. The Sudder Moonsiff of Dacca succeeded to the office of the Sudder Ameen; and under Section 12 of the same Act, that Moonsiff, exercising jurisdiction under the Act within the local limits of the Sudder Moonsiffee, would have had jurisdiction over all proceedings in this suit if this suit had been pending in the Court of the Sudder Ameen immediately before the passing of this Act.

Now, it is very clear that this suit was not pending in the Court of the Sudder Ameen immediately before the passing of this Act, and it, therefore, follows that the Sudder Moonsiff who succeeded the Sudder Ameen had not jurisdiction to try this suit. We also find that this suit was not disposed of until the 25th of January 1869. More than nine months elapsed between the institution of the suit and the disposal of it, and within that time the Sudder Moonsiff ought to have had the suit transferred to the local Moonsiff who had jurisdiction to try the suit under Section 14 of the aforesaid Act.

Baboo Kalee Mohun Doss, the pleader for the special appellant, has referred us to a Full Bench decision in Volume V. of the Weekly Reporter, page 88, but that decision is not in any way applicable to the case before the Court. That decision refers to a case brought under the provisions of Regulation XVII. of 1806, and the learned Chief Justice Peacock held that, under Section 1 of Regulation XVII. of 1806, it was distinctly provided that the time was to be calculated from the date of the promulgation of the Regulation, and not from the date on which it was passed. In that Regulation there was a special provision to that effect, but in Act XVI. of 1868 there is no such provision.

The appeal must, therefore, be dismissed with costs.

The 28th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie. *Judges.*

Ministerial Officers—Section 9, Act XVI. of 1868.

In the Matter of

Anund Chunder Chuckerbutty, *Petitioner.*

Baboo Khettur Mohun Mookerjee for Petitioner.

In the matter of the appointment of a serishtadar in a Moonsiff's Court, it was held to be no irregularity or impropriety on the part of a Judge to call the attention of the Moonsiff to a circular order of the High Court communicating the wishes of Government that preference should be given to certain discharged officers.

Ainslie, J.—THE petitioner is a candidate for the appointment of a serishtadar in the Court of the Moonsiff of Madargunge. The Moonsiff has selected him for the appointment, but the Judge, under Section 9 of Act XVI. of 1868 has declined to confirm the appointment. The petitioner in consequence comes up to this Court to get the order of the Judge set aside, and relies upon a case printed in Volume XIII. of the Weekly Reporter, page 197. In that case Mr. Justice Louis S. Jackson pointed out that the Judge had unmistakeably indicated to the Moonsiff his opinion and his desire that another person, whom the Moonsiff did not think fit to appoint, should be appointed, and held that such conduct on the part of the Judge was irregular.

In this case it appears to us that the Judge has not been pointing out specially to the Moonsiff any particular candidate whom he ought to have appointed, but calling the attention of the Moonsiff to a circular order* of this Court by which the wishes of Govern-

* 13 W. R., Civil Circulars, p. 17

ment were communicated to the several District Courts that officers belonging to the establishments of the Revenue Courts who had lost their appointments, owing to the transfer of rent-suits to the Civil Courts, should, whenever practicable, be re-appointed in the Civil Courts; and that, in so calling the attention of the Moonsiff to this circular order, there was no irregularity or impropriety on the part of the Judge. On the contrary, we think that the Moonsiff was bound to give the preference to any officer belonging to one of the reduced revenue establishments, who had been discharged only in consequence of such reduction, and who was competent to perform the duties of a serishtadar in his Court, unless there were personal objections to him of a grave character; and that the Judge was perfectly right in insisting on the Moonsiff attending to the circular orders of this Court.

In this view of the case, we do not think it necessary to interfere in favor of the petitioner. The application is rejected.

The 28th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Section 73, Act VIII. of 1859—Limitation.

Case No. 1095 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 11th March 1870, reversing a decision of the Moonsiff of Naraingunge, dated the 31st July 1869.

Eshan Chunder Banerjee and others (Plaintiffs), *Appellants,*

versus

Kristo Gutty Nag and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Nuleet Chunder Sein* for Appellants.

Baboos Onookool Chunder Mookerjee, Kalee Mohun Doss, and *Chunder Madhub Ghose* for Respondents.

When a party is substituted or added as a defendant under Section 73, Code of Civil Procedure, the suit is commenced as against him from the time he is made a defendant, and not before; and limitation runs in his favor up to the date of his admission into the suit.

Kemp, J.—THE point taken in this case by the special appellants, the plaintiffs, is that they have come into Court within 12 years from their cause of action as against J. P. Wise; that they had no cause of action as against the Nag Chowdhrys; and that no decree which they might have obtained as against Wise would be binding as against the Nag Chowdhrys; and, therefore, that the Lower Court was wrong in law in holding that the suit was barred, inasmuch as they had not brought it within 12 years from the date of the alleged ouster as against the Nag Chowdhrys. In this case, it is clear that the plaintiffs were ousted on the 1st of Bysack 1263. The suit was brought as against Wise on the 20th Cheyt 1263. The Nag Chowdhrys were made defendants in the suit under Section 73 of Act VIII. of 1859, and when made parties to the suit, they had been in possession of the disputed property, from the date of the admitted ouster to the date of their admission into the suit, for 12 years and 9 months. It has been held in a decision of the late Chief Justice, Sir Barnes Peacock, and Mr. Justice L. S. Jackson, published in Volume VI. of the Weekly Reporter, page 299, that when a party is substituted or added as a defendant under Section 73, the suit is commenced as against that person at the time he is made a defendant, and not before. It is also very clear that, if the Nag Chowdhrys had not been made parties to this suit, and the plaintiffs had obtained a decree as against Wise or any other party, the same question of limitation would have arisen under Section 229, and would have had to be decided under that Section.

We think, therefore, that the Lower Court was right in its finding, and dismiss the special appeal with costs.

The 28th November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Proprietors—Agents—Lessees.

Case No. 112 of 1870.

Regular Appeal from a decision passed by the Judge of Patna, dated the 28th May 1870.

Mussamut Muhbool Buksh and another (Plaintiffs), *Appellants.*

versus

Mussamut Suheedun and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellants.

Mr. A. F. Lingham for Respondents.

Where the proprietors of an estate, on being informed by their agent of a proposition to obtain a lease of the property, refused their consent, and the agent notwithstanding gave the applicant an *amuldustuck* to enter upon the property as lessee and gave no notice at the time to the proprietors, but subsequently inforced them of it: HELD that the proprietors were not under obligation to take early steps to disavow the act of their agent.

Jackson, J.—I REGRET to be unable in this case to concur in the view which has been taken by the Judge in the Court below.

The suit of the plaintiffs is an extremely simple one. They desire the assistance of the Court in getting possession of their own property which the defendant, Mussamut Suheedun, widow of one Abdool Luteef Khan, claims to hold under an alleged lease granted in an informal way to her deceased husband. There was also an allegation that the defendants Doodraj Muhton and Brijo Singh were in some sort of collusion with the principal defendant; but the object of the suit really was that the plaintiffs should recover possession of their own property from Suheedun.

The case set up by Mussamut Suheedun was that her husband had gone to a person named Ahmud Hossein otherwise called Khejoo Meah, who is married to one of the plaintiffs, and is consequently the son-in-law of the other Muhbool Buksh, and that he had verbally agreed to give a lease, and in furtherance of that consent he gave an *amuldustuck* or written paper authorizing Ahmud Hossein to go and enter upon the property and announce himself as lessee or intended lessee thereof. It was further contended that the plaintiffs had been aware of the act of Khejoo Meah, and that they had not in any way disavowed what he had done in the assumed capacity of their agent, but, on the contrary, they had received rents from the defendants, and therefore ratified the lease.

It appears to me that the proof of this altogetner failed. The principal witness whom the defendants examined was Ahmud Hossein *alias* Khejoo himself. He gives a full account of the occurrences. He says that Abdool Luteef, being desirous of getting a lease of this property, which he had previously held on a lease at a much higher rate of rent, and which had been intermediately held by the defendant Doodraj Muhton, had come to him and had a conversation upon the subject, and that he had promised to recommend the plaintiffs to grant the lease: that afterwards, being asked by Abdool Luteef to give him an *amuldustuck*, supposing that, with reference to the season of the year, no particular harm would come of his doing so, he did what was, no doubt, improper and unauthorized, and gave him the *amuldustuck*. He says that he did not at that time mention the matter to the ladies, but afterwards, on his doing so, they informed him that they would not give Abdool Luteef the lease, and thereupon he considered the matter at an end.

It was sought to be shown that the two ladies had been at Khejoo Meah's house at the time of the conversation between Khejoo Meah and Abdool Luteef, and that Khejoo Meah went into the private apartments where the ladies were as if to obtain their consent to what he was doing. As to this, I think that the evidence of Khejoo's brother is to be believed, from which it appears that the ladies went on a visit to the town where these two brothers lived in separate houses situated in different mohullahs, but were the visitors of the brother, and not of Khejoo, inasmuch as the visit was made on the occasion of a marriage which took place in that brother's family. It also appears that the marriage took place, not in the month in which this conversation took place, but in a different month, namely, in the month of Falgoon.

The learned Counsel who appeared for the defendant has insisted that the ladies

were bound to have taken some early steps to have undeceived the defendants and to have disavowed the act of Khejoo Meah. I do not perceive that any such obligation was thrown upon them. It is not shown that they had any notice that an *amulduslack* had been granted. All that they knew was that a proposition had been made by Abdool Luteef to obtain a lease, to which proposition they did not consent. It appears to me that the plaintiffs cannot be refused possession of their own property, inasmuch as it is not shown that they had parted with their right either by any act of their own or by any act of their duly authorized agent, or by any act of a person not authorized to act for them, but which they had subsequently ratified.

It appears to me, therefore, that the plaintiffs were entitled to judgment, and that the judgment of the Lower Court must be reversed, and judgment entered for plaintiffs with costs. That portion of the decree of the Court below, however, which awards costs to the defendants Doodraj Muhton and Brijo Singh will stand, as no cause of action has been made out against them, and they will also get the costs of this Court upon the amount of costs awarded them by the Lower Court.

Glover, J.—I concur generally in this judgment.

The 28th November 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Conveyance—Hindoo widow—Reversioner—Alienation.

Case No. 126 of 1870.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and W. Markby, on the 22nd June 1870, in Special Appeal No. 78 of 1870.

Mohunt Kishen Geer (Defendant-appellant), *Petitioner,*

versus

Busgeet Roy and others (Plaintiffs-respondents), *Opposite Party.*

Baboo Bhowanee Churn Dutt for Petitioner.

Baboo Unnoda Pershad Banerjee for Opposite Party.

When several persons join in a conveyance and convey "the whole and entire property absolutely," they must be taken to have exercised every power which they possess, and to have parted with their whole interest whether in possession or expectation.

A Hindoo widow in possession and the apparent next taker by joining in one conveyance can make a complete title.

Markby, J.—I THINK this is a proper case for the admission of a review.

The case was complicated, and the several principles of law in dispute having been settled, we had to apply them to a variety of circumstances.

I think, in dealing with the alienation by Teeluk Chand, the widow of Janokee, I overlooked the fact, which is now pointed out, that Gooroo, the then apparent next taker of the property, was a party to the conveyance.

It is contended that his being a party would not make any difference, because he had a share which it was necessary to convey, and there is no reason to suppose that, when he joined in the conveyance, he meant to deal with anything more than his own share; and that, if he had intended to affirm and join in the sale by Teeluk Chand of the share vested in her as widow, that should have been so expressly stated.

It does not, however, appear to me that this is the true way of construing the deed. When several persons join in a conveyance and convey "the whole and entire property absolutely," I think it must be taken that they have exercised every power which they possess, and that they have parted with their whole interest whether in possession or expectation.

But it was also contended that, Gooroo being only the possible next taker, his joining in the conveyance would not make the title good. But I think that, even if the property did not eventually, at Teeluk Chand's death, become vested in Gooroo, still, according to the rule of Hindoo Law which has been adopted by this Court, the title of the alienee is complete. To hold otherwise would only necessitate the adding of two or three words to the conveyance, because the widow may at any time surrender the property to the apparent next taker, who will then become absolute owner. But that is

not necessary. The two by joining in one conveyance can make a complete title.

I have always understood this to be the rule, and no decision to the contrary has been produced before us. It was said that the Privy Council had recently taken a different view, but the name of the case was not mentioned, and we have not seen it.

The review will be admitted, and as the matter has been fully argued, there will be no necessity to hear the case further. The decree will be amended in accordance with his judgment.

I think there ought not to be any costs. If the parties had paid prompt attention to the judgment of the Court, the error might have been at once corrected before the decree was drawn up.

Bayley, J.—I concur in admitting a review in this case.

The 28th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Remand—Evidence—Issues.

Case No. 1068 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 11th March 1870, modifying a decision of the Moonsiff of that District, dated the 31st July 1869.

J. P. Wise (Defendant), *Appellant,*

versus

Ishan Chunder Banerjee and others (Plaintiffs), *Respondents.*

Baboos Nubo Kishen Mookerjee and *Anund Chunder Ghossal* for Appellant.

Baboos Sreenath Doss and *Nuleet Chunder Sein* for Respondents.

When an Appellate Court remands a case under Section 354 for the trial of an issue which the Lower Court may have omitted to raise or to try, it is not limited to the evidence then on the record, but may keep the case pending on its own file until the return of the first Court's finding on the issue with the evidence recorded on the trial thereof: or the Appellate Court may itself try the issue so raised.

When the evidence is accepted by a Subordinate Judge as sufficient to warrant a decree, and the case is only remanded for a defect of parties, his successor is justified, when the case is returned by the first Court in respecting the former judgment and looking upon the evidence as *primâ facie* good and sufficient.

Ainslie, J.—ISHAN CHUNDER BANERJEE, the plaintiff in this suit, sued Mr. J. P. Wise, to recover possession of two-thirds of a one-third share of the julkur of the river Megna appertaining to talook No. 343, and of two-thirds of an 8-annas share in julkur Meneakhallee.

This suit, having been disposed of in the first Court, was taken on appeal before the Subordinate Judge of Dacca. The Subordinate Judge confirmed the judgment of the first Court in respect of julkur Meneakhallee, but remanded the suit for re-trial in respect of julkur Megna in consequence of a defect of parties, and the case having been re-tried, a second appeal was filed before the Subordinate Judge, and at the hearing of that appeal the Subordinate Judge has again, as regards the claim of Mr. Wise, remanded the case to the first Court under Section 351 of the Code of Civil Procedure for trial of an issue as to the boundaries of the julkurs claimed by the parties respectively.

In special appeal, the appellant objects that the Lower Appellate Court was wrong in remanding the case under Section 351, but should have decided it on the evidence at present on the record. We do not entertain the slightest doubt that the Subordinate Judge was wrong in remanding the case under Section 351, for under that Section it is only when the first Court disposes of a case upon any preliminary point so as to exclude any evidence of fact, that the Appellate Court ought to remand; but we do not think that the Lower Appellate Court was limited to the evidence at present on the record, for under Section 354 it is open to an Appellate Court to raise any issue for trial which the Lower Court may have omitted to raise or to try, keeping the case pending on its own file until the return by the first Court of its finding thereon, together with the evidence recorded on the trial of such issue, or the Appellate Court can itself try the issue so raised. That is the course which the Subordinate Judge should have adopted, and which he must now adopt.

The second ground of special appeal is that the Subordinate Judge has improperly accepted as binding the decision of the

former Subordinate Judge passed when the case first went up in appeal, and that that decision is only binding as regards the Meneakhallee julkur. There is no doubt that this contention would be perfectly sound if supported by the record, but we do not think that the Subordinate Judge has gone beyond this—that as the evidence on the whole question was before the former Subordinate Judge, and was accepted by him as sufficient evidence to warrant a decree, the case being only remanded for a defect of parties, he thinks it his duty to respect that former judgment, and to look upon the evidence before him as *primâ facie* good and sufficient; but he has not stopped here, he also goes on to find for himself that there was a possession as against Mr. Wise within the term of limitation.

We do not, therefore, think that there is anything in the second ground of appeal which warrants our interference.

On the first ground, the order of remand to the first Court must be set aside, and the case sent back to the Subordinate Judge to be completed under Section 354. The costs of this appeal will follow the result.

The 29th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Act XXVI. of 1867, Schedule B, Art. 11, note (*b*)—Appeal.

Case No. 1134 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 23rd April 1870, reversing a decision of the Moonsiff of that District, dated the 5th July 1869.

Mofeezooddeen Chowdhry (Plaintiff), *Appellant,*

versus

Kureemoonissa Bibee (Defendant), *Respondent.*

Mr. R. E. Twidale and *Moulvie Syud Murhumut Hossein* for Appellant.

Baboos Debendro Narain Bose and *Grish Chunder Ghose* for Respondent.

No appeal lies to a Subordinate Judge from the decision of a Moonsiff under Act XXVI. of 1867, Schedule B, Art. 11, note (*b*), as to the market-value or annual net profits of property.

Ainslie, J.—THE question raised by the special appellant in this appeal is whether the Subordinate Judge had the power to interfere with the finding of the Moonsiff on the point of valuation of the property in suit. The pleader for the special appellant relies upon note (*b*) under Article 11 of Schedule B of Act XXVI. of 1867, in which it is said that the Court may, either of its own motion or on the application of any party to the suit, issue a commission to any proper person directing him to make such local or other investigation as may be necessary and to report thereon to the Court, and the decision of the Court as to the market-value or annual net profits shall be final. It appears to us that, with reference to the terms of the Act quoted above, it was not open to the Subordinate Judge to try the question of valuation, and that we are, therefore, bound to set aside his judgment on that point, and to remand the suit for trial on the merits. It appears that in this case the first Court has proceeded precisely in the manner pointed out in the note in question by deputing a Civil Court Ameen to hold a local investigation as to the annual profits and market-value of the land in suit, on the question raised by the defendant in the suit as to the jurisdiction and proper stamp for the plaint. The costs will follow the result.

The 29th November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Misjoinder—Section 7, Act VIII., 1859.

In the Matter of

Rutnessur Dass and others, *Petitioners.*

Baboo Obhoy Churn Bose for Petitioners.

HELD that there was no misjoinder of different causes in a suit including plaintiff's whole claim, where his cause of action was that the Revenue Commissioner had taken possession of his lands and given it in pottah to other people.

Bayley, J.—I THINK the Lower Court ought to try this case. The misjoinder is not to be considered with reference to the

number or position of the defendants, but with reference to the cause of action arising to each of them respectively. The proper course would be, I think, to let summons issue on the defendants and thus give them liberty in their defence to raise any point of law, such as that of misjoinder, as they think fit or may be advised.

Jackson, J.—I quite concur. As the case stands at present, I do not think there is any misjoinder at all. The plaintiff brought this suit with reference to Section 7, Act VIII. of 1859, including the whole claim arising out of his cause of action. His cause of action was that the Revenue Commissioner had taken possession of his lands and given it in pottahs to other people. Even if there were more than one cause of action, it seems to me that the Deputy Commissioner ought to have acted under Section 9. Act VIII. of 1859, and tried the different causes of action separately. But as the case stands, there seems to me to be no different causes of action at all.

The 29th November 1870.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Lessor—Lessee—Damages.

Case No. 109 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 12th March 1870.

Mahomed Esa Khan and others (Defendants), *Appellants,*

versus

Baboo Keshub Lall (Plaintiff), *Respondent.*

Mr. R. T. Allan for Appellants.

Baboo Unnoda Pershad Banerjee for Respondent.

A party who took from certain proprietors of an estate a lease of their interest therein without advance, or premium, not having been put in possession, and finding another party in possession with an adverse title, commenced a suit against him, which was unsuccessful. He then sued the lessors and their representatives for damages to recover the expenses of the litigation, and the whole of the profits he had expected from the lease.

HELD that the plaintiff had no right to recover from the lessors the expenses of the litigation; and, as it was not contended that the lessors had wilfully misrepresented things, he was entitled only to nominal damages.

Jackson, J.—THE plaintiff in this case is a banker. It seems that he took from three ladies, named Mussamuts Ayesha Begum, Elahee Khanum, and Sukeena Khanum, a lease of their interest amounting to 15 annas and 6 dams in Mouzah Amruth, for a period of 9 years without any advance or premium (*selamee*), at an annual jumma of 1,415 rupees under a lease, dated 2nd January 1863. The plaint alleges that the lessors failed to put the plaintiff into possession; that the plaintiff, finding another party who set up an adverse title in possession of the mehal, commenced a suit to recover possession, but that the lessors omitted to render him any assistance in that suit, in consequence of which the suit was defeated. He now, therefore, sues to recover from two of the lessors and from Mahomed Esa Khan and Mussamut Mokeema Begum, who are described as representatives of the third lessor, damages for breach of contract; and as the measure of those damages he claims to recover the amount of expenses to which he was put in the litigation I have mentioned, and also the whole of the profits which he expected to derive from the lease of the mehal.

He has got from the Court below a decree for his entire claim.

As to the estimated profits under the lease, the only evidence of any kind offered by the plaintiff is a copy of a lease which appears to have been granted by one of the defendants, Elahee Khanum, to a different party at a considerably higher rate than the rent reserved under the plaintiff's lease; and upon this piece of evidence the Court has awarded damages, only providing that, in respect of years not yet come or expired, the plaintiff is to receive the amount due on account of those years as the years fall in.

Against this decree, the representatives of Ayesha Begum have appealed to this Court.

It appears to me that the claim of the plaintiff is altogether untenable. The question of the liability of Mahomed Esa Khan and Mussamut Mokeema Begum, as the heirs of Ayesha Begum, has not been raised before us. We have only to consider whether the award of damages is right or no.

The lessors have, no doubt, failed to carry out in giving possession the contract of lease into which they had entered with the plaintiff. The plaintiff considers that, in consequence of that failure and under the clause in his lease to which I shall presently advert, he is entitled to recover from the defendants everything in the shape of loss or damages which he has incurred in consequence of that failure.

The learned vakeel who appeared for the respondent was at first inclined to rest his client's claim to those damages on general principles, and to contend that, as a matter of law, the plaintiff would have been so entitled without express words being contained in his contract. He now appears to resile from that contention, and to rest the plaintiff's claim entirely upon the specific clause in the contract.

That clause is in these or nearly in these words: In the event of plaintiff not being put into possession of the leased premises, the lessors will have to make good anything in the shape of *khisarah* or *nookan* to which the lessee may be put in consequence; and it is contended for the respondent that, in making this agreement, the parties had in contemplation such expenditure as the plaintiff claims in the present suit.

I cannot see any trace of the parties having had any such thing in their contemplation, and it appears to me improbable that they should. It is not denied that the lessee, when he found that he could not get possession, might have thrown up his lease and retired from the matter altogether. Upon what principle, therefore, is he entitled, when he had that option, to say: "As a matter of advantage to myself I prefer to litigate the title of my vendor with the party in possession; and failing in that litigation, I will make my lessors pay my expenses"? It seems to me he has no right whatever. If he entered upon this contest, he did so at his own risk, and having failed, he must take the costs on himself.

Then as to the profits, what consideration had the defendants for taking upon themselves the risk of the plaintiff obtaining the profits which he claimed here? Absolutely none. There was no money advanced. The rent reserved was much less than the profits which the plaintiff claims that he was entitled to. I am at a loss to see on what ground a party who gives a lease such as that which is the subject of the present suit can be called upon to *recoup* the party who fails to recover possession the whole advantage which he might have had if he had obtained possession under the lease. There is no authority, as admitted by the respondent's vakeel, for any such right as a matter of law; and I certainly fail to see anything in the terms of the lease which would justify the claim in this particular case. It is not contended that there was any misconduct on the part of the lessors, or that they wilfully misrepresented things, and so led him into any expense which he might not otherwise have incurred. So far as we know anything to the contrary, the lessors *bonâ fide* believed that they had title, and under that belief granted the lease to the lessees. He and they were both disappointed; he loses the lease, and they the rent. All that the plaintiff is entitled to under the circumstances, we think, is nominal damages, and those damages we fix at 200 rupees.

The judgment of the Court below will, therefore, be reversed, and judgment will be entered for the plaintiff for 200 rupees. Each party will pay their own costs in the Court below, and the appellant will get the costs of this appeal.

Glover, J.—I concur.

The 30th November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Certificate under Act XXVII. of 1860—Hindoo devotees.

Case No. 283 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 15th June 1870.

Gureeb Doss (Petitioner), *Appellant,*

versus

Mungul Doss (Opposite Party), *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Debendro Chunder Bose for Respondent.

The person entitled to a certificate enabling him to collect the debts due to the estate of a deceased ascetic or devotee must be the disciple or spiritual brother or preceptor of the deceased, and such person should not be deprived of his right, even though mentally incapable of succeeding to the office of the deceased.

Jackson, J.—THE Judge, in disposing of this matter, appears to have gone beyond his proper province. The question that he had to determine was, who was entitled to a certificate enabling him to collect the debts due to the estate of the deceased Bal Gobind. The well-known rule in these matters is, that the person entitled is the disciple or spiritual brother or preceptor of the deceased, who appears in this case to have been an ascetic or devotee. The question is one which ought not to be mixed up with the right to succeed to the office of Mohunt, and the person who is entitled in such cases ought not to be deprived of his rights either because he has lost his fingers, or is of advanced age, or even because he appears to be mentally incapable of holding that office; for even if the petitioner was a lunatic, the Court, on being moved, would take proper means to protect his interests, but would not refuse him what he was entitled to; but it seems to me there is no ground for assuming the incapacity of this party. He appears to have been a person attached to the shrine at which the deceased person ministered. He appears also to have been of the same school, and to have been the preceptor of his preceptor, whereas the rival claimant, Mungul Doss, belongs to a different community. Under these circumstances, I think there can be no doubt that the appellant was entitled to the certificate which he asked for.

It is observed by the Judge that his decision in no way touches the question of succession to the Guddee, and the same observation will apply to our decision.

I think the Judge's order must be set aside with costs.

Glover, J.—I am of the same opinion.

The 30th November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Injunction as to property—Civil Court's powers.

Shaikh Moheeooddeen, *Petitioner,*

versus

Shaikh Ahmed Hossein, *Opposite Party.*

Mr. R. E. Twidale for Petitioner.

No one for Opposite Party.

The power of a Court to attach property and to appoint a receiver extends only to the better management or custody of any property which is in dispute, and ceases when the suit comes to an end. An injunction in respect of property cannot be maintained after a claim is dismissed or pending an appeal.

Jackson, J.—WE think there can be no doubt that the order of the Subordinate Judge refusing to withdraw the attachment and the order appointing a receiver made under Section 92 of the Code of Civil Procedure after the dismissal of the suit, is erroneous, and that the injunction comes to an end when the case has been dismissed.

The power of the Court in respect of such matters extends only to the better management or custody of any property which is in dispute in a suit, and therefore when the suit has come to an end, and when there can be no longer any decree to satisfy or property coming to the defendant in that suit, there can be no further ground for the continuance of an injunction or any such measure.

Section 96 shows that, if the claim of the plaintiff is dismissed, and it shall appear that there was no probable ground for instituting the suit, the Court may award compensation to the plaintiff. If it had been contemplated that an injunction or an attachment might subsist pending an appeal, or until the period for lodging an appeal had elapsed, the Court would not probably have had authority given it to grant compensa-

tion under that Section. The Act does not give power to the Court to attach property or to maintain an injunction in respect of property until an appeal shall have been lodged, or after the appeal has been admitted during the pendency of the appeal. But the Appellate Court has the same power in respect of granting an injunction which the Court of original jurisdiction has. If, therefore, the party whose suit has been dismissed desire to have any measure taken for the better management of the property which he claims, he will be at liberty to apply to the Appellate Court who has authority to make such an order. The order of the Subordinate Judge must be set aside with costs.

The 30th November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Sale in execution—Appeal—Section 257, Act VIII., 1859.

Case No. 277 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 23rd May 1870, reversing an order of the Subordinate Judge of that District, dated the 13th December 1869.

Sonamonee Dossia (Decree-holder), *Appellant,*

versus

Motee Singh and others (Judgment-debtors), *Respondents.*

Baboo Taruck Nath Palit for Appellant.

Baboo Luckhee Churn Bose for Respondent.

A judgment-debtor having preferred various objections to the Court of the Subordinate Judge which was executing the decree against him, his objections were rejected, and the Court proceeded to sell the property attached in execution. The judgment-debtor then preferred an appeal to the Judge against the order which threw out his objections, but without expressly objecting to the confirmation of the sale.

HELD that the Judge was entitled to deal with the case as an appeal against the sale, which had taken place before the appeal was preferred; and no further appeal therefore lay to the High Court.

Jackson, J.—IN this case the Zillah Judge, upon an appeal by the judgment-debtor, set aside the sale ordered by the Subordinate Judge in execution of decree. It has been determined by a Full Bench of this Court in a case which is to be found reported in 9 Weekly Reporter, page 218, that in such cases there is no further or special appeal to the High Court; and the decree-holder who comes before us in special appeal contends that in this case the Zillah Judge did not act under the provisions of Section 257 of the Procedure Code, that he consequently acted without jurisdiction, and this Court may interfere under its general powers of supervision given by Section 35, Act XXIII. of 1861.

The facts are these: Previous to the sale, the judgment-debtor preferred various objections to the Court which was executing the decree, one of them being that the proclamation or publication had not been duly effected; that the Court rejected the petition of objection, and immediately afterwards proceeded to sell the property. The judgment-debtor preferred an appeal immediately to the Zillah Judge, but without expressly objecting to the confirmation of sale, and thereafter appealing to the Zillah Judge he made his appeal against the order which threw out his objections.

Now, the contention of the decree-holder is that the judgment-debtor was bound to have first preferred an objection to the Subordinate Judge after the sale, upon the very point upon which he had preferred an objection before the sale. Of course, the Subordinate Judge would come to the same conclusion that he did on the former occasion. It is obviously desirable that objections to sales should be preferred at the earliest possible moment. We think the Judge, having the matter before him, was entitled to deal with the appeal as an appeal against the sale which had taken place before the appeal was preferred, and as if it were an appeal against the order confirming the sale. Under these circumstances, the objection is one of form, and one which we ought not to entertain, but we ought to deal with this as an appeal under Section 257, and as such, one upon which a further appeal cannot be entertained. The appeal must, therefore, be dismissed with costs.

The 30th November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Recorder's Court—Assistant Commissioner—Execution.

In the matter of

Kyanpettee of Moulmein, *Petitioner,*

versus

Nga Sha Law and another, *Opposite Party.*

Mr. W. A. Montriou for Petitioner.

Mr. Sanderson for Opposite Party.

The Court of the Recorder of Moulmein has no jurisdiction to execute a decree made by the late Court of the Town Assistant Commissioner.

Jackson, J.—We think it quite clear that the Court of the Recorder of Moulmein had no jurisdiction to issue execution upon a decree made by the late Court of the Town Assistant Commissioner. The Recorder's Act (XXI. of 1863) contains no provision, such as is to be found in the High Court's Act and other Acts of the kind, enabling the Court of the Recorder to deal with suits or proceedings previously pending in any other Court, or enabling that Court to continue in the way of execution, or otherwise, any matters commenced or decided in other Courts. The learned Recorder assumes that the extinct Court of the Town Assistant Commissioner had been absorbed in the Recorder's Court; but there appears to be no foundation for this opinion. It is probable that the decree upon which execution has not been had may afford a cause of action of which the Recorder may take cognizance; but that is a matter we need not decide at present. We think that the order complained of must be set aside, the rule being made absolute with costs.

The 1st December 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Plaint—Special appeal.

Case No. 722 of 1870.

Special Appeal from a decision passed by the Officiating Judicial Commissioner of Chota Nagpore, dated the 22nd January 1870, affirming a decision of the Deputy Commissioner of Lohardugga, dated the 7th June 1869.

Sree Pershad (Plaintiff), *Appellant,*

versus

Raj Gooroo Trumbuck Nath Deo and others (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Wopendro Chunder Bose* for Appellant.

Mr. R. T. Allan and *Baboo Rash Beharee Ghose* for Respondents.

Where the prayer in a plaint was to have an alienation set aside by reason of the illegitimacy of the party who made it, and the plaintiff failed to prove the alleged illegitimacy, he was held to be debarred, in special appeal, from urging a new ground for the prayer, *viz.*, the absence of consent of other heirs.

Bayley, J.—We think this special appeal must be dismissed with costs. The point now raised before us was not raised in the plaint. The prayer in the plaint was that, whereas the party who made the alienation was not the legitimate son, *therefore* the alienation was invalid, and should be set aside.

The Lower Appellate Court distinctly records that the point was raised for the first time before that Court, and it is not denied by the special appellant that this was so; but it is argued before us that, whether it be so or not, the point is involved in the facts of the case, and we are pressed to decide whether, supposing the legitimacy to be admitted, it is not in the power of the plaintiff to sue and obtain a decree to set aside the alienation as being made without the consent of the other heirs in a joint Hindoo family living under the Mitakshara Law.

Now, it is clearly laid down in the Privy Council case of Eshan Chunder Singh,* Volume XII., Moore's Indian Appeals, that the Courts are to restrict the plaintiff to his prayer in the plaint, and not to give decrees which go beyond that prayer. Applying that test to this case, the prayer in the plaint is to have the alienation set aside, because it is invalid, not by reason of the absence of the consent of other heirs, but by reason of the illegitimacy of the party; and if we decide the case on the point now raised for the first time, we shall virtually declare that, although the plaintiff asked to set aside the alienation for the specific reason *of the illegitimacy of the party*, and failed to prove that fact, yet he is entitled to have that alienation set aside now, after such failure, on the new ground of the absence of the consent of other heirs, which was not the point raised in the plaint. That comes, I think, within the prohibition and injunction of the Privy Council Ruling cited, and from what has been stated above it is clear that the proposition now attempted to be urged is extraneous and separate from that on which the plaintiff based his prayer, and being extraneous and quite separate cannot be said to be involved in it.

Our attention has been drawn to two decisions, one reported at page 28, Volume XII., Weekly Reporter, dated 29th July 1868, and another in page 15, Volume VIII., Weekly Reporter, dated 7th June 1867; but there is nothing in those judgments, nor has the pleader for the special appellant been able to show us anything in them which justifies the contention that, where there is an alienation made by one shareholder, and another sharer sues to set aside that alienation, it follows as a consequence that a decree must be absolutely given to the party who sues to set aside the alienation.

We dismiss this special appeal with costs.

* 6 W. R., P. C., p. 57.

The 1st December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Costs—Deposit.

Case No. 285 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Bhaugulpore, dated the 4th June 1870.

Rajah Leelanund Singh (Decree-holder), *Appellant,*

versus

The Court of Wards on behalf of the Rajah of Durbhungah (Judgment-debtor), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

Costs are not consequential upon partial relief being granted in a suit, involving a much larger subject-matter, a portion of which is still *sub-judice*, and cannot, therefore, be given by the High Court upon a decree of the Privy Council if not provided for by the decree.

A deposit of costs accompanied by a prayer that they should be inquired into upon a particular principle does not imply an admission on the part of the depositor of his obligation to pay costs to the extent of the deposit.

Jackson, J.—THE appeal in this case relates to certain questions arising in execution of a decree of Her Majesty in Council. The appellant, who is Rajah Leelanund Singh, had brought a suit to recover a large quantity of immoveable property, which suit was entirely dismissed by the decree of the late Sudder Court. On appeal to Her Majesty in Council, the plaintiff obtained judgment in respect of two mouzahs; and as to some further portion of the claim a remand took place, and the claim in regard to that further portion has not yet terminated.

On a former occasion, when this Court was called upon to order execution in conformity with the decree of Her Majesty in Council, the Court declined to make any

order in respect to the wassilat of the two mouzahs decreed, because the decree which was sought to be executed contained no instructions in that behalf. The plaintiff thereupon appealed again, and the Judicial Committee observed that the wassilat should be looked upon as consequential upon the award for the immoveable property in dispute, and directed accordingly that wassilat should be assessed. The present appeal relates to this very amount of wassilat which has now been refused by the Subordinate Judge, the order of the Privy Council not having apparently reached his Court: the appeal also relates to certain questions of costs.

Now, I confess that, in dealing with execution of decrees from Her Majesty in Council, I expect to be on some future occasion somewhat embarrassed in dealing with questions of wassilat in consequence of the observations made by their Lordships in this appeal; but in the present case there can be no doubt. The Judicial Committee having interpreted its own decree as having included wassilat, execution must include such wassilat accordingly. The wassilat, therefore, must be ascertained in terms of the decree of Her Majesty in Council, dated 19th July 1870.

But, however the case may be as to wassilat, it appears to me clear that costs are not consequential upon partial relief being granted in a suit involving a much larger subject-matter, a portion of which is still *sub judice*, and it is impossible to say what conclusion the Privy Council will arrive at in regard to the costs of the whole litigation when it has the matter before it; and as the costs have not been provided for by the decree of that tribunal, I do not think we will be right in giving them.

As to the costs of the Court below, it was insisted that the Court of Wards, having made a deposit of 600 rupees, and prayed that the costs should be enquired into upon a particular principle, has, in fact, admitted that it was bound to pay costs to that extent. I think that the deposit meant nothing more than a payment into Court of an amount which the Court of Wards has assumed as the outside amount it would have to pay on that account. I think the Court was not bound to award costs when it did not otherwise find that costs were payable.

The other point relates to costs which are costs of the proceedings in appeal to England. Those are matters over which the Judicial Committee alone have jurisdiction, and I do not think we would be justified in ordering the costs of such an appeal when the Judicial Committee have not ordered them.

Each party must pay his own costs of this appeal.

Glover, J.—I concur.

The 1st December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Sections 3 and 17, Act X. of 1859—Rates—Assumptions—Bhaolee payments.

Case No. 1149 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 11th March 1870, reversing a decision of the Deputy Collector of that District, dated the 3rd October 1869.

Ram Dyal Singh (Defendant), *Appellant,*

versus

Baboo Luchmee Narain (Plaintiff), *Respondent.*

Moulvie Mahomed Yusuf for Appellant.

Baboo Sreenath Doss for Respondent.

In a suit against a ryot who had been paying on the *bhaolee* principle, for a kubooleut binding him to pay a money-rent in excess of anything that he had been paying, in which plaintiff based his claim upon Clause 1, Section 17, Act X. of 1859, where the Judge, proceeding entirely upon the engagements of other ryots "holding the same blocks of land as the defendant," assumed the rents claimed to be reasonable and in proportion to the produce, and decreed the plaintiff's claim: it was HELD that the assumption was unwarrantable, and the decision untenable.

Quære.—Under the words "rate of rent" in Section 3, Act X. of 1859, did the Legislature intend that a ryot should be required to give a kubooleut at *nukdee* rates when he had been previously holding upon a *bhaolee* tenure?

Jackson, J.—THE plaintiff in this suit is the zemindar. He alleges that the defendant holds within his estate a quantity of land amounting to 80 beegahs, or thereabouts, which is held partly by the *nukdee* or cash rent, and partly upon the *bhaolee* principle, that is, the principle of division

of crops between the landlord and tenant; and then sets forth that the division of crops and the amount to be paid causing continual disputes between the landlord and tenant, he is desirous of having the rate once for all fixed and determined in the way of cash payment; that he has, accordingly, tendered a pottah at a rate which he considered reasonable, and called upon the defendant to give him a kubooleut; and that, the defendant having refused to comply with his demand, he brings this suit.

The defendant's statement varies much from that of the plaintiffs in respect of the proportion at which the land has been held *nukdee* and *bhaolee;* and he alleges that he has held by far the greater portion of the land at one uniform rate of division of crops for a number of years; and he, therefore, claims the benefit of Section 4, Act X. of 1859, and of the exemption provided by Section 3 of the Act.

The Deputy Collector who tried the suit found the plaintiff entitled to a kubooleut from the defendant, not at the rate which he claimed, but at a somewhat lower rate; and if the finding of the Zillah Judge had been in accordance with that of the first Court, we should have been bound to reverse the judgment on that ground in conformity with the ruling of the Full Bench, inasmuch as the plaintiff could not be entitled to recover a kubooleut at another rate than that at which he had tendered the pottah; but the case coming on appeal by both parties before the Zillah Judge, the Judge was of opinion that the plaintiff was entitled to the rates which he claimed; and he, therefore, gave the plaintiff a decree for a kubooleut at the rate claimed.

The grounds of special appeal argued before us have been two. In the first place, that, in the circumstance of the defendant's holding, namely, of his having held *bhaolee* for a number of years, the plaintiff would not be entitled to ask for a kubooleut at *nukdee* rates from him at all; and, secondly, that the evidence on which those rates were assessed was not such as the Judge ought to have proceeded upon.

In respect of the Judge's ruling upon the first point, the pleader for the respondent has referred us to a case in 4 Weekly Reporter, page 23, Act X. Rulings; and also to another case in 8 Weekly Reporter, page 170, in which that first ruling is followed. There the learned Judges appear to have held that payment for a number of years at one uniform *bhaolee* rate would not be a payment at an unchanged rate, such as would protect a ryot under the provision of Section 3, Act X. of 1859.

Now, if it were necessary for us to decide the case on this question, I confess I would have considerable difficulty in assenting to the rulings in these cases; because, if the rulings are correct, the Legislature must have intended that ryots who have held land upon one principle, that is to say, upon one fixed ratio of division of the produce of their land with the landlord, from the time of the Permanent Settlement, would be entitled to no protection whatever, but would, after these 80 or 90 years, be subject to a suit for enhancement or for commutation of their rent at such money-rates as the landlord might be enabled to prove.

I cannot believe that the Legislature could have intended any such injustice to ryots in those parts of the country where the *bhaolee* system is prevalent, as it is in many parts of Behar. In those parts of the country, there being no such thing as a rate of rent in money, ryots, holding from the time of the Permanent Settlement, would have no protection whatever, unless the Legislature meant to include under the words "rate of rent" the mode or principle of *bhaolee* payment. But it is not necessary for us to determine the case upon this point; if it had been so, I should have been inclined to propose a reference to a Full Bench.

Upon the second question, we have to consider whether the Judge had before him such evidence as would justify a finding in favor of the plaintiff. I think it quite clear that this suit must be dealt with as a suit for enhancement. As the plaint stands, it really seems to amount to no ground of action at all. What the plaintiff says is that, as the mode of payment at present in force leads to perpetual disputes, I have thought it fit to commute the ryot's rent into a fixed money-payment, and tendered him a pottah at that rate; and I demand that he should give me a kubooleut. But it seems pretty clear that the landlord did seek to obtain from the ryot a kubooleut binding him to pay a money-rent in excess of anything that he had been paying, and the pleader for the respondent admitted that he founded his claim (the defendant being a ryot having a right of

occupancy) upon the first Clause of Section 17, Act X. of 1859, namely, that the rate of rent paid by such ryot is below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. Now, had the Judge before him any evidence to show that the ryot was paying a rate of rent below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent? It seems to me that he had none at all. The Judge discusses at some length the amount of the produce, but as to the money equivalent he goes entirely upon the kubooleuts or engagements of seven ryots holding "in the same blocks of land as the defendant," which, he says, seem to be *bond fide;* and then he proceeds to say: "If they have agreed to "pay a money-rent at those rates instead of "the previous rent in kind, it must be as-"sumed that the rents are reasonable and in "proportion to the produce;" but why was the plaintiff entitled to have this assumed as against the defendant? It appears to me that that portion of the Judge's decision is untenable.

We asked if there was any other evidence to support the finding of the Judge on this point. None was shown, but we were referred to the claim of the defendant for damages in a suit where the landlord had unlawfully attached the crops, and there it is said that the defendant, then the plaintiff, claimed damages 56 per cent. higher than the present statement. But that does not affect the case. The plaintiff, when suing for damages, would naturally put his case as high as he could, but he made no statement, no admission, then as to what the rates were; and even allowing that the kubooleuts of these seven ryots are good for what they purport to be, namely, *bond fide* admissions of seven ryots in the same blocks of land, they would not amount to what the law prescribes, namely, evidence that the rate of rent paid by the defendant is below the rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. Does it appear that these ryots had rights of occupancy, or to what class of ryots they belonged, or that they cultivated land possessing similar advantages or being of the same quality? Nothing of the kind is shown.

On this point, therefore, the plaintiff having entirely failed to make out his case, he could not be entitled to obtain the decree which the Deputy Collector had given him, and therefore, in reversing the judgment of the Court below, I do not think we ought to confirm that of the Deputy Collector, but dismiss the plaintiff's suit *in toto.*

The appellant will get his costs.

Glover, J.—I concur in this judgment.

The 1st December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Misconduct—Investigation—Costs—Jurisdiction.

In the Matter of

The Collector of Tirhoot, *Petitioner.*

Baboo Onookool Chunder Mookerjee for Petitioner.

Upon the application of the Collector, who was a party to a suit, an inquiry was held by the Subordinate Judge into the conduct of a Civil Court Ameen, who had made a local investigation in the suit. The Ameen was acquitted and the Collector ordered to pay his costs, including vakeel's fees.

HELD that, as in the case of miscellaneous proceedings, the Civil Court was competent to award such costs against the Collector.

Jackson, J.—I THINK we ought not to interfere in this case. It seems that the Collector, who had been a party to a civil suit in the Court of the Subordinate Judge, had received information which led him to believe that the Civil Court Ameen who made a local investigation in that suit had been guilty of misconduct, and accordingly he applied to the Subordinate Judge to make an enquiry into the matter. The Subordinate Judge, however, for good or for bad reasons, at that time refused to make the enquiry. Thereupon the Collector applied further to the Zillah Judge, who, on his application, directed the Subordinate Judge to hold the enquiry. Accordingly, the enquiry took place, and witnesses were examined. The result was that the Ameen

was acquitted, and the Subordinate Judge did not think fit to carry the case any further, but he dismissed the Collector's application, and ordered that he should pay the costs of the Ameen, including vakeel's fees, which he fixed at 80 rupees.

The Collector now comes before us, having first applied to the Zillah Judge to reverse the order, contending that the order to pay costs in such a case is not warranted by law.

It appears to me that this enquiry was a preliminary enquiry under Section 171 of the Code of Civil Procedure, and was in the nature of a miscellaneous proceeding in the Subordinate Judge's Court to which the Collector, as a party to the previous suit, was a party, the Ameen being the opposite party; and the rules of the High Court enable the Subordinate Civil Courts to award vakeel's fees within certain limits in such proceedings. It appears to me clear that the Subordinate Judge, or Judge of any Civil Court, who is required to investigate a matter of this sort, would, as in the case of miscellaneous proceedings, be competent to award costs in favor of the party who succeeded and against the opposite party, and vakeel's fees would be a proper element in such costs.

It was argued that in this case the Collector came forward in the interests of justice, and that a party defending himself would not be entitled to costs, especially pleader's fees; and it is also observed that the award of costs was not in conformity with the practice of our Courts.

It seems to me that, when an officer like a Civil Court Ameen finds himself charged with misconduct or with a criminal offence, the prosecutor or promovent being no less a person than the Collector, he is quite justified, and I think he is wise, in having himself defended by Counsel We think it reasonable that the party who takes the responsibility of bringing forward and pressing such charges, and fails to substantiate them, should be made to pay the costs thereof.

We think, therefore, that we ought not to interfere in this case.

Glover, J.—I concur in thinking that the Subordinate Judge had power to award costs under the circumstances stated.

The 2nd December 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Ameen's map—Decree—Evidence—Plea of limitation—Section 20, Act XIV., 1859—Admission by tenant—Estoppel.

Case No. 1101 of 1870.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 4th March 1870, reversing a decision of the Moonsiff of Kechoogunge, dated the 26th August 1869.

Brijonath Chowdhry (Plaintiff), *Appellant,*

versus

Lall Meah Munneepooree (Defendant), *Respondent.*

Mr. C. Piffard and *Baboos Ashootosh Dhur* and *Grish Chunder Ghose* for Appellant.

Baboos Kalee Mohun Dass and *Kalee Prosunno Roy* for Respondent.

HELD that, in a suit to establish title to land, where an Ameen's map which professed to show the daghs of a hustabood chittah was not questioned by either party, it was not open to the Court to question its correctness, and to try whether it was possible to construct any map from the chittah.

When a decree is put in as evidence, it is not open to the Judge to take into consideration its merits or the evidence on which it was founded.

A plea of limitation under Section 20, Act XIV. of 1859, can only be raised by the defendant in the suit, and not by third parties who neither represent nor derive title from him.

Where application is made to a Collector for a tenure liable to pay revenue on account of an estate which applicant has carved out of unoccupied waste, and it is found that Government is not in position to create such a tenure, the applicant is not bound by his offer made under an erroneous impression, nor is he estopped thereby from pleading as against the landlord that he is not liable to pay any rent.

Ainslie, J.—THIS is a special appeal against a judgment of the Judge of Sylhet, reversing a decision of the Moonsiff of Kechoogunge.

The plaintiff states that he is purchaser at a sale held in 1860 in execution of decree of the rights of Rajah Rajendur Narain in talook Ram Gobind Ghose. He claims possession of certain lands as belonging to Mouzah Utterbagh, Pergunnah Adumpore, and within that talook. He alleges that he received rents from the defendant up to

the year 1272, B. S., but that from 1273 the defendant and other ryots, at the instigation of Lall Mahomed Chowdhry, between whom and plaintiff there had been litigation, refused to pay rents, and that he was accordingly forced to have recourse to the Revenue Court He accordingly brought suits against the recusant ryots who set up as their defence that the lands held by them do not belong to the plaintiff's estate but are unsettled lands, the property of Government, and that they never had paid rents to the plaintiff. These suits having been dismissed, the plaintiff appealed to the Judge, and obtained decrees in several suits; but two appeals, one being against the special respondent in this suit, were thrown out on the ground of want of jurisdiction, the amount in suit being below Rupees 100. In consequence of these decisions, the plaintiff has brought this suit against the tenant-defendant and against Government to establish his title to the lands, and to recover mesne-profits.

The Government denied the plaintiff's title, but subsequently withdrew from the suit under a solehnamah. The occupant defendant pleaded that plaintiff held no lands to the north and east of Nyna Cherra, and that the lands in suit formed no part of the plaintiff's talook; that he had held them for a long term of years without payment of rent, but as under the Government; that he had petitioned the Collector to make a settlement of these lands with him, and that plaintiff was barred by limitation, as he never was in possession of the subject of suit.

The first Court made a decree in favor of the plaintiff modifying his claim for mesne-profits, and passing a special order as to costs. The plaintiff is willing to take that decree as it stands.

On appeal, the Judge held that plaintiff's suit is barred by limitation, and that he has never held possession of the lands claimed. He has rejected the evidence of the witnesses examined by the plaintiff, and has found on an examination of the chittahs on which plaintiff relies, and a comparison of them with a survey made by the Civil Court Ameen, that they fail to establish plaintiff's right and possession.

The first is a hustabood chittah of 1195 B. S. The Judge says it is so utterly vague as to be worthless in determining the position of any particular land. He admits that, so far as it shows that the first plot lies north of Nyna Cherra, it is in plaintiff's favor, but he goes on to say whether it lay contiguous to Nyna Cherra as shown in the Ameen's map or not (and none of his three maps have been impeached) there is nothing to show; whether it lay north of any portion of that part of Nyna Cherra shown in the present Ameen's map, or north of some portion of that Cherra which is not shown in the Ameen's map, there is nothing to show. In fact, it might be far to the south-east of the land in dispute. But here it seems to me the Judge has overlooked the statement in the parenthesis that none of these maps have been questioned. If the defendant accepted the Ameen's map as showing the daghs of the chittah of 1195, it was not open to the Judge to say that the Ameen may have started from a wrong point, and misplaced the whole, and, in doing so, he clearly has committed an error in law. The Judge has then proceeded with his examination of the chittah, but throughout this examination he seems to have overlooked the fact that the Ameen's map, which professes to show the daghs as defined in the chittah, has not been questioned by either party. The chittahs undoubtedly are wanting in definition; but if the Ameen, on examination of the ground and comparison of the chittahs, conceived that the daghs ought to be represented as he has shown them on the map, and if the parties did not take any exception to such representation, I hold that the Judge went beyond his duty in trying whether it was possible to construct any map from the chittah, and whether such map was correct.

The Judge then considers Mahomed Masoom's chittah of 1239, this being drawn up in a resumption-suit brought by Government against the proprietors of Mahomed Deolgam, Pergunnah Bhanoogatch.

From the Ameen's map it appears that Pergunnah Bhanoogatch is bounded to the south by a road or pathway known as Bastoor jungle. Plaintiff contended that the lands the Government wished to resume lay to the south of this boundary-line, and here again he is supported by the present Ameen's map, which shows the position of the lands measured by Mahomed Masoom as being between the Nyna Cherra and the Bastoor jungle, and coinciding more or less with the lands shown in the map constructed from the chittah of 1195. Now, I find that the claim of Government

to resume these lands as unsettled lands of Pergunnah Bhanoogatch was dismissed by the Special Commissioner. Subsequently, in 1840, the Special Deputy Collector made an attempt to resume certain lands as nankar and rent-free khanabaree lands of Pergunnah Adumpore. Two parties opposed the Government; 1st, Lall Mahomed Chowdhry and another, as the parties in actual possession; and 2nd, Radha Gobindo Singh, as claimant of the lands in question as appertaining to talook Ram Gobind Ghose of Adumpore Pergunnah and talook Gour Huree Ghose of Bhanoogatch Pergunnah. This latter then asserted that the lands which the Deputy Collector sought to resume were the identical lands which Government had already failed to resume as belonging to Pergunnah Bhanoogatch. The Government claim was dismissed, and the two defendants were left to fight out their claims as might seem best to them. Eventually, a suit was brought against Lall Mahomed Chowdhry, in which the plaintiff was successful, and possession was given to him as against Lall Mahomed under a decree of 1865. In the meantime, Rajah Rajendro Narain had purchased talook Ram Gobind Ghose in execution of a decree, and in 1845 one Ahmed Ali was deputed to put him in possession, and has left us a third chittah. The Judge has objected to this chittah that it contains such discrepancies and improbabilities that the only inference to be drawn is that Ahmed Ali never went over the ground at all, and that his measurements were purely inventions. He says: "It is possible that he went along one of the roads leading northwards to the Bastoor jungle, but my own impression is that, at all events, this part of his chittah was prepared simply from what some gomashta or person anxious to benefit the Rajah told him; and it must be remembered that even at that time the land between Bastoor jungle and Nyna Cherra was debatable land, occupied by Munneepoories, to which the Government claim had been dismissed, and to which the right and title had been declared."

The conclusion at which the Judge arrives is that Ahmed Ali only nominally put the Rajah in possession, and that, as a fact, matters were left in *statu quo*. Now, even if this be so, it appears to me that the Judge has erred in assigning its proper effect to these proceedings, and has omitted to take into consideration a point of great importance in estimating the *bona fides* of Ahmed Ali's proceedings and the previous measurement by Mahomed Masoom. The country admittedly was covered by the densest jungle, and it was in the highest degree improbable that any but the roughest approximation to a correct measurement should be made, and very probably only the cleared and partially cleared or naturally open lands were measured at all. But I do not think it can be contended either that the Government intended to resume nothing but these open spaces, or that, in putting the Rajah into possession of his lands, it was intended to exclude the impassable jungle. Ahmed Ali very likely followed the previous measurements, and may perhaps have compiled a chittah from them, but it cannot be supposed that the Rajah was taking possession of less than had been claimed in the resumption-proceedings of 1840. The Judge himself, in the passage I have quoted, admits that the Government had claimed the land between the Bastoor jungle and Nyna Cherra, and that its claim had been dismissed, because the right and title of no person had in 1845 been declared. Are we to assume that it had no legal owner? I think not. We find two parties, the proprietors of Utterbagh and Jelalpore respectively claiming it, and eventually the former prevailed and got a decree against the latter. The Judge says of that suit: "The plaintiffs claimed certain land as appertaining to talook Ram Gobind Ghose, "which had been in the possession of the "Rajah and purchased by the plaintiffs in "execution of decree in 1267. The defendants alleged that plot 1 was not in the "plaintiff's Mouzah Utterbagh, but in Jelalpore, and that plots 2, 3, and 4, appertained to the rent-free khanabaree in "Utterbagh and Moidabagh belonging to "them, and they alleged that the plaintiffs "were endeavouring to get more land than "the Rajah held in talook Ram Gobind "Ghose."

Eventually, the plaintiffs succeeded except as to 8 hâls of khanabaree. Further on the Judge says: "Plot 1st is the large "tract north of Nyna Cherra, which I have "described above as the old debatable land. "So far as I can see, in the proceedings of "1865, beyond the vague and general statement in the defendant's written statement, "there is nothing to show that the defendants had or laid claim to any portion of "this plot No. 1, or that they had any exclusive right to the whole or any part "thereof. In the second place, the documents on which the plaintiff got his

decree are the same as those filed in this case, and which I have commented upon "above. In the third place, I find no proof "whatever that that decree has ever been "acted on, so far as regards the land now "sued for. In fact, plaintiff, having a valid "claim to the south of Nyna Cherra, ap-"pears to me to have laid claim in his suit "to the lands north thereof, and sued "people who had no real interest therein, "in order to establish a title for himself by "getting a decree. I notice two things, 1st, "that plaintiff included in his claim 8 hâls "of land south of Nyna Cherra which the "Court found he had no right to; and 2nd, "that in the boundaries of plot No. 1 the "eastern boundary is said to be the hill "belonging to talook No. 1, while up to "that time the land was said to be bounded "by the hill, *i. e.*, that the hill lay beyond "the land."

On this passage I have to remark: *1st.*—That the nature of the defendants' answer does not show that the plaintiff had no good claim: if it shows anything, it shows that they receded from the position taken by them in 1840, when in the resumption-proceedings they appeared as claimants of the said plot No. 1, hostile to the plaintiff's predecessor. *2nd.*—That it was not open to the Judge to take into consideration the merits of the decree or of the evidence on which it was founded. *3rd.*—That because plaintiff claimed but failed in obtaining land which he was not entitled to, his claim to that which was decreed to him is in no way invalidated. *4th.*—That the fact that the plaintiff may have pushed his eastern boundary forward so as to take in land, *viz.*, the hill which he had no right to claim, is wholly immaterial in this suit as the lands now in suit are, as shown by the Ameen's map, west of the hill. *5th.*—That the suit was to establish the zemindaree title as against the zemindar of Jelalpore, and that it was wholly unnecessary to make mere squatters such as the defendants, who, by their own confession, had no proprietary right, parties to the suit, and that the inference that the suit was intentionally brought against a wrong party does not in any way arise from the facts; and *lastly*, that looking to the form of the suit as set forth by the Judge, it does not clearly appear that any proceedings in execution were necessary as to the plot No. 1; and even if they were, the plea of limitation under Section 20, Act XIV. of 1859, is a plea which could only be raised by the defendant in the suit, and not by third parties who neither represent nor derive title from him.

The Judge has stated that the suit was instituted on the allegation that certain land had been wrongly demarcated by the survey-authorities, and the plaintiff sued for rectification of the survey-proceedings, for recovery of possession, and *for a declaratory order confirming their right and possession.* Now, if this is read in connection with what the Judge has said of the defence set up and with the result of the suit, it certainly does not appear that any re-delivery of possession in respect of plot 1 was at all necessary. The natural conclusion appears to me to be that the declaratory order would apply to the lands the possession of which, as admitted by the Judge, was never seriously contested, and consequently the argument from non-execution is one for which there is no legal basis.

The result of an examination of the proofs submitted by the plaintiff is that it is evident that three parties claimed the proprietary title in a certain piece of ground which includes the lands now in suit, *viz*, Government and the proprietors of Utterbagh and Jelalpore. The first and the last have failed, and except the second there is no owner left. The possession of the plaintiff may have been nominal, so far that he never exercised the rights of a proprietor as against the occupant-cultivators, but as against all hostile claimants of the ownership it has been real, constantly and successfully asserted. The Judge has, by an examination of the chittahs above alluded to, endeavoured to show that there was no actual occupation by the plaintiff, or at any rate that he never occupied the whole; but it appears to me that he was in error when he overlooked the fact that there really is no hostile claimant of the proprietary title, as far as the record shows, and that the defendant does not in any way claim a greater right than that of a squatter on some other person's land. The defendant has attempted to set up a title for the Government, and may be in no way bound by the solehnamah, but he is bound by the Special Commissioner's and Special Deputy Collector's decisions against the title of his principal; and as the decision of the Lower Appellate Court, so far as concerns the documentary evidence, has proceeded on an erroneous view of the position of the parties, it appears to me it must be set aside.

Then I have to come to the oral evidence. It is contended that the Judge has rejected

this without assigning any reason for differing from the first Court. and several decisions have been read to us by the learned Counsel for the special appellant to support his plea that, in doing so, he has failed to come to a legal determination. But I think the Judge has assigned reasons for disbelieving the witnesses. He first sets forth the position of the defendant as a squatter from a long time on uncleared land. and then goes on to say that of the witnesses called to prove payment of rent up to 1272, some are evidently tutored and others are not speaking from actual knowledge. If I thought that the erroneous view taken of the documentary evidence had influenced the Judge in determining on the credibility of the witnesses, I should be obliged to propose an order of remand, but it appears to me that such an order is not justified in this case. It is clear that the Judge has made up his mind as to the oral evidence on certain grounds, which, if correct, are sufficient, and we are not now sitting to try their correctness. The finding that the plaintiff has never received rents from the defendant must therefore stand.

Then it has been urged that, granting that the plaintiff has failed to prove payment of rents, yet the defendant has, by his admission that he is a tenant of Government land, and offer to pay rent for it, estopped himself from pleading as against plaintiff that he is not liable to pay any rent. But, as a matter of fact, I think the defendant's petition to the Collector for a settlement cannot be taken as an application for a ryotee holding in a known Government zemindaree, but rather as one for sanction to his having carved out an estate for himself out of the unoccupied waste ; and that what he wanted was a tenure liable to pay revenue, recoverable under the rules for recovery of arrears of revenue, and not to be held subject to the law of landlord and tenant. When it turns out that the Government is not in a position to create the tenure, defendant is no way bound by an offer made under the impression that the power of creation was with the Government, and consequently no question of estoppel arises. I hold that the finding on the question of limitation was correct, and I would, therefore, dismiss this special appeal with costs.

Kemp, J.—I concur in this judgment. The Judge has found on the evidence that the plaintiff has failed to prove the receipt of rent from the defendants, and I am not prepared to say that the Judge's estimate of the credibility to be attached to the evidence adduced by the plaintiff is wrong. The defendants have been in occupation of the disputed lands for more than 12 years, their occupation being adverse to the plaintiff. The suit has, therefore, been properly dismissed as barred under the statute of limitation.

The 5th December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Zemindar—Farmer—Act IV. of 1840.

Case No. 107 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 22nd February 1870.

Lekhraj Roy (Plaintiff), *Appellant,*

versus

The Court of Wards on behalf of the Rajah of Durbhangah (Defendant), *Respondent.*

Mr. J. W. B. Money for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Semble.—Where a zemindar lets his estate in farm for a term of years, and so delegates the whole of his rights, privileges, and immunities to another person, he becomes himself bound by an adverse decision under Act IV. of 1840 to which the farmer was a party.

Jackson, J.—We think it unnecessary to trouble the respondent in this case.

The plaintiff acquired by purchase mouzah Surmustpore Kalee Pershad, and he sues to recover from the defendant who is the owner of an adjoining mouzah called Khuwaspore an area of 518 beegahs and 19 biswas of land, together with wassilat of that land.

The defendant pleaded that the plaintiff or his predecessors had had no possession whatever of the disputed land within 12 years; also that they were barred by an adverse award under Act IV. of 1840 made by the Magistrate of Purneah on the 26th February 1859; they also denied that the plaintiff had any title whatever to the land in question.

All these issues have been decided in favour of the defendant, and the plaintiff thereupon appeals to this Court. The learned Counsel, Mr. Money, who appeared for the appellant, argued at considerable length that the Court below is in error in deciding that the plaintiff was affected by the adverse award under Act IV. of 1840. He pointed out that this award was not one between the respective zemindars, but between two persons who held the mouzahs in question as Moostajirs under the zemindars; and he contended that, under the terms of Clause 7, Section 1, Act XIV. of 1859, the limitation therein specified applied only to parties bound by an order which he contended to mean the actual parties to the proceedings, or their privies by law.

If it were necessary to decide the case exclusively upon that point, we should be inclined to hold, although we do not express any final opinion upon the matter, that where the zemindar has let his estate in farm for a term of years, and so delegated the whole of his rights, privileges, and immunities to another person, who thereupon becomes to that extent his representative, an adverse decision under Act IV. of 1840, whether under Section 2 or Section 4 of the Act to which the Moostajir or farmer had been a party, would be a decision by which he, zemindar, himself is bound. But it is not necessary that we should determine the case on that ground alone, for it is quite clear on reading the evidence that the plaintiff altogether failed to prove his possession or that of his vendor, but, on the contrary, the defendant did prove adverse possession extending over 12 years previous to the suit. It is quite clear, therefore, that the plaintiff must have failed upon that ground as well as upon the other, and as the defendant has preferred a cross-appeal objecting to the decision on the ground that the Subordinate Judge has not applied this rule of limitation, we think we are bound to deal with it, and say that the suit is barred by the general law of limitation.

The Subordinate Judge, we observe, has also found that the plaintiff had no title; but it is not necessary that we should go into that point, as the decision of the other is sufficient.

The appeal will be dismissed, and the decision of the Lower Court affirmed with costs.

The 5th December 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Rajshahye—Pubna—Jurisdiction.

Case No. 270 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Pubna, dated the 17th May 1870.

Shama Soonduree Debia (one of the Judgment-debtors), *Appellant,*

versus

Binode Lall Pakrashee and others (Decree-holders), *Respondents.*

Baboos Romesh Chunder Mitter and *Nuleel Chunder Sein* for Appellant.

Baboo Rajender Nath Bose for Respondents.

HELD that, after the orders of Government of 1867, dividing the whole of the jurisdiction of the Principal Sudder Ameen of Rajshahye into two portions, the Small Cause Court Judge of Pubna alone had jurisdiction to perform in the district of Pubna the duties which, but for those orders, would have been performed by the Principal Sudder Ameen of Rajshahye.

Jackson, J.—THE question here raised is that the Subordinate Judge, or as he was formerly called the Principal Sudder Ameen, of Pubna has not jurisdiction to entertain execution-proceedings under decrees of the Court of the Principal Sudder Ameen of Rajshahye, but should have referred the respondent to the Court of the Subordinate Judge of Rajshahye. It is pointed out to us that, on a previous occasion, a Bench of this Court ruled that the contention of the appellant was correct, and directed the Lower Court to act accordingly.

There can be no doubt that, as a general rule as the law stands, every Court of original jurisdiction must execute its own decrees within its own jurisdiction, and the Subordinate Judge of Pubna has no jurisdiction to execute the decree of the Subordinate Judge of Rajshahye. But, on this question being raised before the Principal Sudder Ameen of Pubna, he made enquiries into the matter, and ascertained that the appointment of the Principal Sudder Ameen of Rajshahye had been abolished, and that the duties exercised by him in the jurisdiction of Rajshahye had been made over to the Small Cause Court Judge of Rajshahye.

while the duties exercised by him in the jurisdiction of Pubna had been transferred to the Small Cause Court Judge of Pubna. Under these circumstances, the Subordinate Judge held that the whole jurisdiction, not only of future suits, but of suits already instituted and of execution of decrees, was so transferred.

The special appeal to this Court was to the effect that the appointment of Principal Sudder Ameen which had been abolished was that of an Additional Principal Sudder Ameen; that the Small Cause Court Judge of Rajshahye had been Principal Sudder Ameen before the Additional Principal Sudder Ameen was appointed, and continued to be a Principal Sudder Ameen while the other appointment continued; and that the decree which was now being executed, being a decree of his Court, must be executed in his Court.

We have ascertained that in the year 1855 up to some date in December, the Small Cause Court Judge was also Principal Sudder Ameen of Rajshahye; that by the orders of the 19th December of that year, his jurisdiction as Principal Sudder Ameen ceased, and a separate Principal Sudder Ameen was appointed. The latter exercised all the jurisdiction of the Principal Sudder Ameen of Rajshahye, until his appointment was abolished in 1867. It was then ordered that the Small Cause Court Judge of Rajshahye was in future to perform the functions of Principal Sudder Ameen in the district of Rajshahye proper, and the Small Cause Court Judge of Pubna to perform the functions of Principal Sudder Ameen in the district of Pubna. We think that these orders divided the whole of the jurisdiction of the former Principal Sudder Ameen of Rajshahye into two portions, and that the Small Cause Court Judge of Pubna had thereafter alone jurisdiction to perform in the district of Pubna the duties which, but for these orders, would previously have been performed by the Principal Sudder Ameen of Rajshahye. We find there was, in fact, no separate Principal Sudder Ameen of Beauleah, that being only the name of the Sudder Station of Zillah Rajshahye.

Under these circumstances, we are not satisfied that there is any error in law in the decision of the Lower Court. It is possible that on the former occasion all these facts were not laid before the Division Bench who tried the case. We dismiss the appeal with costs.

The 5th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch and W. Ainslie, *Judges*.

Mesne-profits—Local investigation—Evidence —Section 180, Act VIII. of 1859.

Case No. 3 of 1870.

*Appeal preferred under Section 15 of the Letters Patent of the High Court of the 28th December 1865, against a judgment of the Hon'ble E. Jackson and the Hon'ble F. A. Glover, two of the Judges of this Court, dated the 29th April 1870, in Special Appeal No. 131 of 1870, from a decree of the Zillah Court of the 24-Pergunnahs, dated the 6th September 1869, the said Judges having been equally divided in opinion.**

Deb Narain Deb (Plaintiff), *Appellant*,

versus

Kalee Dass Mitter (Defendant), *Respondent*.

Baboos Ashootosh Dhur and *Debendro Narain Bose* for Appellant.

Baboos Kalee Mohun Dass and *Mohinee Mohun Roy* for Respondent.

HELD (upholding the decision of E. Jackson, J., in XIII. W. R., p. 412) that in a suit for wassilat, where the Ameen's inquiry was not completed owing to the plaintiff's laches, there had been no proper investigation, and the plaintiff could not recover. There is nothing in Section 180 which empowers a Court to receive as evidence in a cause the deposition of witnesses alone taken under a local investigation, without the report of the Ameen.

Norman, C. J.—THE plaintiff sues claiming mesne-profits in respect of 399 beegahs of land in Abâd Kistorampore. The plaint

* 13 W. R., p. 412.

states that the plaintiff was owner of 6 annas 8 gundahs in that estate; certain other persons, his co-sharers, namely, Ramanath Mitter and Nil Ruttun Mitter, of 3 annas 4 gundahs each; and the defendant owner of 3 annas 4 gundahs; that an agreement having been made that each of them should cultivate portions of the estate, the defendant cultivated 399 beegahs in excess of his share, for which the plaintiff sued and obtained a decree in April 1865, and got possession in December 1867.

The defendant's answer, so far as it is material to the present question, is that the land was jungle; that by an agreement between himself and the other shareholders, each took certain portions of land and cleared them, there being no stipulation that any one should claim rent, wassilat, or mesne-profits against any of the others; that he had greater trouble, and had been put to much expense in cultivating the land; that the plaintiff had reaped the benefit of his labor and money; that he had cleared the jungle which was very thick; that the plaintiff, upon payment of a small sum as his share of the expenses to which the defendant had been put in bringing the land under cultivation, had obtained a decree for possession; that had he not cultivated the lands, they would have remained in a state of jungle for years, and the plaintiff would have made no profit from them.

At the trial, on the day fixed for hearing, the plaintiff gave no evidence, but asked for a local investigation.

The Court accordingly issued a commission to an Ameen directing him to make an investigation, and report the result to the Court.

The Ameen commenced his investigation on the 2nd of April 1869. On the first day he examined two witnesses; the second day was a holiday; on the third and fourth days he examined 11 witnesses; on the fifth day he stated that the deposit made by the plaintiff to meet the expenses of the investigation was exhausted; and he applied to the plaintiff to make a further deposit. The plaintiff's mooktear stated that there were 9 witnesses still to be examined, and wanted the Ameen to go on with his enquiry without any further payment. He said that the witnesses remained concealed, and that he intended to produce them at some future enquiry; on which the Ameen, without making any report, stated the circumstances, and transmitted the depositions to the Court.

Mr. Justice Elphinstone Jackson, the Senior Judge, differing from Mr. Justice Glover, held that the plaintiff was not entitled to obtain a decree for wassilat; that it was for the plaintiff to show that he was entitled to a decree for wassilat, and that he had failed to do so.

Secondly, he held that the local investigation was not completed owing to the default of the plaintiff, and he was of opinion that the Lower Courts could not look at the Ameen's incomplete proceedings as evidence in the case.

I think that there can be no doubt that the learned Judge is right on both points.

The plaintiff and the defendant are co-sharers. The defendant, by an arrangement with the plaintiff and his other co-sharers, cultivates—as he well and lawfully might—a portion of their joint property. The arrangement is—the land being jungle, and apparently unmeasured—that, if he brings into cultivation a portion larger than his share, he shall give up the excess lands. He does so, and upon giving up such excess he receives from the plaintiff a compensation in respect of the money which, out of his separate funds, he had spent in improving the joint property.

Now, the decree under which that compensation was paid was not put in, but I think the presumption is, in the absence of any evidence to the contrary, that the compensation would represent the amount paid by the defendant out of his own funds in excess of what he had been able to realize out of the joint property in satisfaction of what he had expended on it. If the case is otherwise, it was for the plaintiff to prove it, but he gave no evidence to establish any such case.

I think, then, the presumption is that the plaintiff is not entitled to anything more than what was given him by the former decree. If wassilat was payable, it was for the plaintiff to show it; but he has not attempted to do so.

As to the second point, it is a matter which, I think, is free from doubt.

Section 180 of the Civil Procedure Code makes provision for the case of a commis-

sion for local investigation. It provides that the Court may issue a commission to an Officer of Court, or other person, directing him to make such investigation and to report thereon to the Court. It provides that the Commissioner shall have power to examine any witnesses who may be produced to him by the parties, or any other persons whom he may himself think proper to call upon to give evidence in the matters referred to him: it gives him power to call for and examine documents and other papers relevant to the subject of inquiry; and the Section goes on to say that: "The Commissioner, "after such local inspection, or as he may "deem necessary, and after reducing to writ-"ing, in the manner hereinbefore prescrib-"ed for taking the depositions of witnesses "in the presence of the Judge, the deposi-"tions taken by him, shall return the de-"positions, together with his report in writ-"ing subscribed with his name, to the "Court."

It further enacts that: "The report *and* "depositions shall be taken as evidence "in the suit, and shall form part of the "record."

Now, in the present case, the commission was never fully executed; no report was ever made, and there is nothing in Section 180 which empowers the Court to receive the *deposition of the witnesses alone, without the report of the Ameen*, as evidence in a case.

I am of opinion that there is nothing in Section 180 that would warrant us in treating the depositions taken under the imperfect investigation which took place in the present case, as part of the record or as evidence in the cause.

The result, therefore, is that the plaintiff has given no evidence whatever in support of his claim, and I am of opinion that the judgment of the Senior Judge is correct on this point also, and that this appeal must be dismissed with costs.

Loch and Ainslie, JJ., concurred.

The 5th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch and W. Ainslie, *Judges*.

Measurement of ryot's land—Section 9, Act VI. (B. C.) of 1862.

Case No. 4 of 1870.

*Appeal preferred under Section 15 of the Letters Patent of the High Court of the 28th December 1865, against a judgment of the Hon'ble F. A. Glover and the Hon'ble Dwarkanath Mitter, two of the Judges of this Court, dated the 13th July 1870 in Special Appeal No. 291 of 1870 from a decree of the Zillah Court of Tipperah, dated the 22nd January 1870, the said Judges having been equally divided in opinion.**

Doorga Churn Doss (Plaintiff), *Appellant*,

versus

Mahomed Abbas Bhooyan (Defendant), *Respondent*.

Baboo Romesh Chunder Mitter for Appellant.

Baboo Kalee Mohun Doss for Respondent.

Held (upholding the judgment of Glover, J., in XIV. W. R., p. 121) that a person who alleges himself to be the proprietor of an estate, but who is not in receipt of the rent, is not entitled, under Section 9, Act VI. (B. C.) of 1862, to ask for the assistance of the Collector in measuring his lands. That Section is intended to provide for cases when a proprietor, or other person in possession of an estate, is opposed in making measurement by the occupants of the land, and not for cases where the title of the person claiming the right to measure is a matter in contest.

Norman, C. J.—I AM of opinion that the decision of Mr. Justice Glover is correct, and must be affirmed.

The question entirely turns upon the construction to be put on Section 9 of Act

* *Ante*, p. 21.

VI. of 1862 of the Bengal Council, which enacts that "every proprietor of an estate "or tenure or other person in receipt of "the rents of an estate or tenure has a "right of making a general survey and "measurement of the lands comprised in "such estate or tenure." Also that, "if any "person intending to measure any land "which he has a right to measure is op-"posed in making such measurement by "the occupant of the land," he can apply to the Collector to inquire into the case.

The point is this, namely, whether a person who alleges himself to be the proprietor of an estate, not being in receipt of the rents, is entitled to ask for the assistance of the Collector in measuring his lands.

The plaint in this case states that the defendant No. 1 Abbas Ali, and the defendant No. 2 Akbur Ali, had been in possession of a portion of a talook by cultivating it and in respect of the remainder by receiving rents from the other defendants; that on the 6th Cheyt 1275, the defendant No. 2 Akbur Ali, for the consideration of 400 rupees, sold his share to the plaintiff, and that he (plaintiff), having purchased it, is proprietor, and is in possession.

The Deputy Collector treated the question as if the only issue was whether the plaintiff was the proprietor, and came to the conclusion that there was not the least doubt as to Akbur Ali's "being one of the proprietors of the talook." But I may observe that, although he refers to the evidence given before him as to Akbur Ali's being in possession in 1275, he does not distinctly find that in the year 1275, and down to the time of the sale to plaintiff, Akbur Ali was in actual possession and in receipt of the rents of his share of the talook.

The purchase by the plaintiff not being denied, the Deputy Collector, thinking the proprietorship of the plaintiff to be sufficient to entitle the plaintiff to an order allowing the measurement, made an order to that effect.

From that decision there was an appeal to the Judge.

The Judge says: "That he (plaintiff) pur-"chased the rights and interests of Akbur "Ali, whatever they were, is not denied, "but those rights and interests are contest-"ed."

"It appears that, ever since the purchase "by the plaintiff, numerous disputes have "arisen between the parties which have "caused much litigation in the Criminal "Courts. In consequence of this, the plaint "iff has not been able to get possession of his "purchase." The Judge adds: "In this "case, the plaintiff seeks to measure those "lands of which he has never been in pos-"session; and whether he has a right to "possession as a purchaser of another's "rights and interests, and which are contest-"ed as having belonged to the party from "whom he purchased, can never be in the "power of the Revenue Courts under this "law to decide."

The Judge, therefore, reversed the order of the first Court. From that decision there was an appeal, and on appeal Mr. Justice Glover and Mr. Justice Mitter differed.

Mr. Justice Glover in his judgment says: "Now, the plaintiff in this suit is admitted-"ly out of possession: he has neither got "manual possession of the estate, nor has "he ever received any rent from it; and it "seems to me immaterial whether his ven-"dor Akbur Ali had possession and received "rent or not, so far as a suit of this kind is "concerned. It is clear that that possession "was never transferred to the plaintiff; and "until he acquires it, he cannot, in my "opinion, sue for measurement."

Mr. Justice Mitter supposes, but I think erróneously, that "the first Court has dis-"tinctly found as a fact that his (plaintiff's) "vendor Akbur Ali was in possession of the "talook in question up to that date; and he "says, as this finding has not been reversed "in appeal by the Judge, the plaintiff is "fully entitled to assume it to be correct for "the purposes of the present discussion." The learned Judge goes on to say: "Sup-"pose, then, that there had been no sale to "the plaintiff, and that this suit had been "brought by Akbur Ali himself, could it "have been contended for one moment that "the mere fact of Akbur Ali's not having "received any rents from the defendants "during the interval between Cheyt 1275, "the date of the plaintiff's purchase, and "Srabun 1276, the date of the institution of "this suit, would have been a sufficient "answer to his claim; and would the de-"fendants have been permitted upon that "ground alone to say that Akbur Ali was "not a *proprietor in the receipt of rents* "within the meaning of Section 9, Act VI. "of 1862?"

Now, I do not for a moment suggest that it is necessary for a proprietor in the receipt of rents to be receiving rents every day in the year. If he once commences to receive rents, and thenceforth continues to receive them at the time when rents are ordinarily payable, he is undoubtedly the actual proprietor in receipt of the rents although it may have been some months since any rents were, in fact, paid to him.

In the present case, the purchase was made on the 6th Cheyt 1275. Now, the Bengalee year ends with Cheyt, and there would, I suppose, be a kist payable in or at the end of Cheyt or some time in the month following.

If he really got possession after his purchase, he would have received that kist; and, therefore, it seems to me that it cannot be said that there is no reason for any presumption that the plaintiff is not in possession, though he received no rent, because he had no opportunity of receiving rents between the date of his purchase on the 6th Cheyt 1275 and the middle or latter end of Srabun 1276, when the suit was instituted.

Again, if he was in possession, evidence might have been given that he commenced or continued to receive rents after the commencement of the suit.

It has been found by the Judge below that the plaintiff was out of possession. This is not a regular appeal, and we are not now trying the question whether the evidence on which the Judge came to that finding is, or is not, satisfactory. For myself, I think there is little doubt but that he had good grounds for that conclusion, looking to the manner in which the case was put forward by the plaintiff, and has been treated by the first Court. It appears to me clear that the Section in question is intended to provide for cases when a proprietor, or other person in possession of an estate, is opposed in making measurement by the occupants of the land; and not for cases where the title of the person claiming the right to measure is a matter in contest. We should be very careful to prevent persons from taking an undue advantage of the provisions of such an enactment as Section 9 of Act VI. of 1862, B. C., by using it as a means of trying questions of title without paying the proper stamp-duty, or of getting a sort of colorable possession by harassing or intimidating the ryots.

It is clear in the present case that the plaintiff's vendor, even if he got some sort of possession in 1275, had been out of possession for a number of years, and possibly his claim might have been barred by limitation. For the above reasons, I am of opinion that this appeal should be dismissed with costs.

Loch, J.—I am also of the same opinion. The appeal must be dismissed, and Mr. Justice Glover's decree must be affirmed with costs.

Ainslie, J.—I concur.

The 5th December 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Remand—Re-hearing.

Case No. 1205 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 19th March 1870, affirming a decision of the Moonsiff of Gurbetta, dated the 19th May 1869.

Haradhun Chuckerbutty (Plaintiff), *Appellant,*

versus

Protap Narain Chowdhry (Defendant), *Respondent.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Rash Beharee Ghose for Respondent.

S sued to establish his claim to certain property as the next heir of its former owner, on the death of whose grandmother, the property had been taken possession of by defendant (P), and obtained a decree. Upon this, P appealed, and while the case was under appeal, S sold his rights to H, who, on application to the Court, was made a party to the suit. The case was then remanded for further inquiry to the first Court, which dismissed the claim on account of default of both plaintiff and defendant. H then applied for opportunity to show that he had not been in default, but his application was rejected on the ground that he was no party to the suit. He then appealed, but the Judge also ruled that he was no party.

Held that, when the case was remanded for re-trial, some date should have been fixed for the re-hearing which would have given the parties opportunity to appear and take measures to carry on the suit, and that the Judge's decision must be set aside, H having been, in reality, a party to the suit.

Jackson, J.—It appears to us that this case should be remanded to the Subordinate Judge of Midnapore for a re-trial on the merits.

The plaintiff is the special appellant. The property in dispute has already formed the subject of a civil suit. Sreedhur Chuckerbutty was then the plaintiff, and he grounded his claim to the property as the next heir of its former owner Umbika Churn Chuckerbutty, on the death of whose grandmother, Jankee Daye, it had been taken possession of by the defendant Protap Narain Chowdhry. In the first Court Sreedhur Chuckerbutty obtained a decree, and Protap Narain Chowdhry thereupon appealed. While the case was under trial on appeal, Sreedhur Chuckerbutty sold his rights in the property to the present plaintiff, Haradhun Chuckerbutty. He applied to the Court to be made a party to the suit, and a proceeding of the 2nd November 1867, which has been read to us, proves that he was made a party to it. On the appeal, the case was remanded to the first Court for further enquiries. This order was passed on the 25th December 1867. On the 8th January 1868, the first Court dismissed the plaintiff's claim on account of the default of the plaintiff and the defendant in the case. Haradhun Chuckerbutty applied to the Court for opportunity to show that he had not been in default, but his application was rejected on the ground that he was no party to the suit. He appealed to the Judge, who also ruled that he was no party to the suit. He then instituted this suit. The Moonsiff dismissed it on the merits, on the ground that Sreedhur Chuckerbutty was not the next heir to Umbika Churn Chuckerbutty. The plaintiff appealed, and the Subordinate Judge dismissed his appeal on two grounds: *first*, that plaintiff was a party to the former suit, and that that suit was dismissed on his default under Section 114, Act VIII. of 1859; and *secondly*, that Sreedhur Chuckerbutty was not the nearest heir. This special appeal is preferred on both the above grounds.

It is said here in the first place that the former suit was dismissed under Section 110 of the Act, and not under Section 114, and under the former Section the plaintiff is at liberty to bring a fresh suit. We are satisfied that the dismissal was not under Section 110. That relates only to cases where both plaintiff and defendant are absent at the date on which the suit is appointed to be heard. It is clear from the grounds on which the default was declared that the defendant was not then absent, but that the defendant's default had been the not taking measures to serve some person with notice as ordered by the Court. The suit was dismissed under Section 114 on the default of Sreedhur Chuckerbutty. The present plaintiff, who then stood in the place of Sreedhur Chuckerbutty, and had been admitted as his representative in the suit in the Appellate Court, was not allowed in the Lower Court to act as his representative, and all his attempts to carry on the case were set at nought, both the original Court and the Judge in appeal distinctly recording that he was no party to it, though he had been distinctly made a party to it.

The next question for consideration, then, is whether, under these remarkable circumstances, Haradhun Chuckerbutty can be held to be precluded from again raising this claim. Sreedhur Chuckerbutty had not an interest in the former suit, and naturally would not attend to carry it on. The only person whose interest it was to proceed with it was declared by the Courts to be no party to it, and was treated as if he was no party. Looking to the precedent of the Privy Council noted in the margin,* where, in very much the same manner, a person interested in a suit was refused the right which he possessed to be made a party to it, we think that the present plaintiff's suit cannot be held precluded from trial because of the default of a party who had lost all interest in the former suit. The proceedings in the former suit were of a most summary character. The order passed on appeal ordering a remand and re-trial of the case was dated the 28th December 1867. The order of the Lower Court dismissing the suit on default was passed on the 8th January 1868. When a case is remanded for re-trial, some date should be fixed for the re-hearing, which will give the parties opportunity to appear and take measures to carry on the suit. It would seem in this case as if the Lower Court fixed such a date as precluded the party most interested in the trial from reappearing, and then, after dismissing the suit on default, refused to listen to his objections to such dismissal on the now proved incorrect ground that he was no party to the suit It would be shutting the present plaintiff out of all opportunity to have his claim tried if we hold that such a decision debarred him from re-instituting his claim

* 10th Moore's Indian Appeals, page 476. Tara Kant Banerjee *versus* Puddo Monee Dossee and others.*

* 5 W. R., P. C., p. 63.

We, therefore, set aside the decision of the Subordinate Judge on this point.

We also think the Subordinate Judge's view of the Hindoo Law as to Sreedhur Chuckerbutty not being a nearer heir to Umbika Churn Chuckerbutty than the defendant Protap Narain Chowdhry is open to great doubt. The Subordinate Judge quotes no authority for his decision. Baboo Shama Churn in his Vyavasta Durpana would give Sreedhur Chuckerbutty priority over Protap Narain Chowdhry. The Subordinate Judge finds that there are some nearer heirs alive than Sreedhur Chuckerbutty. He does not state to whom he alludes. It may be that he alludes to some other person, and not to Protap Narain Chowdhry. This issue in the case has probably not been thoroughly and carefully sifted in consequence of the decision on the former issue.

We set aside the decision of the Subordinate Judge, and remand the case to him for re-consideration and decision of this point and of any other point which may have been raised on the appeal and which was not determined at the former trial. Costs to follow the result.

The 6th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch and W. Ainslie, *Judges*.

Jurisdiction—Suit for dissolution of marriage—Section 1, Act VIII. of 1859.

Case No. 5 of 1870.

*Appeal preferred under Section 15 of the Letters Patent of the High Court of the 28th December 1865, against the judgment of the Hon'ble F. A. Glover and the Hon'ble Dwarkanath Mitter, two of the Judges of this Court, dated the 13th July 1870, in Special Appeal No. 547 of 1870, from a decree of the Zillah Court of the 24-Pergunnahs, dated the 28th December 1869, the said Judges having been equally divided in opinion.**

Anjona Dossee (Plaintiff), *Appellant*,

versus

Proladh Chunder Ghose and others (Defendants), *Respondents*.

* *Ante*, p. 132.

Baboos Kalee Prosunno Dutt and *Jadub Chunder Seal* for Appellant.

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Respondents.

Held (reversing the judgment of Glover, J., in XIV. W. R., p. 132) that a suit by a Hindoo mother, as the guardian of her infant daughter, for a declaration that an alleged marriage of that daughter with the defendant was null and void, is a suit of a civil nature which may be entertained in the Civil Courts of this country under the provisions of Section 1, Act VIII. of 1859.

Norman, C. J. (Loch and Ainslie, JJ., concurring).—In this case, Anjona Dossee sues as the mother and guardian of her minor daughter Kuppoora Dossee, the defendant Proladh Chunder Ghose, alleging that he (defendant) forcibly carried off Kuppoora Dossee, who appears to be an infant of about 5 years of age, without her consent, to the house of one Tara Chand, and there went through a marriage-ceremony with her. The suit is brought to declare this marriage invalid.

The first Court made a decree declaring the marriage invalid.

On appeal, the Subordinate Judge, Baboo Koylash Chunder Deb, on the authority of opinions expressed in a case reported in the Weekly Reporter, Volume XI. page 412, (Ram Sarun Mitter *versus* Rakhal Doss Dutt), held that a suit to declare a marriage invalid could not be entertained in the Civil Courts under Act VIII. of 1859. From this decision, there was a special appeal to the High Court, and the point on which the Judges differed was this — whether the Civil Courts of this country are competent to take cognizance of a suit for the declaration of the invalidity of a Hindoo marriage, no question of property being involved in the case. The opinion of Mr. Justice Glover, which was in the negative, being that of the senior Judge, prevailed.

Now, the 1st Section of Act VIII. of 1859 enacts that: "The Civil Courts shall "take cognizance of all suits of a *civil* "*nature*, with the exception of suits of which "their cognizance is barred by any Act of "Parliament, or by any Regulation of the "Codes of Bengal, Madras, and Bombay, "respectively, or by any Act of the Go-"vernor-General of India in Council." And Section 15 of the Act provides that: "No "suit shall be open to objection on the "ground that a merely declaratory decree "or order is sought thereby, and it shall be

"lawful for the Civil Courts to make bind-"ing declarations of right without granting "consequential relief."

The question now before us is whether a suit praying to have it declared that a marriage is invalid brought by one of the parties to that supposed marriage is a suit of a civil nature.

Regulation III. of 1793 established Courts of Dewanny Adawlut as Courts of Judicature for the trial of *civil suits;* and in order to see what civil suits were, as the term was understood in this country at the time of the passing of that Regulation, and as it is understood in this country at the present time, it is necessary to refer to the 8th Section of that Regulation.

The Zillah Courts which are the Courts of Dewanny Adawlut referred to by Section 2 were by Section 8 of the same Regulation "empowered to take cognizance of all suits "and complaints respecting the succession "or right to real or personal property, land, "rents, revenues, debts, accounts, contracts, "partnerships, *marriage*, caste, claims to "damages for injuries, and *generally of all* "suits and complaints of a *civil nature* in "which the defendant may come within any "of the descriptions of persons mentioned "in Section 7, provided the landed or other "real property to which the suit or com-"plaint may relate shall be situated, or in "all other cases the cause of action shall "have arisen, or the defendant, at the time "when the suit may be commenced, shall "reside as a fixed inhabitant, within the "limits of the zillah or city over which "their jurisdiction may extend."

Suits regarding marriage are, therefore, treated by Section 8 of Regulation III. of 1793, as being civil suits or at least *suits of a civil nature.* By Section 15 of Regulation IV. of 1793, a rule is laid down by which Judges are to form their decision, amongst other things, in suits regarding marriage and caste, and all religious usages and institutions, namely, according to the Mahomedan Law in the case of Mahomedans, and according to the Hindoo Law in the case of Hindoos.

In the Courts of the Bombay Presidency, numerous cases will be found in Borradaile's Reports of suits relating to marriage. In Volume I., Borradaile's Reports, page 387, will be found the case of Kasee Ram Kirpa Ram *versus* Umburam Auree Chund, in which Huree Chund complained that Kasee Ram, his father-in-law, neglected to send his wife Ichha with her dower to his house. Kasee Ram answered, and Ichha put in a petition complaining of illness, and alleging that that was a valid ground of divorce, and the Court was of opinion that there were sufficient grounds of a divorce between Huree Chund and Ichha, and a precept to the Zillah Court was issued pronouncing one.

Again, in the case of Kasee Dhoollubh *versus* Ruttun Baee (page 410, idem), a divorce was granted to the plaintiff who was a woman of the barber caste on account of her husband's dissolute life and bad character, it being shown that the customs of that caste permitted a divorce for bad conduct of one of the parties.

In a case reported in Volume VI., Moore's Indian Appeals, page 348 (Ardaseer Cursetjee *versus* Perozebaye*), which was a suit brought on the Ecclesiastical side of the Supreme Court of Bombay for the restoration of conjugal rights, their Lordships of the Privy Council hold "that the Supreme Court of "Bombay on its Ecclesiastical side had no "jurisdiction to entertain such a suit, as there "existed such a difference between the duties "and obligations of a matrimonial union "among Parsees from that of Christians; "that the Court, if it made a decree, had no "means of enforcing it, except according to "the principles governing the matrimonial "law in Doctors' Commons, which were in "such a case incompatible with the laws and "customs of the Parsees."

But in giving judgment, Dr. Lushington said: "It may be that such laws and cus-"toms do not afford what we should deem as "between Christians an adequate relief; but "it must be recollected that the parties them-"selves could have contracted for the dis-"charge of no other duties and obligations "than such as for time out of mind were "incident to their own caste; nor could they "reasonably have expected more extensive "remedies, if aggrieved, than were custom-"arily afforded by their own usages. Such "remedies we conceive that the Supreme "Court on the *Civil side* might administer, "or at least remedies as nearly approaching "to them as circumstances would allow."

There is also another case in Volume I. of Borradaile's Reports, page 14 (Nund Lall

* 4 W. R., P. C., page 91.

Bhugwan Doss *versus* Tapee Dass and Purbhoo Dass) in which the Sudder Court at Bombay held "that a marriage-contract to be "valid must, both by the rules of caste "and laws of the Shaster, be made with "consent of parents on both sides."

It is clear, therefore, that suits relating to marriage have been entertained by the Courts of the Bombay Presidency as suits cognizable by the ordinary Civil Courts.

Suits relating to marriage deal with that which, in the eye of the law, must be treated as a civil contract and with civil rights arising out of that contract. Suits for relief against contracts procured by force or fraud are ordinarily cognizable by Civil Courts.

In a suit declaring the invalidity of a marriage, the Court could grant consequential relief. It might restrain the person alleging himself to have the rights of a husband from enforcing any claim to the custody or possession of the person of the woman founded on the supposed marriage.

If such relief could be granted, it is not easy to see why a declaratory decree under Section 15 might not be made. Such a declaration may be of the greatest importance to a girl circumstanced as the infant plaintiff is. If the marriage is, in fact, no marriage, unless she can obtain a declaration from a Court of Justice that the marriage is null and void, unless she can obtain the protection which such Court can give her, she may be obliged to live with the defendant in a state of concubinage, or at least she will be prevented from marrying any one else. The rights which a decree in this suit may protect—with which the defendant may be restrained from interfering—the preservation of the personal purity of the infant plaintiff and her right and power to contract a valid marriage—are amongst the highest rights which a human being can possess; and it would be a matter deeply to be lamented if the Court had no power to protect and defend them.

We have, however, no doubt of the existence of that power. We think that a suit such as the present is a suit of a civil nature which may be entertained in the Civil Courts of this country under the provisions of Section 1, Act VIII. of 1859, and that view seems to me to be sanctioned by the opinion of the Lords of the Privy Council in the case we have referred to.

We think that the Court must have jurisdiction in such suit to declare the marriage void, if procured by fraud or force, and celebrated without the consent of the necessary parties or without the formalities necessary to render it a binding marriage according to Hindoo Law. We must, therefore, pronounce that Mr. Justice Mitter's judgment is correct. The decision of Mr. Justice Glover must be reversed, and the case remanded to the Lower Appellate Court for trial on the merits.

The appellant will have his costs of both the hearings in this Court.

The 6th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Execution-sale—Bidding by decree-holder.

Reference to the High Court by the Recorder of Moulmein, dated the 9th April 1870.

Veerapah Chetty and another, *Petitioners*.

The fact of a judgment-creditor bidding at a judicial sale without the leave of the Court does not *ipso facto* invalidate the sale.

Case.—I HAVE taken time to consider this petition as one of great importance, as affecting, in fact, to a large extent the title to landed property in Moulmein.

The petitioners, as the judgment-creditors of Messrs. Gardner Brooke and Co., took in execution a house belonging to that firm, and at the judicial sale which ensued became the purchasers. Thirty days from the date of the sale having elapsed, they now move for a formal order confirming the sale. The difficulty I find in disposing of the motion arises out of a case which has been cited (*Bandhoo Roy and others* versus *Honooman Singh and others*, III. Bengal Law Reports,

Appellate Decisions, page 320),* in which Mr. Justice Norman thus stated the practice on the point prevalent in the High Court in its original jurisdiction.

"It appears to me to be a matter of grave "doubt whether a decree-holder, causing "property of his debtor other than mere "chattels, such as household furniture,

*The 29th April 1869.

Present:

The Hon'ble J. P. Norman and the Hon'ble E. Jackson, *Judges.*

Case No. 2620 of 1868.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 20th July 1868, reversing a decree of the Principal Sudder Ameen of that District, dated the 9th April 1867.

Bandhoo Roy and others (Plaintiffs), *Appellants,*

versus

Honooman Singh and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Anund Chunder Ghosal* for the Appellants.

Baboo Kalee Krishna Sein for the Respondents.

Norman, J.—HONOOMAN SINGH, having obtained a decree against the plaintiff, applied to the Court for execution of attachment of a decree in a suit of Bandhoo Roy and others against Karu Mahato and others for Rupees 94[illegible]. The Court made an order upon this application, and under Section 236 of Act VIII. of 1859 issued a written order prohibiting the now plaintiff Bandhoo Roy from receiving, and Karu Mahato from making, payment of the amount decreed until the further order of the Court.

This order was served, as prescribed by Section 239, by fixing up the order in some conspicuous part of the Court-house, and by delivering copies of the written order to the judgment-debtor. The attached decree was sold by public auction after the usual proclamation, and realized Rupees 20 only. The plaintiff's contention is that the sale is irregular, inasmuch as the prohibitory order under Section 236 was not served on him. But the Judge, I think rightly, holds that the service of the prohibitory order having been in accordance with the provisions of Section 236 was legal and regular, and therefore dismisses the suit. The plaintiff is not entitled to the particular relief which he seeks in this suit, and we must, therefore, dismiss the present appeal.

There seems, however, strong reason to suppose that the sale of this decree has worked a great oppression on the plaintiff. The facts are not clearly stated in the judgment of either of the Courts, but I am led to infer that the defendant, having caused the decree to be put up for sale, bought it for Rupees 20, and shortly afterwards realized by sale of the property of Karu Mahato Rupees 975. Upon that I desire to observe, first, unless there was some very good reason, of which nothing appears, the Court, in executing the defendant's decree, ought not to have sold the plaintiff's decree against Karu Mahato, but ought to have required the defendants to proceed to enforce that decree by its own process; appointing a manager under Section 243, if necessary. By so doing, the Court would have worked out the plaintiff's lien under the attachment, and secured the rights of all parties. The object of allowing a decree-holder to attach and sell his debtor's property is to ensure that the property may be realized or turned into cash in order to satisfy the decree.

If a money-decree is attached, unless it is shown that there are no means of realizing the amount of the decree, or no prospect of doing so within a reasonable time or except at an expense to which the attaching creditor ought not to be put, to sell the decree is not to realize the debtor's property, but to sacrifice it by selling the chance of realizing it. The whole spirit of Act VIII. shows that, in executing decrees, the Court is not to lose sight of the interest of the judgment-debtor. In securing payment to the decree-holder, it is the duty of the Court to do so without any unnecessary injury to, or sacrifice of, the property of the debtor. A very large discretion for that purpose is reposed in the Court, particularly by Section 243. It certainly never was intended that decree-holders should be encouraged or even enabled to speculate in purchases of the property of distressed men at an under-value. In any case in which property is brought to sale, and the price offered is wholly inadequate, it seems to me that the Judge ought to hesitate before he allows the sale to proceed.

Secondly, it appears to me to be a matter of grave doubt whether a decree-holder, causing property of his debtor other than mere chattels, such as household furniture, cattle, grain, or the like to be put up for sale, can bid at the sale without having first obtained the leave of the Court for that purpose. According to the practice on the original side of the High Court, wherever a decree-holder desires to buy land or other like property at a sale in execution of the decree against his debtor, he obtains express leave from the Court to bid. For myself I make it an inflexible rule not to make an order empowering the decree-holder to bid, unless notice of the application for leave to bid at the sale has been given to the debtor or his agent, except in cases where the debtor cannot be found, and has gone away leaving no agent to represent him. If such an order is made on notice, and the sale is fairly conducted, the debtor has the benefit of the competition of the decree-holder as an additional bidder at the sale, and the price is likely to be enhanced.

If the decree-holder who is bringing the property to sale does not himself intend to buy, his interest is the same as that of the debtor, namely, that the property should be sold at the best price that can be got. But if the decree-holder is allowed to buy as an intending purchaser, he acquires an interest adverse to that of the debtor, adverse to that of the only character in which the decree-holder is recognized by the Court, to buy the property at the lowest possible price. And, therefore, the debtor has a right to be placed in a condition to know what is going on, and to watch the conduct of the sale-officers of the Court who, in lotting and describing the property, stating its advantages and disadvantages, act and cannot but act under the instructions of the decree-holder.

The practice on the original side of this Court follows that of the English Courts of Equity. See Sydney Smith's Chancery Practice, Volume II., page 185; Owen *vs.* Foulkes, 6 Ves. 630, and the cases on the subject collected in Fisher on Mortgages, 502.

In English Courts of Common Law, the security of the debtor is of a different kind. The English Sheriff is held personally responsible for any abuse by his officers. It is laid down that, on a seizure of goods in execution, the Sheriff should not sell for a price which is grossly inadequate, but should return that the goods remain in his hands for want of buyers. On this, the plaintiff usually sues out another writ, namely, el

"cattle, grain, or the like, to be put up for "sale, can bid at the sale without having "first obtained the leave of the Court for "that purpose. According to the practice "on the original side of the High Court,

venditioni exponas, commanding the Sheriff absolutely to sell, and he is then justified in selling at any price he can get. It is the duty as well as the interest of the Sheriff to sell at the best price he can. The Sheriff is not responsible for selling at an under-value, unless he is guilty of some fraud or mal-practice. But in Phillips *versus* Bacon, 9 East 298, a party recovered £500 damages against a Sheriff on a declaration alleging that he had fraudulently and negligently sold the plaintiff's goods very much below their value.

The old practice in Courts of Common Law in England was that the Sheriff might either appraise and sell the goods without any enquiry, or else he might appraise the goods by a Jury, and then sell them—*see* Dalton on Sheriffs, page 147.

In Sayre's case (Crokes's James, 426), the Under-Sheriff of the County of Buckingham persuaded the Jury to appraise the goods of a poor man which were well worth £80 at £22-13-4, and delivered them to the plaintiff for the same sum. The Court of King's Bench held that it was oppression punishable at the Assizes by indictment, and ordered the Under-Sheriff, who was an attorney, to be brought before them.

The facts are not fully before us; but I have a strong impression that it may turn out that the plaintiff in this case has an equity to have the amount realized by the defendants under the purchased decree applied in satisfaction of the money due from him to the defendants.

The case may stand over for three weeks in order that the plaintiff's vakeel may consider whether any remedy is open to the plaintiff on the plaint as it stands; if not, the present suit must be dismissed without costs, and without prejudice to such proceedings as the plaintiff may be advised to take in accordance with the suggestions I have thrown out.

Jackson, J.—I also think that this appeal on the points on which it has been preferred must be dismissed. The procedure in execution and attachment as respects the written order, service of which is taken exception to, seems to have been strictly regular. The written order was proclaimed in Court, and a copy of it was served on the judgment-debtor. The decree which the present respondent had in this manner attached was subsequently brought to sale, and it is not contended that the sale was unfairly or improperly conducted. The result of it was that a decree worth nearly 1,000 rupees was sold for 20 rupees. It would have been better, with the light now thrown on the facts, had the Court exercised its power under Section 243, stopped the sale, and appointed a manager to execute the decree instead of selling it. The Court, however, would, at the time of sale, have no knowledge whether the decree was worth 10 rupees or 1,000 rupees. In such cases the usual practice in the Mofussil Courts is that, the judgment-debtor whose property is being sacrificed should move the Court to exercise its powers under Section 243. There is nothing stated before us to show that the judgment-debtor in this case was vigilant over his own interest or took any action in the matter. It may be that he had no notice of what was going on. I have no objection to the case standing over for three weeks, as proposed by my learned colleague.

The 30th July 1869—Norman, J.—The plaintiff's suit must be dismissed with costs, and without prejudice to any proceedings he may be hereafter advised to take with reference to the suggestions contained in our judgment.

"wherever a decree-holder desires to buy "land or other like property at a sale in "execution of the decree against his debtor, "he obtains express leave from the Court to "bid. For myself I make it an inflexible "rule not to make an order empowering the "decree-holder to bid unless notice of the "application for leave to bid at the sale has "been given to the debtor or his agent, ex-"cept in cases where the debtor cannot be "found, and has gone away leaving no agent "to represent him.

"If such an order is made on notice, and "the sale is fairly conducted, the debtor has "the benefit of the competition of the de-"cree-holder as an additional bidder at the "sale, and the price is likely to be en-"hanced.

"If the decree-holder who is bringing the "property to sale does not himself intend "to buy, his interest is the same as that "of the debtor, namely, that the property "should be sold at the best price that can be "got. But if the decree-holder is allowed to "buy as an intending purchaser, he acquires "an interest adverse to that of the debtor, "adverse to that of the only character in "which the decree-holder is recognized by "the Court to buy the property at the "lowest possible price. And, therefore, "the debtor has a right to be placed in a "condition to know what is going on, and "to watch the conduct of the sale-officers "of the Court who, in lotting and describ-"ing the property, stating its advantages "and disadvantages, act and cannot but act "under the instructions of the decree-"holder.

"The practice on the original side of this "Court follows that of the English Courts "of Equity. See Sydney Smith's Chancery "Practice, Volume II., page 185; Owen "*vs.* Foulkes, 6 Ves. 630; and the cases "on the subject collected in Fisher on Mort-"gages, 502."

This case was first brought to my notice when the petition of *Tsan Hla* (C. Mis. No. 173 of 1870) was before me, and I considered the language used by the High Court so plain as to leave this Court (the practice of which is, by Section 21 of Act XXI. of 1863, made dependent on that of the High Court in its original jurisdiction) no option but to reject the application. Mr. Aubrey, however, who appeared upon the present petition, has argued so strongly, and

I think so reasonably, against the applicability of the law to British Burmah on the ground of the radical difference obtaining here in the proceedings connected with judicial sales, that I am induced to make the matter the subject of a reference. He has, moreover, contended that, under the provisions of Act VIII. of 1859, in cases in which objections are not taken by an interested party within 30 days from the sale, the sale must be confirmed as a matter of course, and that at least it must be considered as within the rule *fieri non debuit factum valet.* The precise point would not appear to have been before their Lordships at the time of the decision cited.

The Civil Procedure Code contains no clause restricting the right of the attaching creditor to bid at the sale, and the practice is rested by his Lordship on analogy to home practice in equity, confirmed by considerations of expediency.

The difference in the mode of executing money-decrees upon land here and at home prevents us from having, I think, the benefit of analogy in a matter in *pari materia.* There is nothing at home equivalent to the judicial sale in India in execution of a money-decree.

Nor is there in the practice prevalent here with reference to judicial sales the danger his Lordship has pointed out in the case before him. It is true, as his Lordship observes, that where an abstract of title is prepared, it is possible for the party preparing it to describe the property in such a manner as to deter purchasers. Here, however, that practice does not obtain, nor is there in Moulmein any other preliminary to a judicial sale of land than the announcement by the Court that the right, title, and interest of A B in certain premises described by reference to a Government grant are to be sold. I cannot therefore see, in the fact of the attaching creditor bidding for property in Moulmein, the ill effect anticipated by the learned Judge. The judgment-creditor bidding for the property has, no doubt, the same desire as any other intending purchaser to obtain the property as cheaply as he may, but he has no more opportunity than a stranger of affecting the property in the particulars referred to by Mr. Justice Norman. It seems to me, therefore, that the only result that can be produced by his bidding is that which his Lordship describes as a desirable one, *viz.*, the enhancement of the price of the property sold. The judgment-creditor says in effect at every bid, "I am willing to estimate the property of my judgment-debtor at so much;" and the more he bids the more, it seems to me, he relieves the estate of the judgment-debtor, and enables it to satisfy other claims. The present case is an instance of what I mean. There were but three bidders present, and the property fetched its full value. It is alleged with considerable probability that, had the attaching creditor not been desirous of purchasing, the contest would have ended much sooner, and a much lower price have been obtained.

The policy of the Court of Chancery to which his Lordship refers has, I may add —more especially in the matter of opening biddings (for which the case cited *Owen* vs. *Foulkes*, 9 Ves., page 348, is also, I believe, still an authority)—never been supported on any principle, and has been unhesitatingly pronounced by some of the ablest text writers, including the learned author of Smith's Chancery Practice cited by his Lordship (see 6 Ed., page 592), to be unsatisfactory.

I may add that, by an order of this Court, the attaching creditor is treated in every respect as a stranger with reference to Section 253 of the Civil Procedure Code.

In the present case, the question I would submit to their Lordships is—

Does the fact of the petitioners having bid at the sale without the leave of the Court, *ipso facto*, invalidate the sale ?

Judgment of the High Court.

Norman, C. J.—We have no doubt that this question must be answered in the negative.

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The 18th August 1870.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Right of a Sebait—Sale.

Case No. 182 of 1870.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 14th December 1869, affirming a decision of the Officiating Moonsiff of Pooree, dated the 26th August 1869.

Drobo Misser (one of the Defendants), *Appellant,*

versus

Srineebash Misser and others (Plaintiffs), *Respondents.*

Baboos Mohendro Lall Mitter and *Obhoy Churn Bose* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

The right of a Sebait to perform services for a Hindoo idol cannot be sold in execution of a decree.

Mitter, J.—We are of opinion that the conclusion arrived at by the Lower Courts in this case is correct. There can be no doubt whatever that the right which the defendant, special appellant, alleges to have purchased was one which could not be sold in execution of a decree. The Sebait of a Hindoo idol has to perform services for the idol, that is to say, to perform the worship of the idol and to prepare food for it, and such a right cannot be sold at a public sale in execution of a decree. The special appellant has failed to give us any authority in support of his contention, and we do not, therefore, find any reason for disturbing the judgment of the Lower Appellate Court.

The plaintiffs have established to the satisfaction of the Lower Appellate Court that they had a right to maintain this suit: and on this point no objection has been taken before us in special appeal.

The special appeal is dismissed with costs.

The 1st December 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Injunction—Section 92, Civil Procedure Code.

Case No. 282 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Hooghly, dated the 1st August 1870.

Prosunno Moyee Dossee and others (Defendants), *Appellants,*

versus

Wooma Moyee Dossee (Plaintiff), *Respondent.*

Baboo Gopal Lall Mitter for Appellants.

Mr. R. T. Allan for Respondent.

An injunction cannot be issued under Section 92, Code of Civil Procedure, on a mere allegation that the defendant wishes to realize debts by bringing actions in Court, without proof of an intention of waste, damage, or alienation.

Loch, J.—Section 92 of the Code of Civil Procedure requires that, previous to the issuing an injunction, it must be shown to the satisfaction of the Court that the property which is in dispute in the suit is in danger of being *wasted, damaged,* or *alienated* by any party to the suit. Now, even if we were to admit that the property referred to in the proceedings of the Subordinate Judge is the property in dispute in the suit, yet no allegation has been made on the part of the petitioner, plaintiff in the pauper-suit, that it is in danger of being wasted, damaged, or alienated. All that she says is that the defendant wishes to realize the debts due to her by bringing actions in Court, and no proof whatever is given that there is any intention of such waste, damage, or alienation. Under such circumstances, we think that the order of the Subordinate Judge issuing the injunction upon the defendant must be set aside, with costs, as contrary to law.

The 1st December 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Possession—Tenancy—Rights.

Case No. 1326 of 1870.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 24th March 1870, affirming a decision of the Sudder Moonsiff of that District, dated the 30th July 1869.

Nazir Lushkur and another (Plaintiffs), *Appellants,*

versus

Golapooddeen Lushkur and others (Defendants), *Respondents.*

Baboo Mohendro Lall Mitter for Appellants.

Baboo Romanath Bose for Respondents.

The mere fact of possession, as tenants for a certain number of years cannot create any right to retain possession as against a person to whom the proprietor has granted a lease.

Mitter, J.—We are of opinion that the judgment of the Lower Appellate Court ought to be reversed. The title of the plaintiff has been proved, and it is therefore for the defendants to show under what right they are entitled to hold the lands in question. The mere fact that they have been in possession of those lands, as tenants, for a certain number of years cannot create any right in their favor to retain that possession against the will of the proprietors. No question relating to Section 6 of Act X. of 1859 arises in this case, and it is admitted by the Judge in his judgment that the defendants have altogether failed to prove the nature of their tenure. Under these circumstances, it is quite clear that the proprietors of the lands in suit were fully competent to grant a lease to the plaintiff, and that the plaintiff is entitled to recover possession of those lands from the defendants, who have no permanent right therein.

The decree of the Lower Appellate Court is therefore reversed, and that of the Court of first instance restored with all the costs of this litigation.

The 1st December 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Section 4, Regulation XVI. of 1797—Execution—Security—Liability of sureties.

Case No. 289 of 1870.

Miscellaneous Appeal from an order passed by the Additional Judge of Nuddea, dated the 25th July 1870.

Nuffer Chunder Paul Chowdhry and another (Petitioners), *Appellants,*

versus

Soorendro Nath Roy (Opposite Party), *Respondent.*

Baboo Sreenath Dass for Appellants.

Mr. R. T. Allan and *Baboos Mohendro Lall Shome* and *Grish Chunder Mookerjee* for Respondent.

The object of security taken from the holder of a decree from which an appeal has been preferred to the Privy Council is to indemnify the appellant for any loss he may suffer owing to execution being taken out during the pendency of the appeal. If the decree-holder does not execute the decree, the terms of the security-bond of themselves fall to the ground, and the surety cannot in any way be made liable for costs or any thing else awarded by the Privy Council.

Loch, J.—The facts of this case are these: One Heeramoney Burmoney sued to recover possession of her husband's share of the moveable and immoveable property against Soorendro Nath Roy Her suit was dismissed by the first Court, and on the 1st February 1864, she, on appeal to the High Court, obtained a decree. Soorendro Nath appealed to the Privy Council; and while the case was pending there, Heeramoney prayed to be allowed to take out execution in 1864. Before taking out execution, she was required to give security. Prankissen Paul became the surety, and nothing

further seems to have been done, and the execution-case was struck off the file of the Court executing the decree. In 1867, Heeramoney again applied to take out execution of her decree, and again she was required to furnish security for the moveable property, and Nuffur Chunder Paul Chowdhry became surety to the extent of 10,000 rupees on the 9th September 1867. On the 16th September 1867, the Judge directed enquiry to be made as to the sufficiency of the security. On the 28th July, or, as is said by the respondent, 28th May 1868, the security was accepted as sufficient, and the decree-holder was permitted to execute her decree. The decree of the High Court was, however, on the 7th July 1868, reversed by the Privy Council,* who dismissed the suit of Heeramoney, and no execution on the part of Heeramoney was ever taken out. Soorendro Nath Roy now seeks to execute his decree for costs against the sureties, and the Lower Court has held that they are liable to him for costs.

In appeal from that order, it is urged that, as no execution has ever been taken out, the sureties cannot be held liable. On the other hand, it is urged that whether execution was taken out or not is immaterial; that the sureties had entered into a contract with the Court; they voluntarily bound themselves, and this engagement of theirs must be looked upon as a kind of mortgage of their property, or, as said by another pleader for the respondent, a decree by confession of judgment; that the parties are bound by the order of the Court accepting the security, and directing the execution to proceed; that they, having voluntarily executed the security-bond, could not resile by stating that no consideration was given; that the question of consideration does not enter at all into a matter of this kind, and the parties who are thus bound by the order of the Court cannot be relieved from their responsibility unless by an order of the Court; that, in fact, the sureties have by their own acts taken the place of the decree-holder, and have rendered themselves liable for every thing that she was liable for; that, in fact, they are in the position of a party who becomes surety for a criminal: and if the criminal escape, the surety would be liable to forfeit the amount of his security-bond; that the contract was between the surety and the Court, and the Court had made an order accepting the security, and directing execution to be taken out; and that, if Heeramoney did not avail herself of that order, the surety is still liable, unless his liability is cancelled by an order of the Court.

The argument for the respondent cannot, I think, be sustained. Heeramoney, on obtaining her decree, applied to the Court in the usual way to be allowed to execute her decree; and under the provisions of Section 4, Regulation XVI. of 1797, the Court were empowered to order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favor the same was passed for the due performance of such order or decree as Her Majesty should think fit to make on the appeal.

Security was, accordingly, tendered and accepted by the Court. But, for reasons best known to herself, the decree-holder did not take advantage of the order of the Court, and took no steps to execute the decree. So that, in fact, the property remained untouched by the decree-holder, and the judgment-debtor received no injury whatever. Now, the object of the security is, no doubt, to indemnify the appellant for any loss he may suffer, owing to the execution being taken out by the decree-holder during the pendency of the appeal in the Privy Council, and the security was given for the very purpose of enabling the decree-holder to execute her decree. If she did not choose to execute her decree, the terms of the security-bond would have themselves fallen to the ground: it was only on her executing the decree that the surety became liable. The decree-holder might have come to the Court the day after the security was accepted, and stated to the Court that, for certain circumstances, "I do not wish to execute my decree," and the position of the parties would have remained as before. So here, though the order was passed, yet as Heeramoney did not choose to execute her decree, the position of the parties remained unchanged, and the surety could not in any way be made liable for costs or anything else which were awarded by the decree of the Privy Council.

I think, therefore, the order of the Lower Court must be set aside with costs, one hundred rupees being allowed for pleader's fees.

Mitter, J.—I concur.

* 10 W. R., P. C., p. 35.

The 3rd December 1870.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Res adjudicata—Obiter dicta.

Case No. 1942 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 20th May 1869, reversing a decision of the Officiating Deputy Collector of Commercolly, dated the 30th January 1869.

Jardine Skinner & Co. (Plaintiffs), *Appellants,*

versus

Dwarkanath Chuckerbutty (Defendant), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort* for Appellants.

Baboo Grija Sunkur Mojoomdar for Respondent.

Where a suit for arrears of rent at enhanced rates for a certain year was dismissed for want of notice, but the Court also found that the pottah set up by defendant was not genuine: HELD that that decision was no bar to a subsequent suit by the same plaintiff for arrears of rent at enhanced rates for a subsequent year.

A matter which is directly adjudicated upon by a Court of competent jurisdiction can be treated as *res adjudicata*, but not matters determined for collateral or incidental purposes only.

Mitter, J.—THE plaintiffs in this case had previously brought a suit against the defendant for arrears of rent for a certain year. Those arrears were claimed at enhanced rates, and one of the pleas set up in defence was that the tenure was protected from enhancement under a mowrosee pottah executed by the predecessors of the plaintiffs.

That case was ultimately dismissed by the Revenue Court for want of notice, but one of the conclusions arrived at by that Court was that the pottah put in by the defendant was not a genuine document.

The present suit has been brought for the arrears of a subsequent year, namely, 1272 B. S.

The Lower Appellate Court has dismissed the suit upon the ground that the tenure is protected from enhancement, inasmuch as the pottah is a genuine instrument.

The only point urged in special appeal is that the question, namely, whether the tenure is liable to enhancement or not, has been set at rest by the decision of the Revenue Court in the former suit, and that the Judge was, therefore, wrong in holding the pottah to be a genuine instrument contrary to that final decision.

I am of opinion that this contention is not sound.

I think it is pretty clear that no question, under Section 2, can arise in this case. The two suits are for arrears of rent for different years, and it is, therefore, clear that the causes of action upon which they are respectively founded are different. Section 2, it must be remembered, bars the cognizance of the suit, and no question as to whether this suit is cognizable or not can possibly arise.

There remains, then, the doctrine of estoppel by previous judgment, upon which so much stress has been laid by the learned pleader for the appellants. I have already expressed my views on this subject in special appeal No. 1036 of 1870,* and I would, therefore, confine myself to the particular reasons which have induced me to come to the conclusion that that doctrine is not applicable to the present case.

In the first place, I have never heard of a case in which a decision, which was ultimately passed against a particular party, has been treated in a subsequent suit as an estoppel in his favor. The former suit was dismissed upon a preliminary ground, and however proper it might have been for the Court by which that case was heard to express its opinion upon the enhancibility or otherwise of the tenure in order to meet the convenience of the Appellate Courts above it, it seems to be quite clear that that opinion was not the ultimate ground of its decision, which was a decision adverse to the plaintiffs. That opinion must be considered in the present case as a mere *obiter*, inasmuch as it was not absolutely necessary for the disposal of the former suit, which was bad upon a preliminary ground. It has been said that the defendant had preferred a special appeal to this Court against the finding of the Lower Court upon the spurious character of their pottah, and that this special appeal was rejected by a Division Bench of this Court as groundless. But the rejection

* Will appear in a subsequent number.

of the special appeal cannot amount to anything more than that this Court did not find any point of law upon which it could interfere with the decision of the Lower Court.

In the next place, I am of opinion that the question as to whether the tenure is liable to enhancement or not was not *directly* before the Court on the former occasion. That question was raised, it is true; and the Court before which it was raised was fully competent to decide upon it, so far as such decision was necessary for the disposal of that suit, which was a suit merely for arrears of rent for a particular year. But the only question which that Court had directly before it was, whether the plaintiffs were entitled to recover those arrears or not. To this extent, the former decision might have been treated as *res adjudicata* if it had been passed upon the merits; but no further. It is to be borne in mind that the Revenue Courts had no jurisdiction to make a mere declaratory decree to the effect that a particular tenure was liable to enhancement. No such jurisdiction was ever given to them, as will be seen from the provisions of Section 23, Act X. of 1859 which defined the particular classes of suits which they were authorized to try. There can be no ground, therefore, for contending that the opinion expressed by the Revenue Court in the former suit, upon the question of enhancibility, is to be treated as any binding declaration upon that point. How then can it be said, either that that question was directly before the Court on the former occasion, or that that opinion can be treated as *res judicata* in the present case, which is brought for an entirely different subject-matter, and upon an altogether different cause of action. It has been said that the nature of the two claims is the same, inasmuch as they are both for arrears of rent. But the claims are *de facto* different, although they are identical in nature; and it is therefore clear that the nature of the claim has nothing to do with the question now under our consideration. Suppose, for instance, that the present suit was brought by the defendants for the recovery of the tenure itself either under Clause 6, Section 23 of Act X. of 1859, or before the Civil Court under the Full Bench decision of this Court in the case of Gooroo Doss Roy.* Could it have been contended for a moment that the opinion expressed by the Revenue Court in the former suit, on the non-mowrosee character of the tenure, would have operated as an estoppel in such a case? The arrears claimed in the former case might have amounted to a rupee, whereas the tenure itself might have been of immense value. The matter which is directly adjudicated upon by a Court of competent jurisdiction can be treated as *res judicata*, but the case is quite different with matters determined for incidental or collateral purposes only.

Lastly, it is admitted that some of the defendants in this case were not parties to the former case, and it is not shown that their title is derived from any of the persons who were made defendants in that case. It is clear, therefore, that, so far as these defendants are concerned, the former decision can neither be set up as a bar nor as conclusive evidence; and this circumstance alone is, in my opinion, sufficient to justify the rejection of the plea of estoppel altogether.

With reference to the defendants above referred to, the Lower Appellate Court was perfectly right in holding that the former decision was not conclusive; and it could not, therefore, hold in the same case as against the other defendants, that the same pottah which it had once found to be a genuine instrument was a spurious one. I see no reason whatever why we should press the doctrine of estoppel to such a length.

For the above reasons, I would dismiss this special appeal with costs.

Loch, J.—The delay in disposing of this case has been occasioned by time having been given to the special appellant to show that Mr. Campbell, the Special Commissioner, had authority to dispose of the rent-suit tried by him on appeal in 1862, as his authority to do so had been denied by the Judge of Rajshahye in his judgment of 19th February 1867. A letter from the High Court of 20th June 1863, No. 122, has been produced, giving the Special Commissioner jurisdiction to try the former case, so that the objection taken by the Judge of Rajshahye to the jurisdiction of the Special Commissioner falls to the ground. I am, however, of opinion that the judgment come to by the Special Commissioner on that occasion cannot be treated as an estoppel, and I concur with my colleague that this special appeal should be dismissed. It is dismissed with costs.

* 7 W. R., p. 187.

The 6th December 1870.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Appeal—Review—Jurisdiction—Section 58, Act X., 1859.

Case No. 223 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 28th March 1870, affirming an order of the Deputy Collector of that District, dated the 16th July 1869.

Soobul Chunder Gooho (Defendant), *Appellant,*

versus

Tumeezooddeen Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Sreenath Doss for Appellant.

Mr. R. T. Allan and *Baboo Kalee Mohun Doss* for Respondents.

A Deputy Collector has no right to entertain a petition for review of judgment under Section 58, Act X. of 1859, after his decree has been modified by the Judge in appeal.

Mitter, J.—We see no reason to interfere with the decision of the Lower Appellate Court. It is quite clear that the decree passed by the Deputy Collector was modified by the decree of the Judge on appeal, and, under such circumstances, the Deputy Collector had no right to entertain a petition for review of judgment under the provisions of Section 58 of Act X. of 1859.

We dismiss the appeal with costs.

The 6th December 1870.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Decree—Instalments—Limitation.

Case No. 284 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Backergunge, dated the 20th May 1870, reversing an order of the Officiating Moonsiff of Burrisaul, dated the 4th March 1870.

Kristo Chunder Shaha and another (Decree-holders), *Appellants,*

versus

Oomed Ali and others (Judgment-debtors), *Respondents.*

Baboos Kalee Mohun Doss and *Jogendro Chunder Bose* for Appellants.

Mr. H. E. Mendies for Respondents.

When a decree provided for payment by instalments, and authorized the decree-holder, in case of default, either to proceed to execute the whole of the decree at once, or to recover each instalment as it fell due, and the decree-holder adopted the latter means of recovering his claim:

Held that, in taking steps to keep his decree alive, he was within time for three years from the date on which the instalment fell due.

Kemp, J.—One Kishen Chunder Shaha obtained a decree against Sheikh Boodhye and others for a sum of 550 rupees on the 8th of September 1865. The decree stipulated that the aforesaid sum was to be paid by instalments, the first instalment of 175 rupees in Pous 1272, the 2nd instalment of 200 rupees in Pous 1273, and the balance of Rupees 175 in Pous 1274. The decree, which was on confession of judgment, further provided that the decree-holder was empowered, in the event of the judgment-debtor defaulting in the payment of any one kist, to execute the decree for the whole debt. It appears that, when the kist of Pous 1272 fell due, the judgment-debtor paid a portion of it in cash, and asked for and obtained an extension of time up to Pous 1273. The decree-holder then took out execution of the whole decree on the ground that there had been a default, and subsequently an arrangement was entered

into by the parties by which an extension was given, and the present application is to execute the decree with reference to the instalments due in 1273 and 1274; and the application being made on the 21st of September 1869, it is within three years from the date fixed in the arrangement made—that is to say, within three years from Pous 1273.

The first Court held that the application was within time; but the second Court, without giving any other reasons for its judgment, relies solely upon a Full Bench decision of this Court published in Volume XIII. of the Weekly Reporter, page 44, Full Bench Rulings.

In special appeal, it is contended that the decree is not barred, and that the circumstances of this case are not on all fours with those of the case quoted by the Lower Appellate Court.

We think that there is no doubt that the decision of the Full Bench is not in point. That decision referred to a case in which a lump sum had been decreed, and it was held that the parties could not substitute an instalment-bond for the terms of the original decree; while in this case the decree authorizes the decree-holder, in the case of a default, either to proceed to execute the whole of the decree at once, or to recover each instalment separately as it fell due. The decree-holder appears to have adopted the latter means of recovering the amount of his decree, and to have taken steps to keep his decree alive within three years from the date on which the instalment fell due. The present application being within three years from that date, the decree-holder is within time.

The decision of the Lower Appellate Court is, therefore, reversed, and the order of the first Court restored with costs.

The 6th December 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Certificate—Act XXVII. of 1860.

Case No. 360 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Midnapore, dated the 15th June 1870.

Protap Narain Doss (Second Objector), *Appellant,*

versus

Poorno Mashee Daye (Petitioner) and another (Third Objector), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Mr. R. T. Allan for Respondents.

Where a Judge, holding that the special title put forward by an objector had not been proved, decided that the widow of the deceased was best entitled to a certificate under Act XXVII. of 1860, the decision was held to be correct, inasmuch as the Judge was not deciding upon the general right and title of the parties to the property, but under a special law for the collection of debts and for the protection of debtors.

Bayley, J.—I AM of opinion that this appeal must be dismissed with costs.

The Judge has found that the special title upon which alone the objector attempts to come in fails. That title is alleged to be a certain deed called নিয়ম আদেশ পত্র (regulating order deed), under which it is alleged that in this family the husband of the petitioner managed the family-property. This, however, is a case in which the Judge was deciding, not on the general right or title of the parties to the property in suit, but under a special law, Act XXVII. of 1860, as to who was the party best entitled to collect the debts due on the estate of the deceased Bissumbur.

The Lower Court has decided that the widow of the deceased was the best entitled, as being his next heir, to have the certificate under the Act cited. It has also found that the special title attempted to be put forward by the objector Protap Narain Doss, as based on the aforesaid deed, was not proved, and that there was no evidence that this deed was ever operative in any Court of law, or that it ever saw the light from the time of its execution in 1187 to 1252. This order of

the Judge under Act XXVII. of 1860 appears to me to be quite correct. It does not prevent the objector instituting a regular suit for the establishment of his title, either under that deed or otherwise. The evil is that in these applications under Act XXVII. of 1860 due regard is not had to the nature and object of the Act which is simply a law for the facilitation of collecting the debts due on the estate of a deceased person and giving acquittances to debtors; but endeavour is made to make it a means for the progress and success of a regular suit, and the sooner this is put a stop to the better.

In this view I would dismiss this appeal with costs.

Jackson, J.—I quite concur with Mr. Justice Bayley. I think the appellant has not made out his case, as he failed to prove the ground upon which he put it in the Lower Court, *viz.*, the special custom of the family under a deed. The point which he now takes is a new point altogether. It is evident that the vakeel is not prepared to argue that point, and I see no sufficient reason for considering the new point. Certainly, the widow was the best entitled to represent her husband, unless exceptional circumstances can be shown; and if there is any discretion in the matter, I should hesitate to grant a certificate to a person who has set forth a title under a deed attendant with so many suspicious circumstances as this deed is.

The 6th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch and W. Ainslie, *Judges*.

Dissolution of marriage—Jurisdiction—Procedure.

In the matter of

Nash Durand, *Petitioner*,

versus

Rebecca Durand, *Respondent*, and A. W. Chill, *Co-respondent*.

A District Judge ought in all cases to inquire into, and set out in his judgment, the facts relied on as giving jurisdiction to the Court to pronounce a decree of dissolution of marriage.

Norman, C. J.—At the time of the presentation of the petition in this case, the husband and wife appear to have resided within the local limits of the jurisdiction of the Recorder of Rangoon, as conferred by Act IV. of 1869, namely, the husband at Thayee Myo, and the wife at Prome, both in Pegu.

The case is a very clear one. The petitioner, a drummer in the 30th Regiment, was married to the respondent at Madras on the 22nd July 1857. In September of that year, he was ordered to proceed with his Regiment to Bengal for service in the field. He left his wife at Madras after having cohabited with her rather more than one month. His pay was 16 rupees a month, out of which he authorized his wife to receive 10 rupees monthly. He continued this allowance for 15 months from September 1857 till he heard that she was living with the co-respondent Chill, with whom she has ever since continued to cohabit, and with whom she went through the ceremony of marriage about the year 1867.

The jurisdiction in this case appears from the record, but we think the District Judge ought in all cases to inquire into, and set out in his judgment, the facts relied on as giving jurisdiction to the Court to pronounce a decree of dissolution.

We confirm the decree of the Recorder of Rangoon dissolving the marriage.

The 6th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch and W. Ainslie, *Judges*.

Dissolution of marriage—Jurisdiction.

In the matter of

F. W. Wingrove, *Petitioner*,

versus

Julie Wingrove, *Respondent*, and A. S. Q. Forbes, *Co-respondent*.

Messrs. G. Gregory and *C. Gregory* for Petitioner.

No one for Opposite Party.

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In a suit for dissolution of marriage, where at the time of the presentation of the petition the respondent does not reside within the jurisdiction of the Court, the jurisdiction of the Judge and the right of the petitioner to petition him will depend on where the parties "last resided together."

Norman, C. J.—In this case, which is a suit for dissolution of marriage brought by Mr. Wingrove against his wife, the petition was presented to, and the case has been tried before, the Judge of Tirhoot.

The Judge's attention does not appear to have been called distinctly to the necessity of enquiring into and recording the facts which give him jurisdiction.

On examination of the papers, we are led to infer that, at the time of the presentation of the petition, the respondent, Mrs. Wingrove, was residing in Calcutta, and not within the jurisdiction of Tirhoot. The jurisdiction, therefore, of the Judge of Tirhoot, and the right of the husband to present a petition to that Judge, must rest on the fact that the parties "*last resided together*" within the jurisdiction of the Judge of Tirhoot. The petition departs from the form given in the Act, and it is not clear upon the evidence that the parties, though residing together in Tirhoot at the time of the discovery of the adultery, continued to reside in that district down to the time when they finally separated.

The case must go back in order that evidence may be taken to show that the Judge had jurisdiction.

As the inquiry is probably merely formal, it will be desirable that the Judge should take up the case at once, and return it to this Court, along with his finding, with as little delay as possible.

The 6th December 1870.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Section 15, Act XIV., 1859—Section 25, Act X., 1859—Jurisdiction.

In the matter of

Shib Doss Tribedee and others, *Petitioners,*

versus

Pearee Soonduree Chowdhrain and others, *Opposite Party.*

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Petitioners.

Baboos Bhowanee Churn Dutt and *Gopal Lall Mitter* for Opposite Party.

Where a party is restored to possession under Section 15, Act XIV. of 1859, the opposite party is not deprived of the right to institute proceedings under Section 25, Act X. of 1859, and an appeal against an order under this Section lies to the Commissioner.

Kemp, J.—This is an application on the part of Shib Doss and others, alleging that they had been illegally ousted of certain properties, and that they brought a suit under Section 15 of Act XIV. of 1859 in the Court of the Subordinate Judge of Tipperah, and obtained a decree restoring them to possession on the 11th of January 1870; that the opposite party then instituted proceedings under Section 25 of Act X. of 1859 against the petitioners in the Court of the Deputy Collector of Bhoolooah on the 18th February 1870; and that, although the petitioners objected to the Deputy Collector's jurisdiction to entertain a suit which virtually was brought to set aside the decree of a Civil Court under Section 15 of Act XIV. of 1859, the Deputy Collector passed an order on the 27th June 1870 rejecting the petitioner's objections: that as the order of the Deputy Collector was illegal, and one which he had no jurisdiction to pass, the petitioners prayed that the record might be sent for.

On the 16th of September last, the record was sent for by an order passed by the Chief Justice and Mr. Justice Kemp, and the opposite party have appeared to-day.

It appears to me, in the first place, that the petitioners have their remedy by an appeal to the Commissioner or to the Collector, as the case may be; and this has been ruled in a decision of the Full Bench, published at page 119 of Sutherland's Full Bench Rulings, which lays down that an appeal against an order under Section 25, Act X. of 1859, will lie to the Commissioner. In the next place, it appears to me that the opposite party would, if proceedings had not been taken under Section 15 of Act XIV. of 1859, have been entitled to apply to the Collector under Section 25 of Act X. of 1859, and there is nothing in Section 15 of Act XIV. of 1859 which deprives the opposite party of their right to institute proceedings under Section 25 of Act X. of 1859, instead of proceeding under Section 15 of Act XIV. of 1859 by a suit in the Civil Court. I, therefore, hold in this case that there was a remedy to the

petitioners, and further that the Deputy Collector has acted with full jurisdiction in the case. The application is rejected with costs.

Mitter, J.—I am of the same opinion.

The 7th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Interlocutory Appeal—Ameen's map.

Case No. 3 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Sarun, dated the 27th September 1869.

Lalljee Sahoo and others (Decree-holders), *Appellants,*

versus

Maharajah Rajendur Pertab Sahee (Judgment-debtor), *Respondent.*

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Appellants.

Mr. R. T. Allan and *Baboos Romesh Chunder Mitter* and *Bhowanee Churn Dutt* for Respondent.

An appeal having been made from an order relating to the execution of a decree, the High Court directed that an Ameen should deliver over possession and make a map of the property so delivered over, and a map showing the boundaries laid down in the decree. The Ameen went to the spot and made a map. That map was not transmitted to the Court; but in consequence of certain proceedings in the Subordinate Judge's Court, a second Ameen was sent and a second map made. These proceedings were wholly disregarded by the High Court, who proceeded upon the first Ameen's map and report, against which no exception was filed in the High Court.

Norman, C. J.—THIS was a question arising between the parties to the suit in execution of the decree for land in Deara Sohugpore, 3,877 beegahs of chur land and 500 beegahs of kuraree land, according to the boundaries specified in that case and shown in the map prepared by one Golam Dustgeer.

The decree-holder having filed a petition for the execution of the decree, the Subordinate Judge made an order that the decree-holder should be put in possession of the decreed property, admitting an objection which had been made by the defendant that the bed of a certain dried up river was not included in the decree. From that order, which was an order passed relating to the execution of the decree, the decree-holder appealed. Upon the materials before us, maps not having been filed, it seemed not quite clear whether the Subordinate Judge's order made in the execution department would give to the decree-holder all that he was entitled to in execution of the decree; and therefore, before pronouncing any opinion, we directed that an Ameen should proceed to the spot, and deliver over possession of the decreed property, according to the terms of the order of the Subordinate Judge; that he should make a map of the property so delivered over; and that he should, at the same time, make a map showing the boundaries laid down in the decree, and to which the decree-holder is entitled under the terms of the decree; and that he should return the two maps to this Court within six weeks from that date, with such explanations as he might think necessary to show whether the land, as specified in the Subordinate Judge's order, includes the whole of the land as given under the decree. The Ameen deputed in pursuance of that order went to the spot and made a map. That map was not transmitted to this Court in pursuance of our order, but certain proceedings appear to have taken place in the Court of the Subordinate Judge at the instance of the defendants, in consequence of which an order was made that a second Ameen should be sent, who went and made a second map. With those proceedings we have nothing to do. The duty of the first Ameen was simply to return his map to this Court.

We must, therefore, wholly disregard the proceedings which took place in the Court of the Subordinate Judge subsequent to the making of the map directed by us, and proceed upon the map made by the first Ameen and his report, against which no exceptions have been filed in this Court, and no valid objection has been shown in the argument before us. The map and the report of the first Ameen taken together show that the Subordinate Judge's order was correct. It is, in fact, a direction that possession should be given of the property within, and according to, the boundaries as laid down in that decree.

The result of this is that the order of the Subordinate Judge of the 27th of September 1869 is confirmed, and the appeal is rejected with costs.

Loch, J.—I concur with the judgment given by the Chief Justice; but with regard to the objection verbally raised before us respecting the possession given by the Ameen, and which is to the effect that he has given possession to the decree-holder of more land than what he was entitled to under his decree, that objection appears to me to be a question with which he cannot deal in this appeal, which must be dismissed with costs.

The 7th December 1870.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Assault—Damages—Cause of Action—Special Appeal—Refusal to examine witnesses.

Case No. 822 of 1870.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 9th February 1870, reversing a decision of the Moonsiff of Ookhrah, dated the 24th November 1869.

Ramessur Bhuttacharjee (Plaintiff), *Appellants,*

versus

Shib Narain Chuckerbutty and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Luckhee Churn Bose for Respondents.

An assault made by parties proceeding together and acting in conjunction as to time, place, and assault is a single act, and the cause of action one common to all the parties.

Where a Lower Appellate Court's refusal to examine witnesses in a suit for damages for assault is made a ground of special appeal, it is not sufficient to put in an affidavit to the effect that a verbal request of the vakeel to examine the witnesses was refused by the Judge.

Bayley, J.—We think this special appeal must be dismissed with costs.

The suit was one for damages for assault, instituted 11 months and 28 days after the date of occurrence. It is true that there were some Fouzdaree proceedings intermediately, but still such delay cannot but be considered as going against the plaintiff's case.

The first Court gave the plaintiff a decree.

The Lower Appellate Court reversed that decision, and dismissed the plaintiff's suit.

In special appeal, three grounds have been taken before us by the pleader for the special appellant. The first is that, whereas Benoy Mookerjee, one of the defendants, did not appeal to the Judge, the Judge was wrong in reversing the whole decree.

The second ground is that the Lower Appellate Court has misconstrued the evidence of the two witnesses examined by the special appellant, and that their evidence was legally complete.

The third ground is that out of the five witnesses produced by the special appellant in the first Court, only two witnesses were examined; and it is added that the special appellant made an affidavit to the Deputy Registrar of this Court to the effect that his pleader requested the Court to examine the other three witnesses, but the prayer was refused.

As to the first point, we think that each case must be governed by its own facts in considering whether Section 337 of the Procedure Code applies. In applying that Section, we cannot take the facts other than as those on record. Here the assault was deposed to be simultaneous, that is, at one time by all the three defendants. The assault was made by parties proceeding together and acting in conjunction as to time, place, and assault. In short, the assault was one single act, and not a divisible and distinct act. Such being the case, it can hardly be said that the cause of action was not one common to all the defendants.

On the second point, it is pressed on us that the Lower Appellate Court is wrong in saying that the evidence did not detail as to when, where, and how the act was committed. We have heard the evidence read, and we cannot say that the Lower Appellate Court has misconstrued the evidence on this point. Nothing in that evidence is so specific, as that the deponent might be criminally indicted on a charge of having stated that in such precise locality, at such

precise time, and in such precise manner, the assault was made by each. Again, in a special appeal, we are not able to say that the Judge has erred in law, because he understood the evidence capable of being understood in one of those two ways; nor can we make the Judge believe a witness whom, from the nature of his evidence, the Court thinks it proper to disbelieve. On the second point also, therefore, we think, there is no error in law in the Judge's judgment.

On the third point, the general practice is to make a petition in the first and the second Courts for the examination of witnesses not examined, but who are considered material in the case; but no such petition or a refusal to examine after such petition has been shown in this case. The affidavit is simply to the effect, that a request was made verbally by the vakeel to examine the witnesses, and refused by the Lower Appellate Court. No affidavit whatever of what passed in the first Court has been tendered; and I think that, in an assault-case like this, the plaintiff cannot succeed simply on the ground of such an affidavit as this is, especially where the plaintiff has not come forward to tender his own evidence. The remarks of the learned Chief Justice, Marshall's Reports, page 183, *mutatis mutandis*, apply fully here, *viz.*, "If "parties," said Sir Barnes Peacock, "will not "come forward and give their own evidence "in cases in which such evidence is most "important, and the best that can be obtain-"ed, they must not complain if their written "statement, verified by their mookhtear and "not by themselves, and supported by the "evidence of menials and a class of witnesses "of whom any number can be obtained to "prove any fact that is wanted, are not be-"lieved. The Court will require the best "evidence to be given, and will not be satis-"fied with the evidence of inferior witnesses "put forward by the parties themselves, "while they remain in the background "and plead their prejudices as an excuse "for their absence. As this rule comes to "be more generally acted upon, fewer false "causes will be put forward, and the occupa-"tion of hired witnesses be gone." I think this view of the learned Chief Justice is one which we should always bear in mind in cases of this nature.

On the whole, I would dismiss the special appeal with costs.

Paul, J.—I also think there is no ground for this special appeal.

The 7th December 1870.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Declaratory decrees—Cause of action—Grounds of special appeal.

Case No. 886 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 14th February 1870, affirming a decision of the Moonsiff of Kandera, dated the 26th August 1869.

Jan Ali (one of the Defendants), *Appellant,*

versus

Khondkar Abdoor Ruhman (Plaintiff), *Respondent.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Debendro Narain Bose and *Moonshee Mahomed Yusuf* for Respondent.

Before the assistance of a Court of equity can be invoked for declaratory relief, there must exist something, either in the nature of an invasion of some right, or in the shape of an impediment or obstacle in the way of a full enjoyment of proprietary right: a mere allegation or threat without action is not sufficient to enable a party to seek for a declaration of his right and title.

Per Paul, J.—A ground should not be allowed to be taken in special appeal for the first time, where it would have to be dealt with in connection with the evidence in the cause, or appeared one capable of explanation; but where the ground of appeal goes to the root of the case, *e. g.*, that the plaintiff had no cause of action, it may be taken and entertained at any time while a suit has vitality, and before the functions of the Court regarding it have ceased.

Paul, J.—In this case, the objection taken by the special appellant, the defendant No. 4, is that contained in the second ground of his petition of special appeal, *viz.*, that the plaint does not disclose any cause of action against the appellant.

The plaintiff stated that he was in possession of certain lands by virtue of his purchase from the defendant No. 2; that he under-let the lands to defendants 1 and 3, and received kubooleuts from them; that the said defendants having fallen in arrears, he attached the crops raised by them on the land; that the tenants disputed the attachment, and the attachment was ordered to be taken off; that subsequently the tenants brought an action against their landlord, the

plaintiff, for an illegal distress, and they recovered damages against him; that, in the last proceeding, defendant No. 4 presented a petition, in which he stated that he was the owner of the lands the crops whereof had been attached, and this objection of ownership affected the plaintiff's title by throwing a cloud over it; thereupon the plaintiff became entitled to sue in the Civil Court for the declaration of his title and confirmation of his possession. The plaintiff obtained a decree declaring his ownership and possession in both the Courts. From this decree, the present appeal is preferred, on the ground, amongst others, contained in the second ground of special appeal already fully stated.

It appears to me that the objection taken in special appeal is valid. The mere allegation of ownership, contained in the petition presented by the defendant No. 4, is not calculated either to affect the plaintiff's title to, or his enjoyment of, the lands in suit, or to raise any cloud which he is obliged to dispel by suit. If the plaintiff's statements are true (and for the purpose of trying the validity of the objection taken in special appeal, they must be taken to be true)—namely, that he, the plaintiff, is the owner of the lands in dispute, having the title-deeds of his ownership in his possession, that he has kubooleuts from defendants 1 and 3, and that he has his collection-papers and other documents showing his possession by his tenants, defendants 1 and 3—it follows that the plaintiff has a title perfectly good, clear, and marketable; and it becomes difficult to understand or to conceive how the bare allegation of the defendant No. 4, that he was the owner of the lands in suit, without any act done by him with a view to the assertion of such hostile ownership, could either affect the plaintiff's right of property, or disturb his possession or throw any the slightest cloud over the title. If bare allegation of ownership was sufficient for the purposes of such a suit, then immediately on a demand being made by A upon B for the delivery to him, as owner, of the possession of property then in the occupation of B, B would be entitled to come into a Court, and have his rights declared and possession confirmed against A. It is quite clear that such a suit, in anticipation of a threatened ejectment, will not lie.

The principle which enables parties to sue to have their proprietary rights declared on the ground that their title has been affected prejudicially by the acts of others is to be found in the case of Sheo Pursun Singh *versus* Rajah of Bettia, Volume X, Moore's Indian Appeal Cases, page 438. The facts of that case were shortly these: A summary suit was brought by A against B to recover arrears of rent of certain mouzahs held (as alleged by A) under a lease. B's defence was a denial of the lease, and an assertion of title in the mouzah as by bhakee birt tenure. The summary suit was dismissed, and A then brought a regular suit against B, seeking (amongst other things) to establish his proprietary title, or, in other words, to have his title to the mouzahs declared. In page 450, their Lordships observe as follows: "If the bhakee "birt tenure be valid, the plaintiff has no "possession in the sense in which he uses "that term. He might have a right to rent "for a time on the footing of contract or "estoppel even from a birt tenant, if the "latter accepted a lease; but that would "rest on special grounds, and would not "flow from his general proprietary title. "Until this claim to a birt tenure be re-"moved, the plaintiff cannot have the pos-"session he seeks, since in some way or "other the defendant stands between the "plaintiff as owner of the *primâ-facie* pro-"prietary right and the cultivators. Had "the defendant admitted the tenancy under "the lease, the plaintiff's title to the rent "would have been established; but that "admission, unless qualified, would also have "removed those impediments to the plaint-"iff's proprietary title which he desires to "have removed, &c., &c."

Again in page 451, their Lordships observe: "This lease being removed (the "plaintiff having failed to prove it, and the "defendant renouncing it), what bar is there "to the assertion of the proprietary right to "the collections, unless the birt tenure in-"terpose one? On that bar the defendant "does not rely, and, unless it be removed, "the plaintiff can scarcely expect to lease or "otherwise manage his zemindaree with "effect. It is an impediment in the way of "his possession, which the suit is instituted "to remove." Further in the same page, the following observations occur: "But as "these Courts have the divided jurisdiction "of a Court of Law and a Court of Equity "substantially united in one Court, a claim "for rent in arrear, and a claim to remove "clouds on the title to demise, seem to be "unobjectionable, and no authority was cited "to support the objection. In truth, the

"claim to rent under the farming lease sup-
"ports the proprietary title."

A careful study of the passages quoted will afford illustrations of the manner in which titles must be prejudicially affected, or clouds thrown over them, before the assistance of a Court of Equity for a declaration of right can be invoked. There must exist in the case something, either in the nature of an invasion of some right, or in the shape of an impediment or obstacle in the way of a full enjoyment of proprietary right to found a claim to a declaratory relief; but a mere allegation, or a mere threat without action taken or founded upon it, will not be sufficient to enable a party to seek for a declaration of his right and title. It is necessary to maintain, with some strictness, the broad principles of justice on which suits of this description should proceed, and to discourage the constant attempts made in these Courts, by means of crooked and artful devices, to turn matters of dispute, however trivial and innocuous, into regular suits concerning title to land, involving at times intricate and difficult issues both of law and fact. The present case demonstrates the attempt to which I have alluded. Out of a disagreement between landlord and tenant as to the right to attach some crops, a formidable suit involving questions of title between the landlord and a third party has been brought into existence. This suit, as I have already explained, will not lie; and therefore the appellant's ground that it discloses no cause of action must prevail. I would observe here that an attempt to turn an allegation into a suit was made in the Land Mortgage Bank *versus* Elias, 14 Weekly Reporter, page 40; and I would refer to the remarks of Mr. Justice L. S. Jackson on the subject in that case.

It is urged by the respondent that the above ground taken in special appeal should not be allowed to prevail, because it was not taken in the Lower Courts. Speaking for myself, I do not think it makes any difference that this ground is taken for the first time in this Court. Of course, where a ground taken in special appeal for the first time would have to be dealt with in connection with the evidence in the cause, or appeared one capable of explanation, I should not allow it to be taken; but where the ground of appeal goes to the very root of the case, such as it does here, I do not consider its being entertained can lead to injustice. It would rather be doing justice to the parties to entertain it; for if the plaintiff had no cause of action, he had no right to harass the defendant by bringing him into Court. But if I am to hold that a man is bound hand and foot, because he, through his pleaders, did not take a ground fatal to the suit in the Court below, it would follow that the legal merits of a cause would be circumscribed and limited by the learning and experience of practitioners in the Lower Courts, and would not be susceptible of fuller development and better and more exhaustive treatment at the hands of practitioners of superior intelligence, who exercise their profession in a higher legal form and before a superior judicial tribunal to which resort is permitted to suitors by the laws of special appeal. Further, if the argument pressed by the respondent be of any value, it would also follow that the superior Court would be bound to confirm judgments or decrees erroneous in law on the very face, to pass decrees on causes of action which have no legal existence, and in short to do other acts of injustice too numerous to specify. I therefore hold that, where an objection or ground goes to the root of a plaintiff's case, admitting for the sake of argument all the allegations of plaintiff to be true, such an objection or ground may be taken and entertained at any time at which a suit has vitality, and before it has passed through its last stage of review, and the functions of the Court regarding it have ceased. I further say that, if any objection of the kind adverted to above is overlooked by the Counsel of the parties, it will be the duty of the Court to consider it.

Holding the views I have expressed regarding the two points argued, I decree the appeal, but without costs.

Bayley, J.—I think that, in this particular case, the ground of special appeal that the plaintiff had no cause of action against the defendant, special appellant, may be admitted, although it was not taken in either of the Courts below, because the law gives us discretion to admit a new ground in special appeal not taken below. It is quite clear from the plaint in this case, which we have heard and considered, that the object of the plaintiff was, under the pretence of getting rents under a kubooleut, to have a declaration of his title to the land. He sued the defendants 1 and 3 for rent under a kubooleut and attached their crops, but was met by the defendant No. 4, special appellant, who alleged that the land was

his by purchase. The defendant No. 4, however, did nothing otherwise to interfere with the plaintiff, or in any way to intermeddle with the real question as between the plaintiff and the defendants 1 and 3.

Now, the mere fact of the defendant No. 4 stating that he purchased the lands from defendant No. 2 did not bring him in the same position, with regard to the plaintiff, as was the position of the defendants 1 and 3, nor prevent him enjoying his rights which he had heretofore enjoyed. The suit by the plaintiff against the defendant No. 4 was simply to obtain a declaratory decree; and I quite agree with Mr. Justice Paul that it is highly necessary to discourage attempts to sue for title under a mere subterfuge of a suit for rent.

I agree in reversing the judgment of the Lower Appellate Court, and in dismissing the plaintiff's suit, but without costs.

The 7th December 1870.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Under-valuation—Pleas—Special appeal—Foreclosure—Service of notice.

Case No. 1143 of 1870.

Special Appeal from a decision passed by the Judge of Dacca, dated the 15th March 1870, affirming a decision of the Officiating Subordinate Judge of that District, dated the 23rd December 1868.

Soorjo Kant Banerjee (Defendant), *Appellant,*

versus

Kristo Kishore Poddar (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose, Romesh Chunder Mitter, and *Kashee Kant Sein* for Appellant.

Baboos Kalee Mohun Doss and *Hem Chunder Banerjee* for Respondent.

Where a plea of under-valuation of the suit was not pressed in the first Court by the defendant's pleader, it was not suffered to be raised in special appeal, although previously urged in the Lower Appellate Court.

Where notice of foreclosure issues, and the serving officer finds that the mortgagor is not at home, it is sufficient if he affixes the notice on the door of the mortgagor's house; personal notice on the mortgagor not being essential.

Kemp, J.—THE defendant is the special appellant in this case. The plaintiff sued to obtain possession with mesne-profits of a one-third share of a towjee recorded mehal No. 5848. The plaintiff alleges that the defendant took from him 5,000 rupees, and mortgaged the aforesaid property. The plaintiff duly foreclosed the mortgage, and now sues for possession. Both Courts have given the plaintiff a decree. In the first Court, there was an issue as to whether the suit had been properly valued; 2nd, as to whether notice of foreclosure had been regularly served; 3rd, whether the amount of consideration had been duly received by the defendant; and 4th, whether the plaintiff was entitled to any, and what, wassilat. The first Court found that the objection as to the valuation had not been pressed by the defendant's pleader in arguing the case; further that, as the plaintiff had valued his claim at ten times the sudder jumma for a defined portion of a mehal, that was a proper valuation. With reference to the service of notice of foreclosure, the first Court found that the service had been duly proved. With reference to the receipt of consideration, the first Court found that the defendant admitted the execution of the deed, and that the onus of proof of the non-receipt of the consideration was on the defendant, as the kobala recited that the amount of consideration was paid in cash. The first Court went carefully into the whole of the evidence on this point, and found that consideration was received. The suit was therefore decreed, and wassilat awarded from the date on which the sale took effect, the amount of such mesne-profits to be ascertained by local inquiry.

The Judge, on appeal, confirms this decision, laying down the same issues as those tried by the first Court. On the valuation-issue, he finds that the value had been properly calculated according to the manner prescribed by law, and he also refers to decisions of this Court, holding that a man is not bound to value a share of an undivided estate at the price stated in his kobala. With reference to the service of nctice, the Judge finds, on the evidence of the peon and of two witnesses, that the notice was served at the defendant's house; he has also found that the consideration was received, and he dismissed the appeal.

The first point taken in special appeal is that, as the plaintiff in his plaint stated that the profits of the mortgaged property were 599 rupees per annum, by his own showing the suit ought to have been valued at between 10,000 and 12,000 rupees; and that, therefore, the defendant has lost his right to an appeal to this Court by the decision of the Judge. With reference to this point, we would remark that in the first Court this plea was not pressed by the pleader for the defendant. Had it been pressed upon the Court, the plaintiff would have had an opportunity of remedying any defect in the amount of the institution-stamp; and we also find that no application was made by the defendant under the Stamp Law to the first Court to issue a commission to make a local investigation as to the market-value of the property.

There can be no doubt that the first Court had jurisdiction to try the suit, even assuming that the valuation put upon the property by the defendant is a correct valuation. If, then, the actual value of the property is, as stated by the defendant, between ten and twelve thousand rupees, the defendant ought to have appealed to this Court. The defendant cannot say that he was ignorant of this, for in his grounds of appeal to the Judge he distinctly stated that there had been an under-valuation of the suit in the first Court, and that he had thereby lost his right to appeal to this Court. We overrule this first ground.

On the second ground as to service of notice, the pleader for the appellant urges that personal service on the mortgagor must be strictly proved.

In this case, both Courts have held that the service at the house of the mortgagor has been proved. The peon who went to serve the notice deposes that he served it by affixing it on the door of the house, the mortgagor not being at home; and there is also a witness who swears that the mortgagor was not at home when the peon went to serve the notice. The Judge having believed that witness and the serving peon, we are unable to interfere in special appeal, and we cannot see what further enquiry could have been made by the peon on the spot.

The next point is that the consideration was not received by the defendant in cash, but that a certain mortgage of the father of the witness No. 16 was cleared off; that a petition on the record shows that that mortgage was cleared off 4 days previous to the alleged receipt by the defendant of the consideration-money.

Both Courts have found on the evidence that the defendant did receive the consideration-money. There is also a recital in the deed that the consideration passed, and there is the fact that the defendant was present at the registration of the deed, and made no objections as to the recital therein contained that the consideration-money had been paid in full. But it is said that the money was to be paid after the registration, according to an understanding between the parties. This argument would also apply to the payment alleged to have been made to the father of the witness No. 16, as it may also be that that payment was made only 4 days after the date mentioned in the petition, and that that mortgage was actually paid off by the consideration-money received by the defendant. At any rate, the first Court having found on the evidence that the consideration duly passed, we cannot interfere in special appeal.

A last ground is taken that certain kismuts in Backergunge ought not to have been included in the decree, but we find that the mortgage-deed included the whole of the mehal No. 5848, and that that mehal comprised the kismuts in Backergunge as well as those in Zillah Dacca.

The special appeal is dismissed with costs.

The 8th December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Clause 3, Section 4, Regulation XI., 1825—Diluvion—Re-formation.

Case No. 688 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 31st December 1869, affirming a decision of the Subordinate Judge of that District, dated the 12th May 1869.

Monee Lall Sahoo and others (Plaintiffs), *Appellants,*

versus

The Collector of Sarun and others (Defendants), *Respondents.*

b

Baboo Romesh Chunder Mitter for Appellants.

Baboo Unnoda Pershad Banerjee for Respondents.

HELD, in accordance with a recent decision of the Privy Council, that the circumstance of a river diluviating the surface of an estate does not deprive the owner of his property in the site, if identifiable, and that he is entitled to land re-forming on that site.

Jackson, J.—IN this case the plaintiff claims to recover possession of 155 beegahs of land in two parts, consisting of 81 beegahs and 74 beegahs respectively, the latter being the more recent formation. The land was described as having formed in the bed of a river in contiguity to the plaintiff's estate, and, in fact, as being a re-formation of land previously belonging to the plaintiff.

It appears that, in consequence of there being an unfordable channel surrounding this land at the time of its formation, it was dealt with as belonging to Government, and a settlement made with the parties who are defendants along with Government.

The Judge, finding that the channel which surrounded this land at the time of its formation had been unfordable, and applying Clause 3, Section 4, Regulation XI. of 1825, gave judgment for the Government and the parties who got the settlement; and the plaintiff has come up here in special appeal.

The decision of the Lower Appellate Court was, no doubt, consonant with the previous rulings of this Court upon the subject of lands formed by alluvion and accretion, but a recent decision of the Privy Council has made a considerable change in the law that we are bound to administer. That decision is reported in 5 Bengal Law Reports, page 521, and also in 14 Weekly Reporter, page 11, in the case of Lopez against Muddun Thakoor and others. This case has been relied upon by the special appellant.

The Senior Government pleader, Baboo Unnoda Pershad Banerjee, sought to narrow its application by contending that it applied to a case between rival proprietors, and did not apply to a case like the present. It seems to us that that would be too restricted an application of the decision of the Privy Council. They appear distinctly to lay down that Clause 3, Section 4, contemplates only cases where the land which has come into existence has been gained or derived from a large navigable river or from the sea, and in respect of which there have been no previous rights of property. They seem to hold that the circumstance of the river having flowed over and diluviated the surface of an estate would not deprive the owner of his property in the site so long as that remains and is identifiable, and they declare that "some-thing more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another."

Now, in this case it is quite clear that the plaintiff alleged the land in question to have re-formed upon the site of the land previously belonging to him; and, in fact, an issue has been framed embracing that allegation, namely, the second issue of fact in the Court of first instance; and if the plaintiff succeeded in making out the case which he set up in that way, namely, that it was land re-formed upon the site of land of his, it seems to us that, under the ruling of the Privy Council, he would be entitled to a decree. The Courts below do not seem to have come to a finding upon this issue, and therefore we think it will be necessary to send the case to the Lower Appellate Court in order to try the case with reference to this judgment.

The 8th December 1870.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Damages—Defamation—Malicious prosecution—Onus probandi.

Case No. 1381 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 20th April 1870, reversing a decision of the Subordinate Judge of that District, dated the 17th May 1869.

Gour Huree Doss Mohunt (Plaintiff), *Appellant,*

versus

Hyagrib Doss Mohunt (Defendant), *Respondent.*

Baboos Juggodanund Mookerjee and *Khettur Mohun Mookerjee* for Appellant.

Baboo Bungshee Dhur Sein for Respondent.

In a suit for damages for defamation of character caused by a criminal charge preferred by defendant against plaintiff, where the Lower Court finds as a fact from the probabilities, inferences, and circumstances in the case that there was reasonable or probable cause for the charge, the finding cannot be interfered with in special appeal.

In an action for malicious prosecution, it lies upon the plaintiff to make out a *primâ-facie* case of malice and want of reasonable and probable cause before the defendant can be called upon to show that he acted *bonâ fide* and upon reasonable grounds.

Bayley, J.— We think this special appeal must be dismissed with costs. This was a suit for damages brought for defamation of character and injury to reputation, by reason of a charge of river dacoity preferred in the Criminal Court against the plaintiff, Gour Huree Doss. The grounds of the suit were, *firstly*, that the charge was found originally by the police to be one of which they would not take cognizance; *secondly*, that the Magistrate would not commit Gour Huree to the Sessions; and, *thirdly*, that the Sessions Judge remarked that the charge was trumped up and not proved as against the person who had been committed before him.

It appears that, after the decision by the Criminal Court, there was a regular suit brought by the defendant, Hyagrib Doss Mohunt, for the boat in dispute against Gunga Doss and Gour Huree. In that suit, the plaintiff got a decree as against Gunga Doss, but Gour Huree was excepted. Gour Huree has now brought the present suit for damages.

The defendant's answer was that he acted *bonâ fide* and in belief of the existence of a reasonable and probable cause for the charge.

The first Court gave the plaintiff a decree for Rupees 1,000 out of Rupees 3,000 for which the suit was brought.

The Lower Appellate Court has reversed that decision and dismissed the plaintiff's case, considering that the defendant had reasonable and probable cause for the charge. The judgment of the Judge in this case is so very full and careful that it cannot be said that he has not considered the case in all its bearings. I shall quote the following passages from his judgment as supporting this statement, and showing that he has not only rightly considered the facts, but has rightly laid down the propositions of law, and applied them to the facts as found. The Judge says: "In this particular case, "the proceedings were commenced by the "appellant's servant. Therefore, the ap-"pellant's responsibility must begin from "the time he became aware of them, and the "question is whether he acted maliciously "and without probable cause in continuing "them before the Magistrate. It is not to be "presumed that he did, and therefore it was "upon the respondent to produce some "evidence of want of probable cause before "the appellant could be called upon to jus-"tify. The only evidence to this which "the respondent's pleader has been able "to show me is that of one witness, who "says that the respondent is over 60 years "old, and the evidence of five witnesses "who say he is a man of position and "worth a lakh of rupees; and hence I am "asked to infer that he would not person-"ally take part in the matter charged. "The evidence as to the extent of his pro-"perty is loose and inconclusive and not "the best which was forthcoming." The Judge then rightly holds that the records of the Magistrate's enquiry and Sessions trial "were evidence to nothing beyond the fact "of the adjudication by the Magistrate and "Judge, and the legal consequence of that." Then as to the question of malice, the Judge observes: "It is to be observed that from "the most express malice, want of proba-"ble cause cannot be implied. Assuming "malice, still if there was reasonable and "probable cause for the prosecution, the "appellant would not be liable."

The Judge then enters fully into the question of probable cause, and decides it upon the facts and circumstances of the case. He first finds the plaintiff Gour Huree espoused the cause of Gunga Doss, and had been actively assisting in enforcing his claims. He then finds that, when the boat in question was in charge of the defendant's servants, it was forcibly taken out of their possession by Gunga Doss and others; that the servants thereupon informed the defendant that Gour Huree personally took part in the transaction; and that it was not unreasonable for the defendant to believe in what they said. The Judge then, taking the plaintiff's own assertion that he was an old man, wealthy, and of high position, says that those facts are not sufficient, even if true, to shift the burden of proof on the defendant. He then

points out what the plaintiff could and ought to have proved in this case; for instance, that he was elsewhere at the time, that the defendant's informants were not credible, and there was no basis for the charge and so forth. The Judge concludes by saying that satisfactory evidence ought to have been produced by plaintiff, but that no such evidence has been produced.

The only point in special appeal pressed upon us with some force is that the onus of proving probable cause for the prosecution should have been laid upon the defendant, and that the Lower Appellate Court was wrong in throwing the burden of proving the *want of probable cause* upon the plaintiff. In support of this contention, we are referred to two decisions of this Court—one reported at page 30, Volume VI., Weekly Reporter, and the other at page 42, Volume XI., Weekly Reporter.

In the case at Volume VI., page 30, it seems that all the facts are not fully stated in the judgment, for the learned Judges there quote the maxim that "malice alone "is not sufficient, because a person actuated "by the plainest malice may nevertheless "have a justifiable reason for the prosecu-"tion"—and send the case back to the first Court to try the question; firstly, whether the defendant is able to show he had a reasonable and probable cause for making the charge; and secondly, if he fails, to determine the measure of damages.

In the other case, reported at page 42, Volume XI., Weekly Reporter, it is stated: "If the charge were found to be false, it "would lie upon the defendant to show "that he had reasonable and sufficient cause "for bringing the charge, and that, on his "failure to show such probable cause, malice "might be inferred." The case is then remanded for trial as against one of the parties. There is, however, a subsequent judgment in Weekly Reporter, Volume XII., page 403, by Bayley and Hobhouse, JJ., who were also Judges in the case in Volume XI., page 42, where this case is fully gone into, and where it is held that, if an accusation is made with good and reasonable cause, there would be no case for damages.

To turn, however, from the cases to the text-book. In Addison on Torts, 3rd edition, page 614, it is said: "The rule is "that, however complicated the facts may "be on which the question of reasonable "and probable cause may depend, the Judge "must leave the facts to the jury, and on "the facts found by them determine for him-"self whether there is reasonable or pro-"bable cause or not." In this case, the Judge in the Lower Appellate Court himself was the jury. He has, from the probabilities, inferences, and circumstances in the case, found as a fact, with which we cannot interfere in special appeal, that there was reasonable or probable cause for the charge.

On the whole, then, I think that this special appeal must be dismissed with costs.

Paul, J.—I have only a few words to add in this case.

In an action for malicious prosecution, it lies upon the plaintiff to make out a *primâ-facie* case of malice and want of reasonable and probable cause before the defendant can be called upon to show that he acted *bonâ fide* and upon reasonable grounds, believing that the facts within his knowledge constituted a valid charge. This is laid down in Westropp *versus* Badnes, 27 Law Journal, Exchequer, page 57. The Judge in his very careful and able judgment in this case has correctly laid down the law to the effect I have stated above. He also found, *first*, that the plaintiff did not discharge the onus of proof cast upon him by the law; and, *secondly*, that, independent of the onus of proof, the circumstances of the case tended to show that it was not unreasonable on the part of the defendant to believe the statements of his servants as to the plaintiff's share in the seizure of the boat. With these two findings a special appeal to any ordinary understanding would appear impossible, but certain cases, namely, in Volume VI., Weekly Reporter, page 29, and in Volume XI., page 43, have been cited to show that the opinion expressed by the Judge of the Lower Appellate Court on the law applicable to the case is erroneous. It is unnecessary to go fully through the two authorities cited by Baboo Juggodanund Mookerjee. The two authorities probably intended to lay down in substance this proposition, which is correct in law, *viz.*, that where the falsity of a charge is brought home to the knowledge of the defendant, the plaintiff has nothing further to prove, because it is obvious that, if the plaintiff starts his case by showing that the defendant laid the charge deliberately, while he knew it to be false, that is the highest degree of proof that a plaintiff can give of the existence

of malice and want of a reasonable and probable cause; and I find that such was the case in the decision cited in Volume VI., page 29, where the defendant knew the charge to be false. I only make these remarks because cases are daily cited as laying down certain legal positions, and these are made use of without a careful study of the facts involved in them. Sometimes Judges lay down principles applicable to the particular facts of the case, believing that, when their judgments are reported, the facts will also be given.

I agree in dismissing this appeal with costs.

The 8th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Section 12, Act XI. of 1865—53 Geo. III., Chapter 155, Section 105—Jurisdiction.

Reference to the High Court by the Judge of the Small Cause Court at Berhampore, dated the 23rd September 1870.

Mirza Rumzan Beg, *Decree-holder,*

versus

Mr. J. Cook, *Judgment-debtor.*

Section 12, Act XI. of 1865, does not bar the trial of suits for wages under 50 rupees against European British subjects, by a Small Cause Court, though it may preserve the jurisdiction of Magistrates in such cases, which was created by 53 Geo. III., Chapter 155, Section 105.

Case.—THE decree of which execution is now applied for by the decree-holder was passed in a suit brought by him as a plaintiff against Mr. J. Cook as defendant. The decree was passed on 7th April 1870 in the absence of defendant. Previous to the day of trial, defendant had personally appeared in Court, and filed a petition in the case, in which he contended that, as the suit was for wages below Rupees 50 against a British-born European subject, it is not cognizable by a Judge of the Court of Small Causes under the provision of Section 12 of Act XI. of 1865, and that the power of trying suits for wages up to Rupees 50 in which British-born European subjects are concerned was conferred on officers exercising the power of a Magistrate by Act of Parliament 53 George III., Chapter 155, Section 105. Though defendant was not present at the time of trial, still, as the objection raised by him was on a point of law, I passed my opinion on it; and considering the case cognizable by this Court, gave a decree in plaintiff's favor overruling the defendant's objection as to jurisdiction. But as the judgment-debtor, after the case was decreed against him, appeared in Court and asked me to take the High Court's opinion on his objection as to jurisdiction before I pass any order for execution of the decree, I therefore, before issuing any order for execution, submit the following points of law for the High Court's opinion on them:—

1st.—Was the plaintiff's suit, which was for wages below Rupees 50 against a British-born European subject, triable by a Judge of the Court of Small Causes?

2nd.—If this Court has no jurisdiction over the plaintiff's case, can the decree passed in it by this Court be executed against the judgment-debtor, or will it be considered null and void?

This Court's decision on the above points of law—

I am of opinion that, under the provisions of Section 4 of Act VIII. of 1859 and Section 6 of Act XI. of 1865, the plaintiff's suit was cognizable by this Court, and that Section 12 of Act XI. of 1865 does not relate to this class of cases. Under Act XIII. of 1869 in regard to certain claims against artificers, and under Section 316 of the Code of Criminal Procedure in regard to claims for maintenance, Magistrates have jurisdiction. But the plaintiff's case does not come under the class of cases mentioned above. I know no law which makes claims for wages against British-born subjects cognizable by a Magistrate or by his assistants or by a Deputy Magistrate. I, therefore, hold that I had jurisdiction over plaintiff's suit, and that the decree passed against Mr. Cook can be executed. Should the question as to jurisdiction of this Court over plaintiff's case be decided in the negative, then the decree passed by this Court will become null and void. The execution of decree held by Mirza Rumzan Beg will be issued or stopped contingent on the opinion of the High Court.

The judgment of the High Court was delivered as follows by—

Norman, C. J.—We think that there is nothing in Section 12 of Act XI. of 1865 to lead to the inference that suits for wages under 50 rupees against European British subjects cannot be tried in a Small Cause Court, though it may preserve the jurisdiction of Magistrates in such cases, which was created by the 53 Geo. III. Chapter 155, Section 105.

The 8th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Suit by minor—Limitation—Section 11, Act XIV. of 1859.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Ranaghat, dated the 31st August 1870.

Ram Ghose, *Plaintiff*,

versus

Greedhur Ghose, *Defendant.*

In a suit by a minor through her guardian for the recovery of property sold more than 3 years before the plaint was filed, plaintiff was held to be entitled to rely on the provisions of Section 11 of Act XIV. of 1859, and to be therefore not barred by limitation.

Case.—THIS is a suit for the recovery of the price of certain property, moveable and immoveable, sold by plaintiff's guardians to defendant. The sale took place more than three years before the plaint was filed; and no particular period being fixed for payment, the cause of action would seem to accrue from the date of the sale, and the limitation applicable would be three years under Clause 9, Section 1, Act XIV. of 1859.

Plaintiff, however, was a minor at the time of the sale, and is, in fact, still a minor, and, therefore, her pleader contends that she is entitled to the benefit of Sections 11 and 12 of Act XIV. In support of his argument, he has quoted two cases. Shahzada Wala Ganoo *versus* Sharobee Begum, 2 Wyman 25, and Ram Chunder Roy *versus* Umbica Dassya, 7 Weekly Reporter 161; but it seems to me that these are not analogous to the present one, and that his client is not entitled to the benefit of Section 12.

It seems to me that Section 11 was not intended to meet a case of this kind. It appears to apply only where a minor comes into Court on the expiration of his disability. Plaintiff had two causes open to her, *viz.*, she might have sued through her guardian before her disability had ceased, in which case she would, I presume, have been bound by the ordinary rules of limitation; or she might have waited till she attained her majority, in which case she could have availed herself of Section 11.

At the same time, if it be held that the present action is barred by limitation, there will be this apparent anomaly, that a suit may be declared barred by limitation now, which will be within time five years hence, on plaintiff attaining her majority.

On the facts above stated, the questions for the High Court's decision are:—

1st.—Is plaintiff in this suit entitled to avail herself of the provision of Section 11 of the Limitation Act?

2nd.—If not, is her case barred by limitation?

The judgment of the High Court was delivered as follows by—

Norman, C. J.—It appears to us that, though the suit is brought during the minority of the plaintiff, who sues by guardian, she, as a minor, is entitled to rely on the provisions of Section 11 of the Limitation Act, and that the suit is, therefore, not barred by limitation.

The 8th December 1870.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Kubooleut—Registration—Evidence—Issues—Procedure under Act X.

Case No. 1376 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 10th May 1870, affirming a decision of the Deputy Collector of that District, dated the 26th April 1869.

Dinonath Mookerjee (Plaintiff), *Appellant*,

versus

Debnath Mullick and others (Defendants), *Respondents.*

Baboo Doorga Doss Dutt for Appellant.

Baboos Chunder Madhub Ghose and *Preonath Banerjee* for Respondents.

Where the contract between the parties to a rent-suit is in no way disputed or denied, and the fact of certain lands having been taken at a certain rent is admitted, the only issue being whether the rent has been paid or not, the case may be tried notwithstanding that the *kubooleut* is inadmissible by reason of non-registration.

In a rent-suit the Court ought, in the first instance, to examine the agents, and then to declare the issues between the parties, and fix a day for hearing.

Jackson, J.—THE Lower Courts seem to have been quite right in rejecting the kubooleut on the ground that it was not registered. But as the contract between the parties is in no way disputed or denied, and it is admitted that certain lands have been taken by the defendant at a certain rent, and the only issue between the parties is as to whether that rent has been paid or not, either by direct payments to the plaintiff or by indirect expenditure on the part of the plaintiff, for the purposes of trying which issue the unregistered document is not required as evidence in any way whatever, the case should go back to the first Court to fix a day for the hearing of the case on the other issues. The kubooleut which is not registered should be returned to the plaintiff who filed it, as it is not admissible in evidence, and consequently cannot be looked into by the Courts.

Under Act X. of 1859, the Court ought, in the first instance, to examine and cross-examine the agents of the parties; and when it has found that the parties are at issue on any particular question, the Court ought to declare those issues, and then to fix a day for hearing the case on those issues. In this case there is nothing to show that the parties were examined; but the issues were fixed probably from the oral statements of the agents and from the written statements of parties. It remains to fix a day for hearing evidence on the issues remaining to be tried.

The decision of the Lower Court is set asi[illegible], and the case remanded to the first Co[illegible]

[illegible] will follow the final result.

The 8th December 1870.

Present:

The Hon'ble J. P. Norman, *Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Execution—Instalment-bond—Right of action.

Reference to the High Court by the Judge of the Small Cause Court at Midnapore, dated the 20th September 1870.

Ashidharee Chowdhry, *Plaintiff*,

versus

Juggessur Kamar and others, *Defendants*.

Execution of a money-decree without interest having been taken out, the judgment-debtors, with the decree-holder's consent, filed a kistbundee stipulating payment with interest in two instalments, and consenting, in case of default, to payment being enforced by execution of the decree. The decree-holder not having taken proper steps, the application for execution was struck off on the date on which the kistbundee was filed.

HELD that a suit on the kistbundee was maintainable.

Case.—THE plaintiff sues to recover the principal and interest amounting to Rupees 103-8 due on kistbundee, dated the 5th July 1867, which was executed under the following circumstances:—

The plaintiff had formerly instituted a money-claim against nine persons, and obtained a decree without interest by their confession on the 4th August 1864. Execution of this decree was taken out on the 1st June 1867; and after the service of notice, seven of the judgment-debtors, the defendants of the present case, filed a kistbundee with the (plaintiff) decree-holder's consent on the 5th July 1867, stipulating that the judgment-debt should be paid up by them in two instalments of Rupees 25-4-6, one in October, and the other in November 1868, with interest at the rate of 6 pies per rupee per mensem, and that, in case of default, payment should be enforced by execution of the decree. The decree-holder not having taken proper steps, the application for execution was struck off on the 5th July 1867, the date on which this kistbundee was filed. On the 27th June 1870, the decree-holder again put in an application for execution, but according to Full Bench Rulings, Bengal Law Reports, Volume [illegible], page 101,* it was held by the Court that no proceedings were taken within the [illegible]

* 13 W. R., F. B., p. 44.

scribed limitation (*i. e.*, within three years from the date of the decree) which cannot be enlarged by the instalment-bond alluded to above, the decree was barred by limitation.

The plaintiff now brings a fresh suit for the recovery of the amount due on the kistbundee against seven of the defendants who were parties to it. The defendants' objections are—

1st.—That the kistbundee has merged into the original decree.

2nd.—That because the execution was barred by limitation, no fresh suit can be brought upon the kistbundee which forms a part of the decree.

With regard to the first point, I have to say that, as the parties to the instalment-bond entered into by the plaintiff (decree-holder) and the defendants in this suit were not the same as those in the original decree (two of the judgment-debtors having been left out), and as the money recovered in the kistbundee, which also contains stipulation of interest, does not amount to the sum decreed, I am of opinion that the instalment-bond is altogether a new kistbundee, and has no connection with the decree. Else, according to the ruling quoted above, execution would not have been barred by limitation, which should have run from the instalment stipulated in that deed. Evidently, the kistbundee cannot in law be taken as a part of the decree.

As to the second point, whether a fresh suit can be brought upon the kistbundee, I am decidedly of opinion that it can; for, when the parties came to a mutual agreement, which cannot form a part of the decree, and which did not save from limitation, it would be inequitable not to allow the plaintiff to bring a fresh action upon this kistbundee within three years from the instalment contained in that deed.

This view is supported by the decision of the Division Bench, dated the 24th March 1865, Lal Mahomed *versus* Moni Lall Gazee, cited in Summary Regular Appeal No 685 of 1865, dated the 10th August 1865, Revenue, Civil, and Criminal Reporter, Volume I., page 121.

Judgment of the High Court.

Norman. C. J.—We think it quite clear a suit on the kistbundee is maintain-

The 8th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Suit against representatives—Assets—Issues.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Kishnaghur, dated the 4th July 1870.

Heera Lall Mookerjee (Plaintiff), *Petitioner*,

versus

Digumburee Kuloonee and another (Defendants), *Opposite Party*.

Baboo Rash Beharee Ghose for Petitioner.

No one for Opposite Party.

In a suit against the representatives of a deceased obligor of a bond, where plaintiff makes it the foundation of his case that the defendants were in possession of property belonging to the deceased, the latter have a right to take issue upon that statement, and, if they succeed, are entitled to a decree dismissing them from responsibility altogether.

If the suit is against the defendants simply as heirs or personal representatives of the deceased, and plaintiff prays for a decree without going into the question of assets, he will be entitled to a decree on proving the execution of the bond.

Case.—This is a case brought against the representative of the deceased obligor of a bond, and the defendant's plea is that he has received no assets from the deceased. I found on the evidence that this plea was established, but the Government pleader who appears for plaintiff has requested me to refer the case to the High Court for the decision of the following question, *viz.*, in a suit against the representative of a deceased debtor, can the Court put in issue the question of assets or no assets; or if the representative character of the deceased is established, is the Court bound to give a decree against the defendant as representing the estate of the deceased, leaving the question of assets to be decided in execution of the decree in the way indicated by Section 203 of the Civil Procedure?

I have been unable to find any ruling by which the point has been definitively settled; but I think that there is nothing in the above Section of the Civil Procedure or in any other part of that Code to prevent the Court from taking cognizance of the plea at the trial, and, if it is proved, from dismiss-

ing the case. This appears to have been the course adopted by my predecessors in this Court in such cases, and it also seems conformable to equity. If the representative raise the plea of no assets at the trial, there seems no reason why it should not be disposed of then once for all, instead of remitting the parties to a further contest in the execution-department.

The judgment of the High Court was delivered as follows by—

Norman, C. J.—In order to answer the question which is now before us properly, it is necessary to state briefly how it arises.

Heera Lall Mookerjee sued Digumburee Kuloonee, the mother, and Mohesh Chunder, the brother, of one Gireedhur, on a bond for Rupees 45 executed by Gireedhur, alleging that Gireedhur died in Cheyt 1266, and that the defendants are in possession of his property.

The defendants alleged that the bond was a forgery, and that there were no assets of Gireedhur in their hands.

The Judge of the Small Cause Court says that it is established on the evidence that the plea that the defendant received no assets from the deceased is correct, and he refers for the decision of this Court the following question:—

"In a suit against the representative of "a deceased debtor, can the Court put in "issue the question of assets or no assets; "or if the representative character of the "deceased is established, is the Court bound "to give a decree against the defendant as "representing the estate of the deceased, "leaving the question of assets to be de-"cided in execution of the decree in the way "indicated by Section 203 of the Civil "Procedure Code?"

So far as regards the case immediately before us, the question appears to us to be a very simple one.

The plaintiff makes it the foundation of his case against the defendants that they were in possession of property belonging to the deceased: he does not even state that they were the heirs of the deceased. The defendants had clearly a right to take issue upon a statement which, if true, would have made them personally responsible; and if, as was the case, the defendants succeed, it appears to us plain that they were entitled to a decree dismissing them from responsibility altogether.

It certainly would be most unreasonable to compel them to litigate the same question over again with the plaintiff in execution of the decree under Section 203.

If the suit had simply been against the defendants, or either of them, as the heirs or personal representatives of the deceased; if they had alleged that no assets had come to their hands, the plaintiff, on proof of the due execution of the bond by the deceased, would have been entitled to a decree against them as representatives of the deceased. if he had prayed for such a decree, without going into the trial of the question whether or not the defendants had assets, and in that case he might have proceeded in enforcement of his decree under the provisions of Section 203. But as he did not choose to content himself with such a decree, but attempted to prove in this suit that assets had come into the hands of the defendants for the purpose of making them personally liable, he must take the consequences of his own failure.

This in no way conflicts with the decisions of the Madras Court referred to in the argument before us, and which are reported in the Madras High Court Reports, one at page 336, and the other at page 423.

The 8th December 1870.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Suit for kubooleut—Co-sharer's right of action.

Case No. 1312 of 1870 under Act X. of 1870.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 11th June 1870, reversing a decision of the Assistant Collector of that District, dated the 8th December 1869.

Romanath Ruckhit (Plaintiff), *Appellant.*

versus

Chand Huree Bhooya and others (Defendants), *Respondents.*

b

Baboos Ashootosh Dhur and *Bhowanee Churn Dutt* for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

The proprietor of a fractional share of an undivided estate has a right to sue for a kubooleut for such share, if he can prove that the defendants have heretofore recognized him as the proprietor of a particular share and paid him separately a certain proportion of the rent.

Paul, J.—In this case, the Lower Appellate Court found that there was no dispute as to the plaintiff's share, *i. e.*, 1½ pie of the zemindary, and that the defendant had admitted having paid rent to the plaintiff separately for his share.

The first point taken in appeal is that, under these circumstances, the plaintiff (who is the appellant), as proprietor of a fractional share of an undivided estate, could sue the defendant for a kubooleut, and that, therefore, his suit has been improperly dismissed.

On this point, I really have no doubt whatever that the plaintiff could sue for a kubooleut, his action being simply one intended to put upon paper a separate engagement and contract already existing between himself as landlord and the defendant as tenant. It is, moreover, the general custom of this country, as far as I know, to collect rents in certain specific shares, and to grant receipts for such fractional shares. To this almost elementary view of the subject, a decision of a Division Bench of this Court is cited as being opposed, *viz.*, a decision reported in Volume XI., page 26; but we find that the same decision is referred to in another case in the same Volume, page 393, as being correct with a clear exception which applies to this very case. We also find that in Weekly Reporter, Volume XII., page 31, there is a case decided by Macpherson and E. Jackson, JJ., holding that a person is entitled to sue for rent for a fractional share of lands, the rent of which has been admitted by the defendant to have been previously paid. The law there laid down is to the following effect: "*If the plaintiff can "prove that the defendants have heretofore "recognized him as being the proprietor of "a particular share of the property, and "have paid to him separately a certain "proportion of the rent, then, no doubt, the "suit will lie against them without the "other joint proprietors being made parties.* "But unless the plaintiff either proves that "the defendants have paid their rent to him "separately, or proves an express agreement "on their part to pay to him separately, "the suit will *not* lie in the absence of the "other shareholders." So that, if we look to the weight of authority, we have the two last authorities that I have mentioned as supporting the position taken by the appellant in this case.

But it is argued by Baboo Hem Chunder Banerjee that these two decisions are in conflict with the case decided at page 26 Volume XI., Weekly Reporter, and therefore we ought to send up the question to a Full Bench for decision. I do not think, however, that the matter stands precisely so, because we find that one of the Judges who pronounced the decision in page 26, Volume XI., resiled from that position in the decision at page 31, Volume XII., which is the latest decision on the subject. This being so, our present view appears to be in conflict with the view of one Judge only, and the view of that one Judge is expressed in a few words. He says in the first place: "It is clear that "the plaintiff does not allege that she held "any distinct portion of this land as a "separate estate." (But this is not our case here.) And then: "We do not find in "Act X. or under any decision of this "Court any authority to the effect that "one who is entitled to a fractional share "of an undivided estate, though he receives "a definite portion of the rent from the "tenant or ryot, is entitled to maintain "a suit for a separate kubooleut in respect "of such undivided share." This seems

to imply that the point there decided was scarcely argued. We do not find any reasons given for the position there taken, except the absence of authority, which, under the circumstances, does not appear to be a sufficient reason. Then, having regard to the distinction very clearly drawn in the other two cases alluded to above, we think we are no way restrained from expressing our own views and deciding upon them.

Of the two other points that arise in the case, Baboo Hem Chunder Banerjee, a gentleman of considerable experience, does not press the second, *viz.*, that the kubooleut did not state the boundaries. It was not necessary that it should do so. It contained all the particulars of area required by Section 2, Act X. of 1859, and the defendant was doubtlessly well aware what the lands were for the rents of which he was sued. If he were not aware of that fact, he could apply for better particulars; but I do not think that such want of specification in the boundaries is any ground for dismissal of the suit. It would be sufficient if, after inquiry, the boundaries were more fully stated in the decree.

The third point is that, inasmuch as the issue, *i. e.*, whether a pottah was tendered before the institution of the suit, had not been raised before the Court of first instance, the Lower Appellate Court ought not to have raised such issue. Now, it is clear that no issue was raised as to the tender of the pottah, and it does not appear that the defendant ever wanted to raise such an issue in the first Court, which he could have asked for if he wished. I do not think that, under Section 354, Act VIII. of 1859, it was right for the Appellate Court in this case to raise an issue involving the tender of pottah, because it does not appear to me that such an issue was essential to the proper determination of the suit on the merits. Moreover, it is quite clear that, had the pottah been tendered to the defendant, he would simply have given it back to the plaintiff, and there is a principle of law which rules that, if a man, by his own conduct, renders the performance of a condition precedent unnecessary, the other party is not bound to perform it. The attitude of the defendant in this suit being taken into consideration, it may safely be assumed that the tender of the pottah to him would have been simply an unnecessary offer of a piece of paper. We consider, therefore, that the point as regards the tender of the pottah cannot be gone into now. If there were anything in it, the objection should have been taken at an earlier stage. The provision as to the tender of a pottah seems to imply that a party should not be unnecessarily harassed by being brought in Court, where, without being in Court, he might enter into an agreement. Section 2 says: "Every ryot is entitled to receive from the person to whom rent is payable a pottah, &c.," that is, entitled to receive a pottah when he requires it. Section 9 says that the tender of a pottah gives a man a right to ask for a kubooleut. I think that both these Sections point to a case where the landlord and tenant are agreed as to terms, or where the landlord tries to obtain from the tenant a kubooleut he is willing to give without giving him a document in return. But, be that as it may, we think that in this particular case the issue ought not to have been raised, and should not be gone into by the Appellate Court, because it was not essential to the right determination of the suit upon the merits.

The special appeal is allowed, and the case remanded for trial on the merits.

The costs will follow the result.

Bayley, J. - I concur.

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The 15th November 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Special appeal—Construction of sale-certificate.

Case No. 386 of 1870.

Special Appeal from a decision passed by the Judge of Patna, dated the 24th February 1870, affirming a decision of the Moonsiff of that District, dated the 15th December 1869.

Mookhya Huruckraj Joshee (Plaintiff), *Appellant,*

versus

Ram Lall Gomashta and others (Defendants), *Respondents.*

Baboo Onookool Chunder Mookerjee for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

A Judge is bound to give full effect to the terms of a sale-certificate; and when he proceeds to limit the effect of that certificate by certain inferences and conclusions drawn from other documents, he does that which he is not at liberty to do, and commits an error of law which it is in the power of the High Court to remedy on special appeal.

Jackson, J.—THE special appellant, plaintiff in this case, had acquired by private purchase from a party, who had purchased the same at a sale in execution of decree, the right, title, and interest of one Pigue in certain godown premises situated on the bank of the river Ganges in the Town of Patna. The defendants were persons who had subsequently purchased other land belonging to the same party.

The question in this suit related to some land which may be described as the river frontage of these godown premises, and lying between a certain revêtement or front wall of the godown, which I understand to have been part of the wall of the old Fort at Patna, and the river; the plaintiff contending that by his purchase he is entitled to this land, and the defendants, on the other hand, contending that the sale-certificate granted by the Court, which is the basis of the plaintiff's title, does not include that portion of the land, and therefore the plaintiff is not entitled. This was the only question which the Courts below had to try, as it was not at all necessary to go into the title of the defendants themselves.

The Subordinate Judge, by whom the suit was originally tried, appears to have thrown out the suit upon a preliminary point. The Judge, on appeal, reversed the decision upon that point, and proceeded to determine the matter on its merits. It is against the decision of the Judge on the merits that this special appeal has arisen.

Neither party here has questioned that part of the decision of the Judge by which he reversed the decision of the Court below him.

The Judge's decision has proceeded upon a construction which he puts on the sale-certificate, and upon certain inferences which he draws from that certificate and the boundaries stated in it, and some other papers which he finds on the record of the case.

The first question is whether, under these circumstances, we are at liberty under the law of special appeal to disturb the decision so arrived at.

The question has not been free from doubt to me; but upon consideration it seems to me quite clear that we have the power and ought to interfere with a judgment which appears to us to be contrary, and the judgment in question does seem to me to be contrary, to law.

The Judge has come to the conclusion that, up to a certain point, the sale-certificate is in favor of the plaintiff; but he proceeds to show how upon certain inferences this tendency of the sale-certificate in the plaintiff's favor does not conclude the case, and therefore throws out the plaintiff's claim.

Now, I quite concur in his construction of the terms of that certificate to the extent to which he construes it favorably to the plaintiff. I have no doubt that the certificate meant to give the purchaser land bounded to the north by the house marked A in the sketch given by the Judge, and beyond that, that is, where that boundary ceases by the river.

The Judge appears to consider that, by the boundary so given as the river, was meant the river at the height at which it stood at a particular season of the year when the purchase was made, which, I believe, was

in the month of October, and not as it stood afterwards when the river had fallen a considerable way, and its margin was consequently lower. It is just this difference which, by the judgment of the Zillah Court, deprives the plaintiff of the land which he claims in the present suit.

On reference to the certificate of sale, it seems that the plaintiff's vendor did not acquire thereby a mere building or godown, but *zumeen* or land on which such godowns stood. The plan does not give us a precise conception of the nature of things; and it seems to me clear that the land, as shown by the Judge, was not entirely covered by one single building, but we may conceive that several buildings stood upon the land so described. That being so, and that which the Court sold to the plaintiff's vendor being land with godowns or buildings standing upon it, the purchaser, I think, is at liberty to insist on the boundary according to its natural and reasonable interpretation; and when we find that the river, without any limit, is set down as the boundary, I think the plaintiff is entitled, in the absence of words to the contrary, to the land as far as the margin of the river, however high or low that margin may be at particular periods of the year. There is nothing to indicate that the revêtement or wall referred to by the Judge was the boundary of the land purchased. If so, that would have been a simple and preferable way of describing the boundary. The boundary given is "the river." That being so, the land purchased is not limited by a wall upon the one side any more than it is upon any other side.

That being the case, I think the Judge was bound to give full effect to the terms of the sale-certificate; and when he proceeds to limit the effect of that certificate by certain inferences and conclusions drawn from other documents, I think he does that which he is not at liberty to do, and commits an error of law which it is in the power of this Court to remedy.

It was hardly contested by the vakeel of the respondent that the Judge's decision, upon the reason of it, could be supported. He was more inclined to stand upon the ground suggested to him by the Court, that the point decided by the Judge was one of fact, and one upon which, therefore, there could be no interference by this Court in special appeal. That certainly was my opinion when I heard the case argued, but upon reflection I consider that this Court can interfere.

It clearly could not affect the plaintiff's case that, in the sale by Emam Bandee Begum to the defendant (who is by mistake written as plaintiff in the judgment) of the house marked *A*, the land between it and the river has been expressly included. It was entirely in the option of Emam Bandee Begum in selling her house to convey or not to convey the land lying in the front, back, or either side of it, and the purchaser might, for his own purposes, stipulate that the words in question should be inserted; and it cannot be said by way of inference from particular transactions that it is or is not the custom to sell the land left by the recession of the river before the retaining wall, together with the main land; nor again could any conclusion of the sort be drawn from the title-deeds which the plaintiff himself derived from Dilawur Ali. That was an entirely distinct transaction, and it was for the parties to sell or withhold from sale any land they chose.

On these grounds, I think the decision of the Judge cannot be supported, and that we are competent and bound to set it aside. The decision of the Lower Court, therefore, will be reversed with costs.

Glover, J.—I concur.

The 1st December 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Interest—Penalty.

Case No. 837 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 12th February 1870, modifying a decision of the Sudder Moonsiff of that District, dated the 18th September 1869.

Peetambur Chatterjee (Plaintiff), *Appellant,*

versus

Kalee Churn Roy and another (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Messrs. G. A. Twidale and *H. A. Mendies* for Respondents.

In a suit to recover money lent upon an agreement to the effect that it should be repaid with interest, at 8 annas per cent. per mensem, by instalments payable in a particular month of each year, with a promise that, if the instalments were not paid in 4 years, the interest would be at the rate of 1 rupee per cent. per mensem, where plaintiff demanded interest on the allegation that the instalments had not been paid for 5 or 6 years:

HELD that, as the first rate was below the ordinary terms on which money is lent in this country, and the penalty was but the ordinary rate to be imposed in case of delay in payment, the plaintiff was entitled to a decree.

Jackson, J.—THIS was a suit to recover a sum of Rupees 700 lent upon an agreement to the effect that it should be repaid with interest at 8 annas per cent. per month, by instalments of 100 rupees in the months of Falgoon each year from 1268 to 1276; the remainder to be paid in 1277.

There was also a clause in the agreement that, if in four years these instalments were not paid, the interest to be paid on the 700 rupees would be at the rate of one rupee per cent. per mensem. The plaintiff brought this suit demanding interest at the higher rate, on the allegation that, for 5 or 6 years after the money had been lent, no instalment was paid as agreed upon.

Both the Courts below have dismissed the plaintiff's claim to higher interest than 8 annas per cent. Both have come to the conclusion that the stipulation as to the higher percentage was a penalty, and the plaintiff had no sufficient ground to recover at that rate. It is upon this ground that this special appeal has been preferred to this Court, and it is urged that the higher percentage was clearly due under the express terms of the agreement between the parties.

On the part of the respondent, we have been referred to a decision of this Court,* reported at page 92, Appendix, Volume IV., Bengal Law Reports, in which it was held that, where a smaller sum is secured by a larger sum, that larger sum may be looked upon as a penalty. In that case, the money had been lent at the rate of one per cent. per mensem. and there was a stipulation that,

* The 28th March 1870.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Case No. 248 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 20th July 1869.

Boley Dobey (Plaintiff), *Appellant,*

versus

Siddhessur Rao Kur (Defendant), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. R. T. Allan and *Baboo Juggodanund Mookerjee* for Respondent.

Kemp, J.—THE plaintiff is the appellant. It appears that, on the 30th Jeyt 1270, a kistbundee was executed by the defendant, the respondent, to the plaintiff's vendor, to the effect that, as there were sums due under 4 decrees, the amount of which is not specified, and on other accounts, also not specified, amounting together to 1,000 rupees. It was arranged between the parties that this sum of 1,000 rupees was to be liquidated in 5 years by instalments of 200 rupees per annum, payable in the month of Jeyt of each year. The kistbundee then goes on to state that, if one or any of the instalments fell due and was not paid, the whole of the instalments were to be considered as lapsed, and the whole amount was to bear interest at the rate of 10 per cent. per mensem, and the interest was to be calculated from the date of the kistbundee or from the 30th Jeyt 1870. The original obligee sold this kistbundee to the present plaintiff. At the time the kistbundee was sold, according to the plaintiff's calculation, 5,499 rupees were due by the defendant, and yet this bond was sold for the sum of 800 rupees, which shows clearly the speculative nature of the transaction. In the plaint, the cause of action is said to have arisen on the 1st of Assar 1271, namely, on the date on which the first instalment, according to the kistbundee, fell due. It is, however, admitted that the plaintiff's vendor received the instalments for 1271, 1272, and 1273, and did not enforce the penalty according to the terms of the kistbundee against the debtor. The plaint, therefore, looking to its usurious character, might very properly have been dismissed on the cause of action on which it was based. The Subordinate Judge finds, and this is not objected to, that the kists of 1274 and 1275 are due, namely, for the kist of 1274, 200 rupees, and for the kist of 1275, 200 rupees, equal to 400 rupees, and he gives the plaintiff a decree for that sum plus 12 per cent. interest from the dates on which the instalments fell due.

In appeal, it is contended that the Subordinate Judge ought to have awarded interest, not at the rate of 1 per cent. per month, but at the rate of 10 per cent. per month, from the date of the kistbundee. The appellant says that, according to this calculation, Rupees 2,211, 9 annas, 15 gundas, 1 cowrie are due, instead of Rupees 488, 6 annas, 4¾ gundas as awarded by the Subordinate Judge. This is a case in which the Court will not be disposed to show any favor to the plaintiff. The terms of the kistbundee, in our opinion, being that interest at the rate of 10 per cent. per annum be paid upon the whole of the principal sum of 1,000 rupees in the event of any instalment falling due, and not being paid, were considered by the parties to be in the nature of a penalty; and looking at the fact that the plaintiff's vendor did waive the penalty on two occasions, namely, in the years 1271 and 1272, and also to the fact that, on the occurrence of any default in paying an instalment, namely, in paying a sum of 200 rupees, the penalty, if the bond was strictly enforced, would amount to certainly more than 2,000 rupees, we think that, on the principle that, "where a smaller sum is secured by a larger sum, that larger sum may be looked upon as a penalty," the judgment of the Subordinate Judge awarding 12 per cent. per annum on the instalments due from the date on which they fell due to the date of payment is an equitable decision, and one with which we shall not interfere in appeal.

The appeal is, therefore, dismissed with costs.

if a certain number of instalments were not paid, the whole amount would be considered to have lapsed, and the loan would bear interest at the rate of 10 per cent. per mensem. We think that the facts of that case are very different from those of this, and the question whether the higher rate of percentage should be looked upon as a penalty or not depends upon the circumstances of the case. Ten per cent. per mensem is an extraordinarily high rate of interest, and the result of that stipulation in the bond was that the recovery of the amount was considered so doubtful that an interest in the sum of Rupees 5,500 was sold for Rupees 800. This case in no way seems to agree with that case. In this case, the terms granted to the defendant at first were below the ordinary terms on which money is usually lent in this country, and it was almost a favor shown to the defendant that such terms were granted; and the penalty was not that any excessive rate should be paid, but that the ordinary rate at 1 per cent. should be paid. There was also in this case other landed security for the payment of the money, and it does seem as if the meaning of the party solely was that, if any delay occur in the re-payment of the money, the lender should receive interest at the ordinary rate of one per cent. per mensem.

We set aside the decision of the Lower Courts, and decree the plaintiff's suit with all costs with reference to the above remarks. A decree will be drawn up in accordance with the judgment above given.

The 7th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Special appeals—Admission—Section 375, Act VIII., 1859.

In the Matter of

Jodoonath Mookerjee and another, *Petitioners*,

versus

Punchanun Mookerjee and others, *Opposite Party*.

Baboos Debendro Chunder Ghose and *Bungshee Dhur Sein* for Petitioners.

Baboos Kalee Mohun Doss, Hem Chunder Banerjee, Chunder Madhub Ghose, Rajendro Misser, and *Oopendro Chunder Bose* for Opposite Party.

Under Section 375, Act VIII. of 1859, when a special appeal is neither rejected nor returned for the purpose of correction, but registered, it becomes upon such registration a case pending in Court; in other words, it is admitted.

Special appeals are not the less "admitted," because under the rules and practice of the High Court they are received and registered as a matter of course, without the exercise of the power conferred by Section 25, Act XXIII. of 1861.

Norman, C. J.—JODOONATH MOOKERJEE and another were plaintiffs, and Punchanun Mookerjee and others were defendants, in a suit in which a special appeal was preferred to this Court. The appeal was heard on the 24th of June 1869, when the decree of the Lower Appellate Court in favor of the plaintiffs was affirmed. After the hearing of this special appeal, namely, on the 29th of April of the present year, the defendants, who were the appellants in the special appeal, made an application to the first Subordinate Judge of 24-Pergunnahs for a review upon the ground of the discovery of fresh evidence. The Subordinate Judge, after hearing the application, and carefully considering the matter, admitted the review by an order, dated the 31st of October 1870.

Jodoonath Mookerjee applied to this Court that the order of the Subordinate Judge admitting the review should be quashed, as having been passed by him without jurisdiction.

We caused a rule to be issued calling upon Punchanun Mookerjee and others, who had obtained the order for the review, to show cause why the order of the Subordinate Judge should not be quashed. Cause has now been shown, and we have to consider whether or not the Subordinate Judge, under the 376th Section of Act VIII. of 1859, had power to admit the review. The 376th Section is as follows: "Any person considering himself aggrieved by a decree of a Court of original jurisdiction, from which no appeal shall have been preferred to a superior Court—or by a decree of the District Court in *appeal from which no special appeal shall have been admitted* by the Sudder Court—or by a decree of the Sudder Court from which either no appeal may have been preferred to Her Majesty

"in Council, or an appeal having been pre-"ferred, no proceedings in the suit have "been transmitted to Her Majesty in Coun-"cil, and who, from the discovery of new "matter or evidence which was not within "his knowledge, or could not be adduced by "him at the time when such decree was "passed, or from any other good and suf-"ficient reason may be desirous of obtain-"ing a review of the judgment passed "against hm, may apply for a review of "judgment by the Court which passed the "decree."

The question we have to consider is, what is meant by the words "a decree of "the District Court in appeal from which no "special appeal shall have been admitted."

In order to see what the meaning of the word "*admitted*" is in that Section, we have to look at the Sections relating to special appeals. The 372nd Section declares on what ground a special appeal shall lie to this Court. The 373rd Section prescribes the mode in which the application for the admission of the special appeal is to be presented. The 374th Section states what the application is to contain, and the 375th Section now repealed provided how that application was to be dealt with. It was as follows: "If the application be not "drawn up in the manner hereinbefore pre-"scribed, the Court may reject it or may "return it to the party for the purpose of "being corrected. When the application is "correctly drawn up, it shall be registered in "a book to be kept for that purpose, which "shall be in the form contained in Schedule "D hereunto annexed, and the case shall "proceed in all other respects as a regular "appeal, and shall be subject to all the rules "hereinbefore provided for such appeals, so "far as the same may be applicable."

Now, in order to say how the case is to proceed after the application is registered, we must refer to the 343rd Section of the same Act. That Section provides that the Appellate Court is to send intimation to the Lower Court of the appeal being registered; that on receipt of the intimation the Lower Court is to transmit to the Appellate Court all papers and receipts or such papers as may be specially called for by the Appellate Court. The 344th Section provides that a day is to be fixed for the hearing of the appeal. The 345th Section provides that the notice of the day fixed for the hearing of the appeal shall be affixed in the Appellate Court, and that a like notice shall be sent by the Appellate Court to the Lower Court. The 346th Section states what are the consequences of the non-appearance of either of the parties. The 347th Section states "that, if an appeal be "dismissed for default of prosecution, the "appellant may, within thirty days from the "date of the dismissal, apply to the Appel-"late Court for the *re-admission* of the "appeal; and if it shall be proved to the "satisfaction of the Court that the appellant "was prevented by any sufficient cause from "appearing when the appeal was called on "for hearing, the Court may *re-admit* the "appeal." The 348th Section provides that the respondent may, upon the hearing of the appeal, take any objection to the decision of the Lower Court which he might have taken if he had preferred a separate appeal from such decision. The 349th Section treats of the manner in which the Appellate Court, after hearing the appeal, is to proceed to give its judgment; and the 350th Section enacts as follows:—

"The judgment may be for confirming, or "reversing, or modifying the decree of the "Lower Court; but no decree shall be re-"versed or modified, nor shall any case be "remanded to the Lower Court on account of "any error, defect, or irregularity, either in "the decision or any interlocutory order "passed in the suit not affecting the merits "of the case, or the jurisdiction of the "Court."

It is clear, therefore, that under the 375th Section, if a special appeal was not rejected or returned for the purpose of being corrected, but was registered, upon such registration it became a case pending in the Court. In other words, it was admitted, and would have to be dealt with as prescribed by the Act. The effect of Section 375 was that, if the party dissatisfied with the judgment of the Lower Appellate Court chose to appeal on questions of law upon a state of facts as found by the Lower Appellate Court to the highest Court of Appeal, he was precluded from afterwards making a new case by going back to the first Court, and asking it to alter its finding of facts. The Legislature has evidently treated it as a matter of public interest that there should be an end of litigation somewhere.

Section 375 of Act VIII. of 1859 was repealed by the 1st Section of Act XXIII. of 1861, and in the place of it Section 25 of that Act was enacted.

Section 25 enacts that, "if the application is not written on a stamp-paper of "adequate value, or if it be not drawn up "in the manner laid down in Section 374 of "Act VIII. of 1859, *or if it do not state "any ground on which a special appeal "will lie, under the provision of Section "372 of the said Act*, the Court may re-"ject the application, or may return it to "the party for the purpose of being cor-"rected. The order for rejecting the ap-"plication may be passed by a single Judge "of the Court."

Now, that 25th Section, no doubt, authorizes and empowers this Court, or a Judge of this Court, to examine the application for the admission of a special appeal; and in the first instance, and without admitting it, to determine whether it states any ground upon which a special appeal will lie; and on finding that such is not the case, to reject the application. This Court, however, has not hitherto acted upon the power conferred upon it by the 25th Section; and as a matter of fact, special appeals, if duly stamped and drawn up in the mode prescribed by Section 374, and the grounds of appeal certified as required by the rules of the Court, are and have been received and registered as a matter of course. But because they are thus admitted and registered under the rules and practice of the Court, they are not the less admitted. It does not follow because the Court might have dealt with the application in a mode which might have resulted in the rejection of the application, that, if such course is not taken, the application can be treated as not having been admitted.

I think that, if a special appeal is presented to the Court, and is registered, it must be considered as having been admitted by the Court.

The present special appeal was not only registered, but the case was heard in special appeal, and judgment was given against the party who now seeks to obtain an order for the admission of the review by the Lower Court.

I, therefore, think the Subordinate Judge had no jurisdiction to entertain the application for a review, and therefore that the rule to quash his order as one made in a matter in which he had no jurisdiction must be made absolute with costs, which are assessed at Rupees 24.

Our opinion is in consonance with two recent decisions: one by Mr. Justice Bayley and Mr. Justice Phear, 9 Weekly Reporter, page 301; and one by Mr. Justice Phear and Mr. Justice Hobhouse, 9 Weekly Reporter, page 471. There are other decisions of the Agra High Court and of this Court to the same effect; and we know of no decision which is in conflict with that which we have pronounced.

Loch, J.—I concur in the view taken by the learned Chief Justice in this case. It appears to me that there can be no doubt that, when a petition is once registered, and the notices have been served and the records have been sent for, that a special appeal must be considered as admitted.

The great contention before us is as to the meaning of the word "*admitted*" as used in Section 376, and also the words "*application for admission of special appeals*" as used in Section 373.

I think the meaning I have given above to the word "*admitted*" is correct, and I come to this conclusion from the words used in Section 325, more particularly from the words of the first part of that Section, which give the Court the power on sundry reasons to reject the application for admission of special appeals; and one among those reasons is that, if the application do not state what is prescribed in Section 372, Act VIII. of 1859, the Court may reject the application. The order for rejection may be passed by a single Judge of the Court, but it must be passed before the application is registered. When once it is registered, it is an admitted special appeal. It is the practice of this Court, and has been since the passing of Act VIII. of 1859, to admit special appeals at once, and then, as required by Section 25 of Act XXIII. of 1861. they proceed in other respects as regular appeals.

I agree with the Chief Justice that this rule must be made absolute with costs.

The 8th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Military pay—Attachment—Refund.

Reference to the High Court by the Judge of the Small Cause Court at Bhaugulpore, dated the 20th September 1870.

Mr. M. A. Cohen, *Plaintiff*,

versus

Mr. McCarthy, *Defendant*.

Where a part of the military pay of a sergeant employed under the Executive Engineer was erroneously remitted by his superior to a Small Cause Court, which had directed execution against the sergeant's civil pay, it was held that the sum remitted should be refunded to the Executive Engineer.

Case.—By the enclosed copies of my letter No. 55, dated 30th June last, and its reply dated 13th ultimo, it will be shown that there were several cases against Sergeant McCarthy in which arose two questions—1st, regarding the competency of this Court of taking cognizance of those cases; and 2nd, as to the execution against the said sergeant's civil pay; and those questions were settled by the High Court in the following words:—

Opinion of the High Court regarding the 1st question: "Whether Sergeant "McCarthy be a soldier or person within "the meaning of that Clause or not, it is clear "that the Court was acting strictly within "its competency."*

Ditto on the 2nd question—"In this case "execution has been directed only against "the civil pay of Sergeant McCarthy, and "such execution seems to be entirely in "conformity with law."*

It was known to this Court by Captain Hills' letter No. 1483, dated 28th June last, that "part of the pay which was remitted to this Court was his military pay and batta;" in reply to which letter I requested him to inform me what amount has been deducted from his military pay or batta, in reply to which he (Captain Hills) informed me in his letter No. 1541, dated 5th July last, that Rupees 79-15-1 out of Rupees 249-1-7 remitted by Captain Hills was deducted from the sergeant's military pay; but as Sergeant McCarthy was during this time obliged to leave this station to defend some case pending then against him in the High Court, and was at last imprisoned by that Court, I refrained from taking steps to refund that amount; but now I have received a letter from the Officiating Executive Engineer, No. 2107 of the 8th instant, in which he asked me for the refund of that money; but I wrote him in my letter No. 91, dated 8th idem, that, as the judgment-debtor was himself imprisoned by the High Court, and there was no chance of realizing any more from him, and his military pay was, after all, his own property, there is no necessity of sending for the said money from the decree-holder; and copies of the letters above alluded to are herewith enclosed.

Wishing to make a reference to the High Court and abide by their direction, I have now sent for the Rupees 79-15-1 from the decree-holder, and held it in deposit.

The question now referred is this—whether that money is to be given back to the decree-holder or to be refunded; and if it is to be refunded, then to whom—to the judgment-debtor already in jail, or to the Executive Engineer from whom the money was remitted to this Court?

I am of opinion that, as the judgment-debtor is in jail, and there is no hope of his coming again into this district or of realizing any more money from him, and this amount, notwithstanding his military pay, is after all his own property and not included in the military equipments and other articles exempted from the operation of the Civil Court's decrees, it would not be inconsistent with equity that the amount already in deposit in Court should be given back to the decree-holder.

The judgment of the High Court was delivered as follows by—

Norman, C. J.—It appears to us clear that the sum of Rupees 79-15-1, referred to in the letter of the Small Cause Court Judge, must be refunded to Captain Hills, the Executive Engineer, by whom it was apparently paid into the Small Cause Court under a mistake.

The civil pay of Sergeant McCarthy having been attached (see para. 2 of the Judge's letter), Captain Hills erroneously made over to the Court, not only the civil, but the military, pay of the sergeant.

*Ante, p. 231.

The 8th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Small Cause Courts—Section 21, Act XI. of 1865 —Reviews.

Application forwarded by the Judge of Jessore, pursuant to the Rule annexed to Circular Order No. 13, dated the 4th of June 1870.

Tadir Hossein Khondkar (Defendant), *Petitioner*,

versus

Keshub Chunder Banerjee (Plaintiff), *Opposite Party*.

Mr. R. T. Allan for Petitioner.

Baboo Bungshee Dhur Sein for Opposite Party.

Act XI. of 1865 gives no power to a Judge of a Court of Small Causes to review his judgment, except as provided in Section 21 of that Act.

Norman, C. J.—THIS was an application to this Court for an order calling on the Judge of the Small Cause Court to entertain an application for the admission of a review.

The plaintiff brought a suit on a bond for Rupees 74 and 4 annas in the Court of Small Causes at Jenidah, and obtained a decree on the 30th of May Forty-five days after that decree, the defendant, having in the meantime paid the amount of the decree into Court, applied for a review of judgment, on the ground that he had discovered that, on the date on which the bond was dated, and on which the plaintiff stated that he had paid the money to the defendant, he (plaintiff) had given a deposition in the Court of Hooghly, and the defendant contends that, on this discovery of new evidence, he is entitled to ask the Court for a review of judgment.

The question turns on the construction of Section 21 of Act XI. of 1865, which enacts that, in suits tried under this Act, all decisions and orders of the Court *shall be final*, subject to two provisions: first, it is provided "that, in any case in which "a decree shall be passed *ex parte* against "a defendant, he may, within thirty days "after any process for enforcing the decree "has been executed, give notice to the "Court by which the decree was passed of "his intention to apply to the Court at its "next sitting for an order to set it aside."

Secondly.—"That it shall be competent "to the Court, if it shall think fit, in any "case not falling within the proviso last "aforesaid" (that is, in any case not decided *ex parte*) "to grant a new trial, if notice "of the intention to apply for the same at "the next sitting of the Court within the "period of seven days from the date of the "decision," and so on.

Mr. Allan has argued that, notwithstanding the language of the 21st Section, Section 47, which enacts that, "except as hereinbefore "provided, the provisions of the Code of "Civil Procedure shall, so far as the same "are or may be applicable, extend to all "suits and proceedings under this Act," empowers a Judge of a Small Cause Court to grant a review of judgment in the manner, and subject to the conditions, mentioned in Section 376 of Act VIII. of 1859.

It appears to me, however, quite plain that, if Mr. Allan's contention were correct, a decision of a Court of Small Causes would be anything but final. I think that there is no ground whatever for contending that Act XI. of 1865 gives to a Judge of a Court of Small Causes any power to review his judgment, except as provided by Section 21 of that Act.

This view is in accordance with the ruling of Sir Barnes Peacock and Mr. Justice Mitter in the case of Pitambur Sadookhan *versus* Doya Moyee Dossee, reported in 12 Weekly Reporter, page 17; and I may add in illustration of what was the view of the Legislature in the Act of 1865 that in Act XXVI. of 1864, which was an Act to extend the jurisdiction of Courts of Small Causes in Presidency Towns, the 15th Section of that Act, which empowered the Local Government with the sanction of the Governor-General in Council to declare that "the "whole or any part or parts of the Code of "Civil Procedure shall be applicable to any "Court held under Act IX. of 1850, or under this Act," contained an express proviso, that "no right of appeal or review shall "in any case be given by any declaration "made under this Section." It restricted the power of the Local Government, preventing them from giving any right of appeal or review in Courts of Small Causes in the

Presidency Towns. I think, therefore, that there can be no doubt that by Act XI. of 1865, which was an Act for regulating the procedure of Courts of Small Causes in the Mofussil, it was never intended that the Judges of such Courts in the Mofussil should have any power to grant a review.

This application is rejected.

Loch, J.—I will only add a few words.

Mr. Allan has contended that the new trial provided for by Section 21 of Act XI. of 1865 is not the same thing as a review; that if he sought a new trial, he would come under Section 21; but that, asking for a review of judgment, he comes under the provisions of the Civil Procedure Code.

Looking, however, to Act IX. of 1850, which is the law for Small Causes in Presidency Towns, we find in Section 53 the very same words used, and the new trial so allowed is of the nature of a review, for that Section allows the Judges to order a new trial in every case in which it may appear to them to be necessary; but the difference between Section 53 of Act IX. of 1850 and Section 21 of Act XI. of 1865 is this, that whereas no time is specified in the former, in the latter the time is fixed, and very strictly fixed; and it may be remarked that, when the jurisdiction of the Small Cause Court of Calcutta was extended by Act XXVI. of 1864, it was provided by Section 15 of that Act that no appeal or review was to be allowed under that Section. It is clear, therefore, as the Chief Justice has said, that the Legislature never intended to allow to Mofussil Small Cause Courts a wider jurisdiction than it allowed to the Presidency Courts.

I concur in the order rejecting this application.

The 8th December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Damages—Jurisdiction—Section 270, Code of Civil Procedure.

Reference to the High Court by the Judge of the Small Cause Court at Hooghly, dated the 23rd September 1870.

Shama Churn Haldar, *Plaintiff*,

versus

Beharee Lall Koilay and others, *Defendants*.

In a suit for malicious prosecution on a false charge of dacoity, a Civil Court, in awarding damages, is not limited to the amount mentioned in Section 270 of the Code of Criminal Procedure.

Case.—THE plaint sets forth that, on 28th Assar 1276, B. S., a dacoity was committed in the dwelling-house of the defendants in Gotoo; that the plaintiff's sister's father-in-law's house is situated near that of the defendants; and that they are in enmity with his sister, owing to their having been ousted of possession of a garden land held in *jote* under her; that the plaintiff's neighbours, Gobind Ghashee and Hem Neogy, are also in enmity with him; and that the defendant Beharee Lall Koilay is an under-gomashta of the said Gobind Ghashee, who is the head gomashta of Polba and Gotoo; that by the instigation of the said Gobind Ghashee and Hem Neogy, his enemies, the defendants had brought a false and malicious charge against him before the Police Inspector of Hooghly, of his having committed the dacoity in question; that on the 31st idem they caused his house to be searched, and identified some of his late wife's jewellery as the property said to have been plundered from their house by the dacoits. He was in consequence sent up by the police as a prisoner to the Magistrate, before whom the defendants also accused him, and succeeded by evidence solely got up by the aid of the police to establish their false charge; that the plaintiff was accordingly ordered to be committed to the Sessions, and kept in confinement until he was to take his trial in the Sessions Court, by which he was released on bail, and was subsequently acquitted, his innocence being proved; the jewellery seized by the police and identified by the defendants were also restored to him. He now sues the defendants for the recovery

in the shape of damages of Rupees 239, said to have been incurred by him in defending himself in the Magistrate's and in the Sessions Courts.

The defendant No. 1 appeared in person, denied the demand, and pleaded that the plaintiff's claim for damages cannot lie, as he was committed to the Sessions by the Magistrate, who saw good and sufficient grounds for so doing. The defendant No. 3 appeared by his pleader, Baboo Ishan Chunder Dutt, denied the demand, and pleaded that a case of this nature would not lie, and that the plaintiff is not entitled to the damages claimed.

The points for determination which arise in this case, therefore, are, *viz.*:—

Issues in bar to the hearing of the suit: —

First.—Whether a suit of this nature can lie in a Small Cause Court or not?

Secondly.—Whether the plaintiff's suit for pecuniary damages can be maintained or not, he having been committed by the Magistrate to take his trial in the Court of Sessions and ultimately acquitted.

As to facts:—

Thirdly.—Whether the defendants, in collusion with the plaintiff's enemies, have fraudulently and maliciously preferred the criminal charge against him, or not?

Fourthly.—What is the actual pecuniary damages sustained by the plaintiff in the criminal case in question?

Respecting the first issue in bar, I am of opinion that under Section 6 of Act XI. of 1865, and the High Court's decision noted in the margin* a suit of this nature would lie in a Small Cause Court.

* Gunga Narain Moitre *versus* Gudadhur Cowdhry—vide Sutherland's Weekly Reporter, Vol. XIII., page 434.

With regard to the second issue in bar, I think that, when the plaintiff has ultimately been proved not guilty and acquitted by the Sessions Court, and the charge for which the Magistrate committed him to the Sessions was found to be groundless by the said Court, the plaintiff has a right to sue for the recovery of any pecuniary loss incurred by him in the case in question.

As to the third issue, it is satisfactorily proved by the examination of the plaintiff himself, and his witnesses Nos. 1 and 2, that the charge of dacoity preferred against him was false and malicious; and from the circumstance of the defendants not having identified any of the dacoits on the night of the occurrence, nor having suspected the plaintiff until after the expiration of 3 days thereof, and it having been also proved that the plaintiff is an honest young man, and that he had enmity with Gobind Ghashee, head gomashta of Gotoo, I entertain no doubt of the veracity of the plaintiff's allegation.

The only point which now remains to be determined is—what would be the amount of damages which the plaintiff is entitled to. The plaintiff gives the following detail of expenses incurred by him, *viz*:—

I. *In the Magistrate's Court.*

		Rs.	As.	P.
1.	Vakalutnamah...	0	8	0
2.	Fees paid to a pleader for two days for making a motion for bail ...	16	0	0
3.	Fees paid to a pleader for three days for cross-examination of the prosecutors and their witnesses	75	0	0
4.	Expenses for taking copies of witnesses' depositions	2	0	0
5.	Paid to his pleader's Mohurrir	1	0	0
	In the Sessions Court.			
6.	Stamps for vakalutnamah and petition for bail ...	1	0	0
7.	Pleader's fees for two days for moving the Court for taking bail	16	0	0
8.	Pleader's fees to another pleader for the same ...	8	0	0
9.	Cost for bail	25	0	0
10.	Pleader's fees on the day of trial	50	0	0
11.	Another pleader's fees ...	40	0	0
12.	Diet-money of witnesses for defence	4	8	0
	Total ...	239	0	0

From the deposition of his witnesses Nos. 1, 3, and 4, it is proved that the plaintiff has incurred the charges set forth in the plaint; but I do not think that he is entitled to recover from the defendants the fees of two pleaders unnecessarily engaged by him, as one would have been quite sufficient to conduct the case, as also the money paid by him to the Mohurrir of his pleader. Deducting, therefore, the amount of these items, *viz.*, Rupees 67, there remains Rupees 172, which appear to be the actual expenses borne by the plaintiff, and I would accordingly give him a decree for the said sum of Rupees 172, with costs in proportion, against the defendants Nos. 1 and 3 alone, the defendants No. 2 being heirs of Mohesh Koilay, deceased, and not liable for damages.

At this stage of the case, it is argued by the defendant's pleader that, under Section 270 of the Code of Criminal Procedure, the plaintiff is not entitled to recover more than Rupees 50 from the defendants, and prayed that a reference on the point be made to the High Court whether the plaintiff will be entitled to an award to the extent of his actual expenses in the suit, or to Rupees 50 only, the maximum amount which a Magistrate can order a complainant to pay as amends to an accused. Though I consider the argument to be of no weight with regard to the decision of a Civil Court, inasmuch as the law cited above bears upon a question in a Magistrate's Court where the complaint is a frivolous and vexatious one, yet at the request of the defendants, as well as for the novelty of the case, I would refer the matter and give the plaintiff a decree for the aforesaid amount contingent on the decision of the High Court.

The judgment of the High Court was delivered as follows by—

Norman, C. J.—This is a suit for malicious prosecution on a false charge of dacoity.

The Small Cause Court Judge gave damages to the extent of the sum which the plaintiff had expended in defending himself.

The point raised is whether, because under Section 270 of the Code of Criminal Procedure a Magistrate dismissing a complaint as frivolous is empowered to award amends to the extent of 50 rupees, the damages to be given by the Small Cause Court Judge are limited to that amount.

We think certainly not. In the first place, the 270th Section applies to cases triable before a Magistrate, *in which a summons on complaint may usually issue*, not to a case of dacoity triable at the Sessions. And secondly, even in such minor cases, though the Criminal Courts have a power of awarding amends limited to 50 rupees, it does not follow that much larger damages might not be given in a civil suit.

The point seems so clear that we are rather surprised that a Small Cause Court Judge should have referred it to this Court.

The 9th December 1870.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Appeal in forma pauperis—Right of action.

In the matter of

Moshaollah Khan, *Petitioner.*

Moulvie Syud Murhumut Hossein for Petitioner.

N sued to set aside the sale of property which M had attached in execution of a decree against N's husband's brother, plaintiff alleging that it belonged to her husband (though the latter's objections under Section 246, Civil Procedure Code, had been rejected), and asking for a declaration of her right and title. N obtained a decree, and both M and the auction-purchaser appealed to the Judge *in formâ pauperis.*

Held that M had good ground of appeal if he could prove that the property belonged to the judgment-debtor.

Jackson, J.—This is a motion on the part of one Moshaollah Khan. It appears that he appealed to the Judge as a pauper from a decision passed against him in a suit in which one Nonnee Khanum was plaintiff. In that suit, Nonnee Khanum sought to set aside the sale of certain property which Moshaollah Khan had attached in execution of his decree against Nonnee Khanum's husband's brother. Nonnee Khanum's allegation was that this property belonged to her husband. Moshaollah's allegation was that the property belonged to the judgment-debtor, the brother. There had been proceedings under Section 246, and Nonnee Khanum's husband's objections to the attachment and sale had been rejected.

This suit was brought to set aside the sale and for a declaration of the plaintiff's right and title to the property. The suit was brought both against Moshaollah Khan, the former decree-holder, and also against the auction-purchaser at the sale. In that suit, Nonnee Khanum obtained a decree in the first Court. Both Moshaollah Khan and the auction-purchaser appealed to the Judge *in formâ pauperis*. The Judge, as regards Moshaollah Khan, has refused his application to appeal *in formâ pauperis* on the facts stated in his judgment that Moshaollah Khan had no ground of appeal from the judgment of the Lower Court declaring that the property belonged to the plaintiff.

We think, however, that he has a very good ground of appeal if he can make out that this property really belonged to the judgment-debtor. In the first place, he is cast in costs in the first Court, which, if he can prove his point in the Appellate Court, he would recover. In the second place, he is very much interested in the question as to whether this property really belonged to the judgment-debtor or not, and whether the sale is to be set aside or not. The Judge has not distinctly stated in what way he comes to the conclusion that the applicant has no ground of appeal. But it would appear that he alluded to the fact that the property would not under any circumstance be in the possession of Moshaollah Khan, and therefore he could have no ground, though the purchaser might. If he is of opinion still that the applicant has no ground of appeal, the Judge should distinctly state the reason under which he thinks that there is no ground of appeal. Upon the face of it, it seems to us that there is a ground of appeal, and that the application should not be dismissed.

We send this case to the Judge, and request him to re-consider his decision as respects the petitioner Moshaollah Khan.

The 9th December 1870.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Defective stamp—Delay—Section 377, Act VIII. of 1859.

In the matter of

Gour Mohun Surmah, Defendant (Appellant) *Petitioner,*

versus

Jugger Nath Acharjee, Plaintiff (Respondent), *Opposite Party.*

Baboo Ashootosh Dhur for Petitioner.

No one for Opposite Party.

An application, presented on the 90th day from the date of the decree having been returned for deficiency of stamp, was re-filed, after the deficiency was made up, beyond the time allowed.

HELD that the application must be dealt with as filed after the 90th day.

Note by the Deputy Registrar.—THIS application was presented on the 90th day from the date of the decree, and was returned for deficiency of stamp, the fee leviable under the Court Fees Act (Article 4, Schedule 1), being *after the 89th day* the same as in the plaint or memorandum of appeal.

The deficiency was subsequently made up and the application *re-filed;* but it is *now beyond the time* (90 days) allowed for filing such applications.

It is a question whether the application should now be treated as one not filed within 90 days, and in regard to which the party filing it is, in accordance with the terms of Section 377, Act VIII. of 1859, required "to show just and reasonable cause, *to the satisfaction of the Court,* for not having preferred it within the limited period" (notwithstanding that the cause of the delay is manifest, *viz.*, oversight of the provisions of the Court Fees Act); or as one filed within 90 days, and to be received in the office *without reference to the Court.*

Judgment of the Court.

This application must be dealt with as filed after the 90th day.

The 9th December 1870.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Section 24, Act X., 1859—Illegal cesses—Abwabs.

Case No. 1384 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 28th April 1870, affirming a decision of the Officiating Collector of that District, dated the 12th August 1869.

Nobin Chunder Roy Chowdhry (Plaintiff), *Appellant,*

versus

Gooroo Gobind Surmah Mojoomdar and another (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Kishen Dyal Roy and *Umurendro Nath Chatterjee* for Respondents.

Under Section 24, Act X. of 1859, an agent cannot be called upon to account for matters other than rents, or what represents rents, collected by him in the course of his employment.

A sum collected by a tehsildar as purvi-bhika, or present for the zemindar on the Unnoprashun ceremony (first eating of rice after birth), considered as an illegal cess.

Paul, J.—THERE is really no ground for this special appeal. The matter might have been disposed of in five minutes, but we wanted to hear fully what the pleader for the appellant had to say. We have thus given him every opportunity of maintaining the proposition of law which is specified in the sixth ground of this special appeal, *viz.*, that the Lower Appellate Court has misconstrued Section 24, Act X. of 1859.

This suit was brought by plaintiff under Section 24, Act X. of 1859, against the defendant who was his Tehsildar. The claim of plaintiff consisted of two sets of items, firstly, a sum of Rupees 12,969, which had been collected as rent by the Tehsildar, of which Rupees 11,266 had been accounted for; and secondly, a sum of Rupees 1,386 and odd annas alleged to have been collected by him as *purvi-bhika*, which, we are told, was for a present for the zemindar on the *Unnoprashun* ceremony, *i. e.*, first eating of rice after birth.

The first Court found that the sum represented by the figure 1,386 rupees came under the provision of Section 10, Act X. of 1859, as illegal cess or abwab. This item has on its very face the appearance of an illegal cess, and denotes a sum of money received, not as rent, but otherwise. These illegal cesses are prohibited by law under Section 10 of Act X. of 1859, and the question is whether, under Section 24, Act X. of 1859, the agent in this case can be called upon to account for matters other than rents, or what represents rents, collected by him in the course of his employment. We think not. It is unnecessary to discuss the question at any length, because our opinion has been sufficiently indicated in the course of the argument, and not a single case has been shown to us nor a single reason suggested as to why the Revenue Court should, like the Civil Court, be resorted to for the purpose of a general account from a collecting agent. Looking to the scope of Act X. of 1859, and in particular to the words of Section 24, we think that the provisions of Section 24 do not include the collection of abwabs or other illegal cesses. It would be strange if the Revenue Court could be made available for the taking of an account of the collection of cesses prohibited by Act X., and could thus be rendered instrumental in securing for the zemindar even as against a Tehsildar sums of money the exaction and receipt of which would render the zemindar liable to an action. Therefore, on that point we think that the decisions of both the Courts below are right. Legislation was to the same effect in 1793.

With regard to the sum of Rupees 266, we also think that there is no error in law in the decision of the Lower Appellate Court. The first Court found that the plaintiff was a debtor to the defendant. The second Court has not disturbed that finding, and when it is remembered that this suit was brought a whole year after the defendant had been dismissed from service and had given in his account, and that the plaintiff, when summoned to appear as a witness, did not attend, we think that no injustice has been done by the Lower Appellate Court in declining to decree the plaintiff's claim to the small sum of money; at all events, that no error in law has been shown.

We think, therefore, that the special appeal should be dismissed with costs.

The 9th December 1870.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Judgment-debtor's rights—Heirs—Certificate-holders.

Case No. 1443 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 27th May 1870, reversing a decision of the Subordinate Judge of that District, dated the 18th February 1869.

Sham Coomar Roy and others (Plaintiffs), *Appellants,*

versus

Juttun Bibee (Defendant), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Mr. C. Gregory and *Baboo Sreenath Doss* for Respondent.

In cases where the right of inheritance really vests, the purchaser of the rights of a deceased judgment-debtor whose representatives hold under a certificate under Act XXVII. of 1860 does not acquire the entire estate, but acquires it subject to all legal and equitable rights of inheritance.

Bayley, J.—We think this special appeal must be dismissed.

The plaintiff, special appellant, is the purchaser in execution of the decree of one Luchmeeput obtained on a hoondee against the widow and the daughter of one Gaisooddeen, as representatives and holding the estate of the said Gaisooddeen under Act XXVII. of 1860. We would here observe that this Act simply enables that representatives to collect the debts due on the estate of the deceased and to give acquittances for those debts. Subsequently, one Jeetun, the mother of Gaisooddeen, sued for her share in the property, and got a decree for one-sixth. It is to be observed that the special appellant, the plaintiff, was no party to that decree, nor was Jeetun any party to the decree obtained by the plaintiff.

The Lower Appellate Court has held that the purchase by the plaintiff was no bar to Jeetun obtaining her share in the inheritance, whatever that share might be under the Mahomedan Law.

The special appellant contends that, as he is the purchaser of the rights and interests of the judgment-debtor in the whole estate represented, not by the mother, but by the widow and the daughter of the deceased, so he is entitled to retain what he purchased in execution of the decree obtained against those representatives.

On the other hand, it is contended, and two decisions have been cited in support of the contention—one reported in V. Wyman, page 27, Kemp and Glover, JJ., dated the 3rd December 1867, and the other not printed, dated 4th January 1868, Regular Appeal No. 136 of 1867, Rajah Raj Kristo Singh, plaintiff, appellant, decided by Loch and Mitter, JJ.,* both showing that in cases where

* The 4th January 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Case No. 136 of 1867.

Regular Appeal from a decision passed by the Additional Principal Sudder Ameen of Mymensingh, dated the 11th March 1867.

Rajah Raj Kristo Singh (Plaintiff), *Appellant,*

versus

Bungshee Mohun Baboo and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee, Unnoda Pershad Banerjee, and *Shushee Bhoosun Sein* for Appellant.

Baboos Nil Madhub Sein, Romesh Chunder Mitter, Sreenath Dass, and *Hem Chunder Banerjee* for Respondents.

Loch, J.—The plaintiff in this case sues to set aside a decree for the amount of a kistbundee, under which decree the property of the late Juggernath Singh, now in the possession of the plaintiff, was declared liable for the debt. He also sues to set aside orders passed by the High Court in the Miscellaneous Department of 10th July and 16th August 1865, declaring that, under the terms of the decree, the property of Juggernath Singh was liable to be sold.

The following statement as regards the family of the plaintiff may assist in elucidating the case. There were three brothers:—

1	2	3
Bissonath	Juggernath, died leaving a widow	Gopeenath, died leaving a widow
Pran Kishen	Indro Monee.	Huro Soonduree.
Raj Kishen, plaintiff.		

and the present suit relates to the property of the second brother Juggernath, who died in Jeit 1236. The three brothers were joint proprietors of the zemindaree of Shooshung. On the death of Juggernath, his nephew Pran Kishen, father of the present plaintiff, sought to succeed to the property on the allegation of family-custom. This suit failed, as the family-custom was not

the right of inheritance really vests, the purchaser of the rights of deceased judgment-debtor, whose representatives hold under a certificate, does not acquire the entire estate, but acquires it subject to all legal and equitable rights of inheritance.

In this view, following the authorities cited, we think that the purchase of the plaintiff, special appellant, must be limited, so as to give him a right to so much of the estate of Gaisooddeen as was covered by the shares of those against whom the decree was held.

established. Indro Monee, alleging a permission from her husband, adopted a son Sree Kishen, and on her death in Jeit 1251 left him under the guardianship of Ram Churn Mojoomdar, who was also appointed by her manager of the property belonging to the minor. Subsequently, a suit was brought by Pran Kishen to set aside this adoption, on the ground that Indro Monee had received no permission to adopt from her husband, and the adoption was declared invalid by the late Sudder Court on the 5th November 1861. While this suit was pending, the defendant Bungshee Mohun Baboo and others, Mohajuns, brought two actions against the heirs of Bissonath Singh and Juggernath Singh to recover from them the amount of separate kistbundees executed by Bissonath and Indro Monee for debts due by Bissonath and Juggernath respectively, and obtained decrees. The decree in the case of the heirs of Juggernath made the guardian of the minor and the property left by Juggernath liable for the amount of the kistbundee. The property of Juggernath had, in the meantime, passed into the possession of the plaintiff, Raj Kishen Singh, as the adoption of Sree Kishen had been set aside, and when the decree-holders proceeded to execute their decree, they were met by Raj Kishen, who contended that, as he was no party to the suit, the property of Juggernath now in his possession could not be sold in satisfaction of the decree. The Lower Court executing the decree held the objection good and released the property, but on appeal by the decree-holders, the High Court, in its proceedings of the 10th July and 16th August, reversed the order, holding that the terms of the decree did make the property of Juggernath liable for the debt.

The present suit is brought to set aside the decree of the 26th August 1859 passed by the Principal Sudder Ameen in favor of the defendants, Bungshee Mohun and others, on the ground of collusion and fraud on the part of the minor's guardian Ram Churn Mojoomdar and the decree-holders, and to set aside the orders of the High Court mentioned above declaring the property of Juggernath liable in execution. The Principal Sudder Ameen has dismissed the suit on the ground that fraud was not proved.

Plaintiff has filed an appeal from this judgment, and raises the following questions: *1st.*—Whether collusion and fraud on the part of Ram Churn Mojoomdar have not been proved; *2nd.*—Whether the property of Juggernath now in the possession of the plaintiff can be sold in execution of a decree to which plaintiff was not a party, the decree having been obtained against parties who were at the time in possession as trespassers.

Another question arises incidentally from the oral pleadings before us—whether plaintiff can bring an action to set aside the orders of the High Court passed in the execution-department.

We think that the first point may be disposed of in a few words. We have heard what the parties have to urge, and we find nothing to support the allegation of collusion or fraud as against the defendant Bungshee Mohun Baboo and others, who appear to have acted in their capacity of bankers, and after securing a kistbundee to protect their own interests, and after showing much forbearance towards their debtor, brought an action against the parties then supposed to be the heirs of Juggernath and in possession of his property. Whether the suit was brought at the particular time at the instigation of Ram Churn Mojoomdar to defeat the claim put forward by Pran Kishen to set aside the adoption, we have not the means of judging, and in the absence of any satisfactory proof of fraud or collusion, we think these defendants must be exonerated from the charge.

Before entering upon the second point, we will dispose of the third now raised. We think that plaintiff is not precluded from bringing this suit by reason of the orders passed in execution of the decree of 26th August 1859 by the High Court. He was not a party to that decree, and though the property of the debtor was in his possession, and the decree-holder sought to execute the decree against that property, it is not shown us that he was by any order of Court substituted for the debtor: he was, therefore, clearly entitled to bring the present suit to set aside the orders passed in execution adverse to him.

We come now to the second point taken in appeal. The allegation of the defendants is that a debt was due to their banking firm by the three brothers Bissonath, Juggernath, and Gopeenath; that the brothers divided the joint-debt, and each became responsible for a third; that Indro Monee, who represented her husband Juggernath, executed a kistbundee, dated 24th Falgoon 1244, for the amount then due by her deceased husband, to which were added certain sums advanced to her for the expenses of his shradh and the costs of a certain suit for mesne-profits and interest, amounting in all, after remissions and payments, to Rupees 29,025. The suit brought by the bankers after the death of Indro Monee was undefended, and was instituted on 27th Kartick 1264, the suit by Pran Kishen to set aside the adoption having been brought on 13th Bhadoor 1263 (27th August 1856); and it is contended that the bankers, knowing of the existence of this latter suit, should have made the present plaintiff's father, Pran Kishen, a party to their suit; that as the defendants against whom the bankers obtained a decree were declared in the suit brought by Pran Kishen to be wrong-doers and in unlawful possession, the property of Juggernath, to which the plaintiff in the present suit alone had a legal title, could not be sold without giving him, who was the real heir of Juggernath, an opportunity of meeting the bankers' claim, and showing, if possible, that they were not entitled to recover.

Had the decree held by the defendant bankers been against Indro Monee, we think that no objection could have been raised to the sale of the property of Juggernath in execution, because Indro Monee was in legal possession of his property as heir, and the debts entered in the kistbundee were for the major part due by Juggernath. Nor can we say that the defendant bankers were wrong in bringing their action against the ostensible heir of Juggernath then in possession of his property; but as that individual has been declared by a decree of a competent Court to have had no right to the estate, and to have been in unlawful possession, and that he is not the heir of Juggernath, who alone could be sued for the debts due by his ancestor, we think the present decree against the property of Juggernath, obtained against wrong-doers and in unlawful possession, must be held to be inoperative as against the property; and that, if the banker defendants wish to make the property of Juggernath liable for their debt, they must bring their action against the legal heir who alone is in a position to meet their claim.

The judgment of the Judge appears to be correct, and we, therefore, dismiss this special appeal, but under the circumstances we think that each party shall bear his own costs in all the Courts.

The 12th December 1870.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Interest—Jurisdiction—Section 2, Act XXVIII. of 1855.

In the matter of

Moizooddy Shaikh, *Petitioner.*

Baboo Woomesh Chunder Banerjee for Petitioner.

In a suit to recover a sum of money due on an agreement under the terms of which interest for 15 days only was payable at the rate of one rupee per diem:

HELD that, as no rate was agreed upon after the expiration of the 15 days, the Court had power to fix a reasonable rate of interest subsequent to that time.

Jackson, J.—THIS was a suit brought by one Shib Narain Tewary against Moizooddy Shaikh to recover a sum of Rupees 19-8 due upon a rokha or agreement, with interest at one rupee per diem from the date of the rokha, *viz.*, 1st Choit 1275. The amount due under the view of the case put forward by the plaintiff was Rupees 295-8 annas.

The first Court found that there was no dispute about the rokha, but under the terms of the rokha interest for 15 days only was payable at the rate of one rupee per diem, and after the expiration of that period no interest was distinctly declared to be payable. The Court, accordingly, gave that high rate of interest only for the 15 days, and after those 15 days it gave the usual rate of interest of 12 per cent. per annum, and on the whole sum adjudged to be due up to the date of the decree it gave further interest at the same rate. The case then went to Mr. Hutchinson, the Subordinate Judge of Tipperah, and the plaintiff, appellant, urged before him that he was entitled to interest at one rupee per diem from the date of the rokha to the date of payment. The only decision which the Subordinate Judge has given upon that point is that, "according to practice and law on matters "of interest, the Lower Court ought to have "allowed interest as contracted for," that is, interest at the rate of 1 rupee per diem.

We think that the Subordinate Judge is mistaken both in practice and in the law upon the point. The contract at the high rate of interest was certainly only for 15 days. It was a short date contract, and the very high rate of interest at 1 rupee per diem was fixed for those 15 days. The contract is silent as to what rate of interest shall be paid after the expiration of those 15 days. Under those circumstances, it cannot be said that the Court is obliged to allow that high rate of interest until date of payment. It may be the usual practice in ordinary cases, where an ordinary rate of interest has been agreed upon between the parties for any particular time, to allow the same rate of interest to continue until the amount is paid. But it does not follow that this practice should be invariably followed. As no rate was agreed upon between the parties after the expiration of 15 days, the Court had undoubtedly the power to fix a reasonable rate of interest subsequent to that time. Section 2 of Act XXVIII. of 1855 distinctly points out the duty of the Court under such circumstances. As regards the interest to be paid on the aggregate sum adjudged to be due at the date of the decree, the Subordinate Judge has distinct power to fix a proper and reasonable rate of interest under Section 10, Act XXIII. of 1861. It seems as if the Subordinate Judge is of opinion that he has no option but, according to law and practice of the Court, he is bound to allow the high rate of interest originally contracted for from first to last. We think he was wrong in this point, and we have no doubt that, after the matter has been brought to his notice with this our opinion, he will reconsider the case with this determination thereupon, and in re-considering it will decide what will be a fair and reasonable interest to be awarded against the defendant.

The 12th December 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Husband and wife—Maintenance.

Case No. 1161 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 23rd May 1870, reversing a decision of the Moonsiff of that District, dated the 12th March 1870.

Lalla Gobind Pershad (Defendant), *Appellant,*

versus

Dowlut Butee (Plaintiff), *Respondent.*

Baboo Annund Gopal Palit for Appellant.

Mr. R. E. Twidale for Respondent.

When the conduct of a Hindoo husband is such as to render it impossible for his wife to live with him any longer consistently with her self-respect and religious feelings, and she lives apart and chastely, she is entitled to maintenance.

Bayley, J.—We think this is a case in which the Lower Appellate Court has properly come to the conclusion that a Hindoo husband who keeps a Mahomedan woman, and by such conduct compels the wife, under her religious feelings, to leave the house, is bound to give maintenance to that wife. It is urged that the cause shown is not a sufficient cause for leaving the husband's house, and a passage is quoted from the last edition of Shama Churn Sircar's Vyavasta Durpana to the effect that a wife may desert her husband when he is an outcast or degraded, but the passage has no bearing on the facts of this case. The question here is whether the conduct of the husband did not render it impossible for the wife to live with him any longer consistently with her self-respect and religious feelings, and, if so, whether she was entitled to maintenance when living with her mother, and, as it is found, chastely.

We think the wife is in such a case entitled to maintenance.

We are then asked to entertain a new point not taken in the petition of special appeal, to the effect that there was no evidence on the record of the Mahomedan concubinage, but we are not disposed to admit this ground at this late stage of the case. The Lower Appellate Court has clearly found as to the conduct of the defendant on this point.

The respondent, on the other hand, contends that the sum of Rupees 3 was not a sufficient amount for maintenance, but this is a question of fact, and not one of law. It is a question which the Lower Appellate Court was quite competent to deal with, having regard to the position of the husband, who is a mooktear and owner of a small land jumma.

We dismiss the special appeal with costs.

The 12th December 1870.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Valuation of property—Act XXVI. of 1867, Schedule B, No. 11, Notes A and B—Jurisdiction.

Case No. 1184 of 1870.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 22nd March 1870, reversing a decision of the Moonsiff of Naraingunge, dated the 30th December 1868.

Eshan Chunder Mookerjee and others (Plaintiffs), *Appellants,*

versus

Lokenath Roy and others (Defendants), *Respondents.*

Baboos Sreenath Banerjee, Nullil Chunder Sein, and *Kalee Mohun Doss* for Appellants.

Baboo Grish Chunder Ghose for Respondents.

The decision of a Court under Act XXVI. of 1867, Schedule B, No. 11, notes A and B, as to the market-value of immoveable property passed after objection made, is final even though no inquiry was made under a commission, the Court not being bound to issue any commission.

Where by such a decision a Moonsiff finds the value of a suit to be within his jurisdiction, a Subordinate Judge is not competent to rule that on that point the Moonsiff has no jurisdiction.

Jackson, J.—This was a suit for the establishment of the plaintiff's right to certain permanently-settled zemindaree lands.

In the first Court there was a dispute as to the valuation of this suit, the defendant contending that the valuation had been placed below the proper market-value by the plaintiff, because he had not ascertained it by calculating ten times the revenue of the whole estate, but only by calculating ten times the revenue of the share which he claimed.

The Moonsiff very properly decided that this contention was wrong under the law, and that the valuation had been properly placed by the plaintiff on a calculation of ten times the revenue of the share which he claimed. The case was afterwards tried upon limitation and upon the merits, and was finally decided.

Both parties are said to have preferred appeals, which were heard by the Subordinate Judge. The Subordinate Judge appears to have taken up the question of valuation. We suppose it was urged before him orally, though it does not appear on the record in the grounds of appeal. On this question the Subordinate Judge decided that a certain decree of the Principal Sudder Ameen of Tipperah, and certain zemindaree-papers filed by the defendant, proved that the market-value of the property was larger than what had been stated by the plaintiff, and as such the suit should have been brought in the Subordinate Judge's Court. The Subordinate Judge decreed the appeal, and remanded the original suit to the Moonsiff with orders to return the plaint to the plaintiff, who would present it to the proper Court.

On special appeal, two objections to the decision of the Lower Appellate Court are taken: first, that the decision of the Moonsiff on the question of the proper valuation of the suit was final, and that, even if there was an appeal, the Subordinate Judge should not rely upon the decision of the Tipperah Court in which the question of valuation was nowhere decided; and secondly, that the Lower Court should not rely upon the papers of one side in the suit without going into the case and ascertaining how far such papers are reliable.

It seems to us that both the grounds of appeal are good. The law, as regards the valuation of suits when this plaint was filed, was, as the Subordinate Judge has pointed out, to be found in Act XXVI. of 1867, Schedule B, No. 11, notes A and B, and more specially in the 3rd portion of note B. That law lays down that in suits for immoveable property paying revenue to Government, where the settlement is permanent, ten times the revenue so payable shall be taken to be the market-value thereof, unless and until the contrary shall be proved.

And the law goes on to say that, in order to ascertain the market-value, the Court may, either of its own motion or on the application of any party to the suit, make certain enquiries, and the decision of the Court as to the market-value shall be final.

In this case, it seems that no enquiry was made by the Court of its own motion; but that certain objection was made with regard to the market-value in the first Court, and that objection was held to be bad. Under such circumstances, it appears to us that the decision of the Court as to the market-value becomes final.

It is argued before us that the decision would only be final where some commission had issued under the terms of this Section. But we do not think that the words of the law are intended to have that effect. The Court is not bound to issue any commission. The Court *may* make such enquiries as it thinks necessary, but whatever decision has been come to shall be final. Upon the decision so passed there is no appeal to the Subordinate Judge.

Another argument used is that the Subordinate Judge has authority to interfere in the matter of jurisdiction, more especially as referred to in Section 350, Act VIII. of 1859. Admitting this to be so, the question as to whether the Moonsiff had jurisdiction or not must depend upon the decision which he arrived at as to the market-value of the property. Had he decided that the market-value of the claim was of a value beyond his jurisdiction, the Subordinate Judge might have held that he had no jurisdiction. But having decided that the value was within his jurisdiction, and that decision being final, the Subordinate Judge could not rule that on that point the Moonsiff had no jurisdiction.

We think that the Subordinate Judge's decision should be set aside, and the case be remanded to the Subordinate Judge to decide the other points raised in appeal.

Costs will follow the final result.

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The 13th December 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Certificate of administration—Act XL. of 1858—Revocation.

Case No. 353 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 21st July 1870.

Tusneef Hossein (Opposite Party), *Appellant,*

versus

Bibee Sookkhoo (Petitioner), *Respondent.*

Mr. R. T. Allan and *Baboo Mohendro Lall Shome* for Appellant.

Mr. C. Gregory for Respondent.

A manager has no authority to deal with the claims or debts and liabilities attaching to the estate of a minor without having taken out a certificate under Act XL. of 1858.

An order for a certificate may be revoked under Section 21, Act XL. of 1859, if the Judge sees sufficient cause for its revocation in the conduct of the party in whose favor it was granted.

Bayley, J.—I AM of opinion that this appeal must be dismissed with costs. The property in regard to which this appeal arises was the property of one Farra Mahomed. It appears that he died leaving two daughters and a son, all minors. After his death, an order was passed granting the certificate under Act XL. of 1858 jointly to one Tumeezooddeen, the son of Bibee Sookkhoo, and to one Tusneef Hossein, the nephew of the deceased. It has been found as a fact that no certificate as above ordered was, in fact, ever issued, and it is stated that intermediately Tumeezooddeen took service of a nature which prevented him acting as manager and guardian of the minors. There is also no dispute as to a joint certificate in the above two names having never issued. It further appears from the statement of Tusneef Hossein himself that he dealt with the property of the minor without any certificate.

Now, in the first place, under Section 3, Act XL. of 1858, no person is entitled to institute or defend any suit connected with the estate of which he claims the charge without having obtained a certificate of administration except under certain provisos; and secondly, under Section 18 of the said Act, it is essential for a person to obtain a certificate before he can deal with the claims, debts, and liabilities attaching to the estate of the minor. It is clear, therefore, that the action of Tusneef Hossein without a certificate, either jointly with Tumeezooddeen or in his own name, was entirely illegal.

The next question is whether, under Section 21, Act XL. of 1858, the Lower Court had authority to revoke the certificate given to the appellant.

Now, the terms of the Section are: "The "Civil Court for any *sufficient cause* may "recall any certificate granted under this "Act, &c." This leads us to a question of fact, *viz.*, whether any sufficient cause has been shown to recall the certificate. I think that sufficient cause has been shown in the very facts admitted by the appellant. The Judge states the appellant himself acknowledged before him that he took possession of various papers and goods belonging to the minors, and released an estate mortgaged or sold to the deceased Farra Mahomed, and that he gave a loan of Rupees 3,000 out of the assets of the minors to a third party without any security and on a simple note of hand. It is contended that the appellant took possession of the papers and goods of the minors within the scope of his office as manager, but as above indicated he had no authority to do so without having taken out a certificate.

It is then urged that, as to the appellant having released the mortgaged estate, there is a satisfactory explanation, *viz.*, that for the sum of Rupees 200 he gave up a deed unregistered and unstamped, and, in consequence, of no legal value whatever. Now, this was a case in which, if the appellant really acted with the consent of Tumeezooddeen or any other friend of the minor, it would have relieved him of much of the doubts attaching to his conduct in this transaction; but when this circumstance is viewed in connection with the other act done by the appellant, *viz.*, that he actually of his own accord, without a certificate and without the assent of the alleged co-manager or any other friends of the minors, gave to a third party a loan of Rupees 3,000 out of the minor's estate without sufficient security, I think his conduct requires a more serious consideration. It is, however, urged by Mr. Allen that Abdoollah Khan was a man well known as a banker in the district, and that

was a sufficient security. I do not think this plea will avail in law. No prudent man dealing with the money of others, specially of minors, would lend money without ordinary security so as fully to protect the minors and provide due acquittance to himself.

Upon all these grounds, I think it is not for us to say that the order of the Judge below, revoking the order for a certificate to the appellant under Section 21, is without legal authority.

There is, however, one further point of appeal, *viz.*, that certain witnesses were tendered by the appellant, but not examined by the Court. No petition, however, is shown on the record tendering such evidence, or any order indicated as passed by the Lower Court refusing to hear the witnesses. We think, therefore, that this ground of appeal also fails.

On the whole, I see no ground for this appeal, and therefore dismiss it with costs.

Mitter, J.—I concur.

The 13th December 1870.

Present:

The Hon'ble F. A. Glover and W. Ainslie, *Judges.*

Declaratory suit—Genuineness of a document —Limitation.

Case No. 1302 of 1870.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 31st March 1870, affirming a decision of the Subordinate Judge of that District, dated the 20th July 1869.

Aratoonnissa (one of the Defendants), *Appellant,*

versus

Akram Ali (Plaintiff), *Respondent.*

Baboo Kashee Kant Sein for Appellant.

Baboo Sreenath Dass for Respondent.

In a suit to set aside as spurious a hibbanamah by which property otherwise the property of plaintiff would become the property of another: HELD that, as there was no question of recovery of rent or mesne-profits or any thing else which could bring the case under Section 77, Act X. of 1859, no plea of limitation, either special or general, could be taken.

Glover, J.—THIS was a suit by the plaintiff for confirmation of possession in a one-anna share of the estate of the plaintiff's father, by declaring spurious a certain hibbanamah set up by the defendant, Aratoonnissa, purporting to have been made by the plaintiff's father, Azmut Khan. It is admitted that the plaintiff is the heir to the whole of the property left by his father, and that he is in possession thereof with the consent of the co-heirs. The only question before the Court was, therefore, whether the hibbanamah set up was or was not a genuine document.

Both Courts have found upon the evidence that it is not genuine, and have given the plaintiff a decree against the special appellant.

In special appeal, it is contended that the Judge ought to have tried the defendant's plea of special limitation under Section 77 of Act X. of 1859; secondly, that there is no finding of the Judge as to the plaintiff's possession, and that, as he has come into Court seeking a confirmation of possession, he was bound to prove that he was in possession of the lands in suit.

With regard to the first objection, we observe that this is not a suit to set aside any Act X. decision, but a suit to get rid of a hibbanamah by which property, which is otherwise the property of the plaintiff, would become the property of another person. There is no question of recovery of rent or mesne-profits, or of anything else which could bring the case under Section 77 of the Rent Law; and therefore we think that no plea of limitation, either special or general, can be taken in this case. We must likewise remark that this point was not taken before the Judge on appeal: at all events, no notice of it is to be found in his decision.

The second objection is disposed of by the fact that the Judge, in the latter part of his decision, says that he affirms the judgment of the Lower Court in its entirety. Now, that judgment decides upon evidence that the plaintiff had been, and was at the moment of bringing the suit, in possession of the property claimed. Both grounds of special appeal therefore fail, and this application must be dismissed with costs.

The 13th December 1870.

Present:

The Hon'ble F. A. Glover and W. Ainslie, *Judges.*

Mortgage—Redemption—Re-entry.

Case No. 1387 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of the 24-Pergunnahs, dated the 30th April 1870, affirming a decision of the Moonsiff of that District, dated the 27th August 1869.

Chunder Coomar Banerjee (Plaintiff), *Appellant,*

versus

Issur Chunder Neogy (Defendant), *Respondent.*

Baboo Ram Churn Mitter for Appellant.

Baboo Opendro Chunder Bose for Respondent.

A judgment-debtor made over certain plots of land to the decree-holder, covenanting that the land should remain in the possession of the latter, in order that the decretal money might be realized from the usufruct for a period of 8 years; the deed stipulating further that, at the end of that period, if anything should still be found due, the mortgagee should recover the same from the mortgagor, neither the latter nor any one claiming through him being allowed to make any objection. The mortgagor then sold his rights and interests in the land, and the purchaser sued the mortgagee, asking to have the land released on payment of what might still be due of the original debt. HELD that plaintiff could not re-enter on the land before the expiration of the 8 years.

Glover, J.—WE see no necessity for calling upon the respondent's pleader in this case. The plaintiff is the purchaser of an equity of redemption from the mortgagor, Gobind Chunder, against whom there was a decree obtained in the Civil Court by one Kashee Chunder. In execution of that decree, Gobind Chunder was arrested, and in order to save himself from the humiliation of going to jail, he made over certain small plots of land to the decree-holder by an ekrarnamah, in which he covenanted that these lands should remain in the possession of Kashee Chunder, in order that the decretal money might be realized from their usufruct, for a period of 8 years from the date of the ekrarnamah, *viz.*, the 5th of March 1864. The deed contained a further stipulation to the effect that, at the end of these 8 years, if any thing should still be found due on the amount of the original decree, the mortgagee was to recover that amount from the mortgagor, and also that neither the judgment-debtor, the mortgagor, nor any person claiming through him, should be allowed to make any objections to that arrangement. Since the execution of this ekrarnamah, it appears that Gobind Chunder has sold his rights and interests in the land to the present plaintiff, and the plaintiff now comes into Court asking to have the land released to him on payment of whatever might still be due of the original debt.

Both Courts have found against the plaintiff, holding that Gobind Chunder, through whom the plaintiff claims, was bound by the terms of the ekrarnamah, according to which he could not re-enter into the land before the expiration of 8 years.

In special appeal, it is contended that the Lower Appellate Court has misconstrued the ekrarnamah; and that, on the terms of that document, and according to principles of equity, the plaintiff ought to be allowed to re-enter on the land upon payment in full of all that might still be found due under the original decree.

On the objection as to the misconstruction of the ekrarnamah by the Lower Appellate Court, it appears to us that the Judge was right, and has put upon the ekrar the only meaning which it could reasonably bear. The document most distinctly hands over this land to Kashee Chunder to do what he likes with it, and to get what he could from it during a period of 8 years. There is no provision made in it that, if by any chance, such as a succession of good seasons or an increase in value of the produce of the land, the usufruct repays the amount of decretal money before the 8 years expire, Gobind Chunder is to re-enter into possession. In fact, the only stipulation we find in the document is the other way, namely, that if there is anything still due at the end of the 8 years, the decree-holder is to recover that sum from the mortgagor. Then as to equity, we fail to see how the plaintiff is entitled to any particular consideration. He or the person through whom he claims mortgaged the land for a fixed period of 8 years, and put it out of his power to re-enter into the land before the expiration of those 8 years. It may very well be that the mortgagee would not have consented to the arrangement, or have allowed his judgment-debtor to go free upon any other terms but those of the ekrarna-

mah; he might have intended to spend capital upon the land, or he might have been actuated by a desire to become a landed proprietor; but whatever his reasons may have been, we can only go upon the terms of the contract before us, and these are distinct to the effect that for a period of 8 years, neither the mortgagor nor the person claiming through him would have it in their power to re-enter into possession of the land. We have been referred to a passage in Macpherson on Mortgages, 5th edition, page 129, in which it is said that it has been held that even a special agreement, that the mortgagee shall remain in possession until payment of the debt is made in one sum, does not prevent the mortgage from being at an end whenever the mortgagee has received both principal and interest. This passage refers to the case of Punjum Singh *versus* Ameena Khatoon in the 6th Weekly Reporter, page 6.

But that case appears by no means analogous to the present one, and moreover it was a decision upon a contract entered into previous to the passing of Act XXVIII. of 1855. The same remarks apply to the case cited by the pleader for the special appellant of Deen Dyal Sahoo *versus* Gunesh Mahatoon, published in 12 Weekly Reporter, page 528. The decision in that case also turns on the fact that the contract was entered into before the repeal of the usury law. The case of Soorjun Chowdhry *versus* Imambandee Begum, at page 527 of the same volume, is very much analogous to the case now before us, and appears to support the opinion we have come to.

The special appeal must be dismissed with costs.

The 14th December 1870.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Representative of a landlord—Right of action—Section 24, Act X. of 1859.

Case No. 658 of 1870.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 17th January 1870, reversing a decision of the Moonsiff of that District, dated the 30th September 1869.

Lall Mohun Singh (Plaintiff), *Appellant,*

versus

Troyluckhonath Ghose and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Mohendro Lall Shome and *Kedarnath Chatterjee* for Respondents.

The assignee or other legal representative of a landlord has a right to maintain a suit, under Section 24, Act X. of 1859, against a gomashta employed by the latter, for moneys received by the gomashta in the course of his employment.

Mitter, J.—The only question to be determined in this case is, whether the assignee of a landholder can maintain a suit against a gomashta employed by the latter, for moneys received by the gomashta in the course of his employment.

I am of opinion that this question ought to be answered in the affirmative.

Section 24, Act X. of 1859, runs as follows: "*Suits by zemindars and other persons in the receipt of rent* against any agent *employed by them* in the management of land, or in the collection of rents, &c., &c., shall be cognizable by the Collectors, and shall be instituted and tried under the provisions of this Act, and shall be cognizable by no other Court."

The words "*suits by zemindar or other persons in the receipt of rent,*" together with the words "*employed by them*" which come immediately afterwards, might, at the first sight, appear to justify the contention that the operation of the Section was intended to be confined to those cases only in which the plaintiff himself is a *de-facto* landholder, and the person sued is the agent who was employed by him directly in the collection of rents. But, on closer examination, it will be found that such a construction would not be a proper one.

I do not think that it was intended by the Legislature that the right of suing under Section 24 should be confined to the employers only, and not extended to their legal representatives.

The object of the Section was to define particular class of suits, and to appoint particular tribunal for their trial. For fulfilment of this object, it was not necessary for the Legislature to make any special reference to the legal representatives of

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parties expressly mentioned therein; inasmuch as such representatives would be entitled, according to the general principles of law, to stand in the precise position occupied by their predecessors. If a landholder is competent to sue his gomashta under Section 24, the right of his legal representative to sue under that Section would seem to follow as a matter of course. The cause of action would survive to the legal representative if he happens to be the heir, or pass to him by transfer if he is an assignee; and as that cause of action is cognizable by the Collectors only, the Court of the Collector would be the proper Court to try the suit in either case.

The contrary interpretation would be productive of the greatest confusion.

If the assignee of a landholder is not in a position to maintain a suit under Section 24, the Civil Court would be bound to entertain his claim; for he must have his remedy somewhere. But what period of limitation would be applied to such a suit when it is brought in the Civil Court? Section 33 of Act X. of 1859 says that suits under Section 24 may be brought at any time during the continuance of the agency, or within one year from the termination thereof. But if the assignee of a landholder cannot be permitted to sue under Section 24, the provision of Section 33 would be necessarily inapplicable to the suit brought by him in the Civil Court, and this latter suit must, therefore, be governed by Act XIV. of 1859. This Act, however, has not made any special provision for such a class of suits, and we must, therefore, apply to them the six years' rule of limitation prescribed by Clause 16 of Section 1 of that Act. At any rate, it has been held by a Full Bench decision of this Court that the periods of limitation prescribed by Act X. of 1859 have not been altered or modified in any manner by Act XIV. of 1859;* and it is clear that any period of limitation which we might select from the latter Act would be different from that laid down in the 33rd Section of Act X. of 1859. Can it be contended for one moment that it was ever intended by the Legislature that the period of limitation would vary in the two suits, namely, the suit brought by the landholder himself in the Court of the Collector, and the suit brought upon the same cause of action by his legal representatives against the same defendant in the Civil Court?

Several cases have been decided by this Court, in which it has been held that the heirs and other legal representatives of the agents described in Section 24 of Act X. of 1859, as well as those of their sureties, can be sued under that Section in the Revenue Court. These cases, no doubt, are not conclusive upon the point now under our consideration. But they are based upon the same principle of interpretation for which the plaintiff has been contending in this case. The heirs and other legal representatives of the agents or of their sureties have not been specially mentioned in Section 24. But if those persons can be sued under that Section, there seems to be no reason why the right of maintaining such suits should not be extended to the heirs and other legal representatives of the "zemindars and other persons in the receipt of rent."

Suppose, for instance, that a zemindar dies leaving his estate to his heir or to a devisee. Can it be contended for one moment that the heir or devisee would be obliged to sue his ancestor's gomashta in the Civil Court, when it is clear that the ancestor himself could have sued that very gomashta in the Collector's Court at any time before his death, provided that the claim was not barred by the provisions of Section 33 of Act X. of 1859? Or that the suit of the heir or devisee would be subject to a different rule of limitation, although it may be based upon the same cause of action?

Suppose, again, that the zemindaree of a zemindar is sold for arrears of Government revenue, immediately after he has ascertained that the gomashta employed by him in the collection of the rents of that zemindaree has embezzled a large sum of money in the course of his employment. Can it be argued that the zemindar would not be permitted to sue under Section 24 of Act X. of 1859, merely because he is no longer a zemindar in the actual receipt of rent?

I see no reason whatever for adopting such a narrow construction of the Section; and if we extend the operation of that Section to suits brought by the heirs or devisees of landholders, there seems to be no ground for holding that it is not to be extended to their assignees also.

For the above reasons, I would reverse the decision of the Lower Appellate Court, and

* 2 W. R., Act X., p. 21.

remand this case to that Court in order to try it upon its merits. The costs of the litigation up to this stage ought to abide the ultimate result.

Jackson, J.—I also think that this case should be remanded to the Lower Appellate Court to be tried on the merits. The costs of the appeal to this Court and of the Lower Appellate Court to abide the final result of the case.

The 14th December 1870.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Bonds—Joint liability—Contribution.

Case No. 835 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 9th February 1870, reversing a decision of the Moonsiff of Aosgram, dated the 26th August 1869.

Troyluckho Nath Roy (Defendant), *Appellant,*

versus

Kashee Nath Roy and another (Plaintiffs), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

Plaintiffs and defendants 1 and 2 borrowed a sum of money from the defendant No. 4, under a bond by which they made themselves jointly liable. On the expiration of the stipulated time for repayment, the plaintiffs alone executed a second bond in favor of defendant No. 4, and a part of the proceeds of this bond being applied to the liquidation of the debt due under the first bond, the residue was paid to them in cash. They then sued defendants Nos. 1 and 2 for contribution.

HELD that the first bond had been legally paid off, and that the plaintiffs were entitled to sue defendants 1 and 2 for contribution.

Mitter, J.—THE plaintiffs in this case and the defendants Nos. 1 and 2 borrowed a certain sum of money from the defendant No. 4, under a bond by which they made themselves jointly liable for the debt.

On the expiration of the stipulated time for repayment, the plaintiffs alone executed a second bond in favor of defendant No. 4, and a part of the proceeds of this bond being applied to the liquidation of the debt due under the first bond, the residue was paid to them in cash.

This suit has been brought by the plaintiffs for contribution against the defendants Nos. 1 and 2.

The creditor, as has been already observed, was made a defendant in the case, and his answer was that the debt due under the first bond had been satisfied by the plaintiffs in the manner alleged by them.

The defendants Nos. 1 and 2 urged in their written statement that the debt due under the first bond, which is admitted to be a genuine instrument, has not been *de facto* paid by the plaintiffs, inasmuch as there has been no *actual payment of money*, and that the plaintiffs had no right to execute the second bond, which is also admitted to be genuine, without their consent.

I confess that I am utterly at a loss to understand what the defendants Nos. 1 and 2 mean by saying that the plaintiffs had no right to execute the second bond without their consent. But be this as it may, I am of opinion that, upon the admitted facts of this case, the plaintiffs are entitled to recover.

The only question which we have to determine in this case is, whether the joint debt created by the first bond has been actually satisfied by the plaintiffs or not. If this question is answered in the affirmative the right of the plaintiffs to obtain contribution from the defendants Nos. 1 and 2, who were jointly responsible with them for that debt, would follow as a matter of course.

After giving my best consideration to this point, I am clearly of opinion that the contention of the defendants Nos. 1 and 2, who are now special appellants before us, is without any valid foundation.

I think it may be safely affirmed as a proposition of law that the pledge of a man's credit is a *sufficient legal consideration.* If a man chooses to advance money upon the credit of another, the repayment of that money is a matter entirely between himself and his debtor; but the latter is nevertheless competent to deal with the proceeds of the loan in any manner not prohibited by law, for he is, to all intents and purposes, the lawful owner of those proceeds.

In the present case, it cannot be disputed that the plaintiffs had every right to execute the second bond in favor of defendant No. 4, and to take from him the amount covered by it on the pledge of their own personal security. It was the business of the creditor to see whether it would be safe for him to advance money upon such a security; but if the creditor was satisfied with it, the defendants Nos. 1 and 2 can have nothing to do in the matter. It is clear, therefore, that the proceeds of the second bond lawfully belonged to the plaintiffs, and the plaintiffs were, therefore, fully justified in treating those proceeds as their own money.

Now, the plaintiffs say that they have paid off a joint-debt which was due from them and the defendants 1 and 2, with a part of the proceeds of the second bond which they have executed upon their own responsibility, though in favor of the same creditor. The joint-bond has been cancelled. The payment has been endorsed on the back of it in the usual manner, and it is now filed by the plaintiffs in this suit as a document returned to them by the defendant No. 4 as a paid off bond. These facts have been not only proved by legal evidence, but they are admitted by the creditor as well as by the defendants 1 and 2. How then can it be contended that the joint-debt has not been *de facto* extinguished? Or that the plaintiffs have not actually satisfied that debt?

Suppose, for instance, that the plaintiffs had executed the second bond in favor of some body else, and not in favor of the defendant No. 4; and suppose also that they had paid off the joint-debt due under the first bond with the proceeds of the second. Could it have been contended for one moment that such a payment would not have been a legal payment of the debt, or that the plaintiffs could not have sued the defendants 1 and 2 for contribution on the basis of such a payment? I am aware of no authority by which such a position can be maintained, nor can I find out any reason why we should make any distinction between the case supposed and the case now before us, merely because the creditor in whose favor the second bond was executed happens to be the same person who had advanced money under the joint-bond.

It has been said that the plaintiffs have not paid anything in cash out of their own pockets. But this circumstance is of no importance. The debt due under the first bond was satisfied out of money which was legally the money of the plaintiffs, and whether the plaintiffs actually took that money in the first instance from the defendant No. 4, and then paid it back to him in satisfaction of the joint-bond, the fact would still remain the same, namely, that the latter bond has been satisfied in full. The mere ceremony of taking the money first, and then giving it back to the defendant No. 4, cannot affect the question one way or the other; and it would be obviously improper to insist upon the performance of such a ceremony as a *sine qua non* to the validity of the payment.

It has been further urged that the plaintiffs might never be in a position to pay the debt contracted by them under the second bond, and that it would be, therefore, unjust to decree contribution in their favor. This argument also is of no force whatever. The plaintiffs might or might not satisfy the debt due from them under the second bond, or the defendant No. 4 might hereafter excuse them the payment of that debt. But these are contingencies which cannot possibly affect the interests of the defendants 1 and 2. These defendants, it is clear, can never be called upon to pay any part of that debt; and it is equally clear that they cannot be molested any further on account of the debt due from them under the first bond. Whatever doubts might have been possibly entertained upon this last point, the conduct of the defendant No. 4 in this case would be sufficient guarantee against any such molestation; and it is, therefore, a matter of no consequence to the defendants 1 and 2 whether the amount due under the first bond has been paid by the plaintiffs *in cash*, or whether that amount has been included in a subsequent bond for which the plaintiffs alone are liable.

Suppose, for instance, that the defendant No. 4 had sold his rights under the first bond to a stranger, but on credit. Whether the purchaser would pay the purchase-money to the defendant No. 4 or not, it is perfectly clear that he would be fully competent to sue the parties bound by that bond for the amount due under it. But if the purchaser could maintain such an action, I do not see any reason why the defendants 1 and 2 should be permitted to take any exception to this suit for contribution. The plaintiffs have pledged their own credit exclusively by the second bond. The creditor has accepted that pledge as a sufficient satisfaction of the first bond, and there was no law that I am

aware of which could prevent him from doing so. The particular mode in which the plaintiffs have satisfied the *joint* debt can be of no consequence whatever to the defendants 1 and 2, provided that that debt has been satisfied according to law; and I do not see any reason to hold that the first bond has not been *legally* paid off. The defendant No. 4 cannot sue upon that bond any longer, particularly after his admission in this case; and as the defendants 1 and 2 have enjoyed their share of the money which was advanced upon that bond, they are bound in law to give back to the plaintiffs a proportionate share of that money, the plaintiffs having discharged the whole of the *joint* obligation.

Suppose, for instance, that the plaintiffs in this case had been the assignees of the first bond. Suppose also that the defendant No. 4 had given them credit for the purchase-money, either on their own personal security or on the security of some property duly hypothecated to him for that purpose. Suppose even that the defendant No. 4 had made a gift of his right under the first bond in favor of the plaintiffs. Can it be contended that the plaintiffs could not have maintained a suit against the defendants 1 and 4 for their share of the debt? Of course, those defendants would be entitled to plead in such a suit, which is to be brought in the shape of a suit for contribution, that they are not liable to pay anything more than that share, but the action would be clearly legal. It has been held by a Full Bench of this Court that, if one of two persons jointly bound under a decree takes an assignment of the decree from the judgment-creditor, he would not be entitled to recover from his co-debtor anything more than a proportionate share of the amount of purchase-money actually paid. But this ruling does not seem to be any way favorable to the defendants 1 and 2. On the contrary, it recognizes the principle that the assignee of the decree, though he is himself one of the parties bound by it, is entitled to sue his co-debtor for contribution, although it has modified the measure of the contribution to a certain extent. Such modifications, however, would be quite out of place, if the case is the case of a donee or heir, and not that of a purchaser. One of two joint obligors might succeed to the interests of the obligee, either under a testamentary devise from him or as his heir, and it is perfectly clear that the devisee or donee would be entitled to recover from his co-debtor to the full extent of the benefit derived by the latter from the joint loan. But be this as it may, if the plaintiffs could maintain this suit either as the assignee or as the heir of the defendant No. 4, there seems to be no reason whatever why they should not succeed in this case. They have paid the joint-debt, and that debt is no longer in existence. The defendants 1 and 2 have been discharged from their share of the liability for that debt, and the creditor has accepted the second bond as a good and valid exchange for the first. Whether the money due under the second bond is ever paid or not is a matter entirely between the plaintiffs and the defendant No. 4; and as the first bond might have been satisfied by the plaintiffs with the proceeds of another bond executed by them in favor of any other person, I see no reason for holding that the joint-debt has not been *de facto* satisfied by them, merely because it has been paid off with the proceeds of a subsequent bond executed in favor of defendant No. 4.

A faint attempt was made by the pleader for the special appellants to make out that there is something unfair in the mode in which this suit has been brought. But I do not see the slightest ground to justify such a contention. The facts are all admitted, and it is quite clear that the defendants 1 and 2 are perfectly safe from a double demand for the same debt. The plaintiffs and the defendant No. 4 did think it mutually convenient to enter into the transaction represented by the second bond, and there is no law which could prevent them from doing so. By that transaction, a joint-debt admittedly due to the defendant No. 4 both from the plaintiffs and the defendants 1 and 2, has been extinguished or paid off; and it is not even pretended that the plaintiff is a mere benameedar for the defendant No. 4, for in that case a question might have arisen whether a benameedar could sue in his own name. In this state of facts, I do not see that any unfair advantage has been taken against the defendants 1 and 2, either by the plaintiffs or by the defendant No 4, or that there would be any hardship or injustice if we compel the defendants 1 and 2 to pay only that portion of the *joint debt* by which they have been actually benefited.

The last point urged is that the plaintiffs cannot maintain this suit for contribution, inasmuch as they paid off the debt due under the first bond at a time when there was "*no pressure upon them.*" I confess that I

am unable to understand the force of this argument. It is admitted that the debt had become due at the time when it was paid off by the plaintiffs; and as debtors are always under the legal pressure of the obligations entered into by them for the payment of their debts, it is manifestly erroneous to raise any question of voluntary payment in this case. It has been said that the plaintiffs ought to have, at any rate, asked the defendants 1 and 2 to pay their portion of the *joint debt* before they took upon themselves to satisfy that debt in the mode alleged by them. But the plaintiffs were under no legal obligation to do so, nor can their right to recover contribution be affected by the omission. The debt was a *joint debt*, and it is, therefore, clear that the plaintiffs were just as much liable to satisfy it as the defendants 1 and 2, so far as the creditor was concerned. The plaintiffs had a perfect right to discharge that liability without consulting with, or waiting for, anybody; and as for the defendants 1 and 2, they have not been put in a worse position than that in which they would have been if the original creditor had sued them for the *joint* debt. In discharging a debt which has already become due, a man is not bound to wait until legal proceedings are taken out against him, nor is there any reason why he should be obliged to allow the interest upon that debt to accumulate, or even to allow the debt itself to run on (if he is in a position to satisfy it) until such proceedings are taken out.

Much stress has been laid upon the last point on the strength of a decision passed by a Division Bench of this Court; but as that point does not appear to have been taken in any shape in either of the Courts below, I would not allow it to be taken here for the first time. I have already shown that that point is not entitled, in my opinion, to any substantial weight, and it is clear that the plaintiffs might have shown that the alleged state of facts upon which it is based did not actually exist, if it had been urged at the proper time. It would be, therefore, unjust to allow the special appellants to press it now as a substantial ground of special appeal.

For the above reasons, I think that a reference to the Full Bench is not necessary, and I would, therefore, dismiss this special appeal with costs.

Jackson, J.—I agree with my learned colleague in the view which he takes of this case. The real question is whether the plaintiff has actually paid off the bond, so that the lender cannot bring any further suit against the debtors. This fact is determined by the endorsement on the bond itself on which the lender has acknowledged that it has been paid off. Whether it was paid in actual cash or not seems to me immaterial. The debt was due, and had not been paid. The lender was at liberty to come upon the security or the principals in the transaction. The plaintiff, who was the security, paid off the debt, and he is now entitled to recover the money from the original borrower. I would, therefore, also dismiss this special appeal with costs.

The 14th December 1870.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Bond—Mortgage.

Case No. 1226 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 2nd April 1870, reversing a decision of the Moonsiff of Seetakoond, dated the 22nd January 1870.

Nazina Bibee (Plaintiff), *Appellant,*

versus

Juggo Mohun Dutt and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Huree Bullub Bose* for Appellant.

Baboo Okhil Chunder Sein for Respondents.

A bond which hypothecates property for money advanced is a deed of simple mortgage.

Mookerjee, J.—In this case the plaintiff is the appellant, and his statement is that in March 1866 Alima Bibee borrowed a certain sum of money from him, and hypothecated the disputed property under a bond; that he, plaintiff, instituted a suit in January 1867 against Alima Bibee, and obtained a decree; that in execution of that decree, he put up the rights of Alima Bibee for sale, and himself purchased the property on the 7th August 1868; and that, when proceeding to obtain possession of the

purchased property, he was opposed by one Juggo Mohun Dutt, who alleged that he had got a kobalah of this property from Abdool Ruzzack.

The disputed property is admitted to have been originally the property of Abdool Ruzzack. Plaintiff's allegation is that in 1855 this Abdool Ruzzack conveyed the property to Alima Bibee, and that, therefore, Alima Bibee had a right in that property; and he being the purchaser of the rights and title of Alima Bibee, he is entitled to it.

Defendant states that he purchased from the same vendor, *viz.*, Abdool Ruzzack, on the 13th March 1868, Alima Bibee's sale having been cancelled.

The first Court gave a decree to the plaintiff on proof that the purchase of Alima Bibee in 1855 was a valid purchase and was never cancelled, and that in 1868 Abdool Ruzzack had nothing to sell to the defendant, he having already sold his property to Alima Bibee in 1855.

The Judge, without trying the issues that were raised by the defendant on appeal, has disposed of the case upon what he calls a preliminary issue, *viz.*, "whether, supposing for the sake of argument that Alima Bibee did fraudulently cause the cancelment of her purchase of a share from Abdool Ruzzack and its transfer by Abdool Ruzzack to Juggo Mohun, plaintiff can, without proving fraud against Juggo Mohun, himself recover possession from him of the share mortgaged to him (plaintiff) by Alima Bibee." The Court also goes on to doubt whether plaintiff's bond is a mortgage-bond or not, merely because it does not provide any remedy to plaintiff in the event of Alima Bibee making a breach of the conditions therein contained.

In special appeal it has been contended that the Appellate Court has not decided the right issue, *viz.*, whether or not Alima Bibee was a purchaser from Abdool Ruzzack in 1855, and had a subsisting interest in the property when the plaintiff purchased it. He also contends that the Lower Court is wrong in law in holding that the deed upon which the suit for money was brought was not a mortgage-deed.

We think that this contention is good; first, because the real issue in this case was whether Alima Bibee had purchased in 1855, and continued to hold an interest in it when the plaintiff purchased the property. We likewise think that the second point is also good, that when a bond hypothecates property for money advanced, it is a deed of simple mortgage.

We think that the Judge ought to have considered the case on the issues which were legitimately raised in the case, and that this preliminary objection was not at all a valid objection to the plaintiff's claim.

The question of fraud hardly enters into this case, because, if Alima Bibee was the purchaser of this property from Abdool Ruzzack, and had mortgaged this property to the plaintiff, the defendant cannot make a valid purchase from Abdool Ruzzack.

The Judge, of course, will find on the evidence before him whether, at the time when the plaintiff purchased this property, Alima's interest was subsisting in the property or not. But it appears that the Judge has not directed his attention to the real issues in the case, but disposed of it on a preliminary objection.

We decree the appeal, and remand the case to the Judge for a decision on the other issues of the case raised by the defendant's appeal.

Costs will follow the result.

The 14th December 1870.

Present:

The Hon'ble F. A. Glover and W. Ainslie, *Judges.*

Rent suit—Admissions.

Case No. 1435 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 29th April 1870, modifying a decision of the Deputy Collector of that District, dated the 14th January 1869.

Soorendronath Roy (Plaintiff), *Appellant,*

versus

Bhyrub Mundul (Defendant), *Respondent.*

Baboos Mohendro Lall Shome and *Grish Chunder Mookerjee* for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

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In a suit for arrears of rent at enhanced rates, if plaintiff asks for rates admitted by defendant, he must abide by those intended to be admitted; and if he desire to take advantage of the finding of the Lower Court, he must submit to the whole finding taken together.

Ainslie, J.—THE plaintiff sued for arrears of rent at enhanced rates. The Lower Appellate Court has dismissed his suit *in toto*, and he now comes before this Court in special appeal asking for a decree according to the old rates admitted by the defendant. In the course of the argument it appears, however, that what the special appellant is asking for is a decree at certain rates which were admitted to have prevailed a considerable number of years ago, and the defendant asserts that, under some Government order passed in 1851, a reduction was made of one-fourth of the amount of rent previously paid by him, and that since that reduction he has been paying at a proportionately lower rate. Therefore, what he has admitted in this case is only a payment of 12 annas in the rupee on his old rate of rent.

The special appellant urges that, as the Lower Appellate Court has found against the defendant in respect of his right to a reduction of one-fourth, the Court was therefore bound to give him a decree for the arrears due at the admitted rates, without taking into consideration the defendant's claim to reduction.

We do not think that this claim can in any way be entertained. If the special appellant, as he says, comes to ask for a decree at the rates admitted by the defendant, he must be content with these rates as they were intended to be admitted by the defendant, that is to say, with a reduction of one-fourth. If, on the other hand, he claims the arrears due on certain rates to be found by the Court, and to take advantage of the finding of the Lower Appellate Court to the effect that the defendant is not entitled to the reduction claimed by him, he must submit to the whole finding taken together; and as we find that the Lower Appellate Court has come to the conclusion that the plaintiff has given no evidence to prove the rates at which he alleges himself entitled to receive rent from the defendant, and as the special appellant declines to take the offer of the respondent to pay him according to the rates admitted in his written statement, we must, on the finding of the Judge on the facts, dismiss the special appeal with costs.

The 15th December 1870.

Present:

The Hon'ble F. A. Glover and W. Ainslie, *Judges.*

Farming leases—Bonds—Execution.

Case No. 252 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 22nd November 1869, modifying a decision of the Deputy Collector of that District, dated the 10th April 1869.

Issur Chunder Sein (Plaintiff), *Appellant,*

versus

Kenaram Ghose and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Appellant.

Baboos Mohinee Mohun Roy and *Nuleet Chunder Sein* for Respondents.

A party who had obtained a farming lease for a period of years on the understanding that he was to repay himself the amount of a loan made to the lessor out of the surplus usufruct of the estate, not being satisfied with his security, sued on the bond executed by the lessor, and obtained a decree by executing which he realized from time to time nearly the whole sum due.

HELD that the decree substituted another means of recovery for the one previously given; and if he chose to recover the greater part of his due under a decree, which in the place of his farming lease gave him power to sell the property leased to him, he could not retain his former status as well.

Glover, J.—THE plaintiff in this case, the purchaser at an auction-sale of a 2-annas share in mouzah Kistopore from one Alla Hafez, sued the defendant, an ijaradar in possession, for rent due for the years 1272-73-74, B. S., amounting with interest to Rupees 749-10.

The defence was that the farm had been given for a period of 11 years, on the understanding that the ijaradar was to repay himself the amount of a loan (Rupees 4,000) made to Alla Hafez out of the surplus usufruct of the estate, at the rate of 753 rupees yearly, and that therefore he was not bound to pay rent to his vendor's representative until the lease had expired.

The first Court thought that the defendant had abandoned his lien, and gave plaintiff a decree in full. But the Judge, on appeal, reduced the amount to a 2-annas share of Rupees 910-4-3 for the years 1272-73-74,

B. S., holding that the lien was not extinguished.

It appears from the record that, some time after the assignment, the defendant, not being satisfied with his security, sued on the bond executed to him by Alla Hafez, and obtained a decree on the 5th of August 1864. He afterwards took out execution of his decree, and obtained from time to time satisfaction of nearly the whole sum due, Rupees 694 (including costs and interest) being the balance unpaid at the time of the last taking out of execution. The defendant's alleged reason for suing on the bond was that he had been dispossessed of 11½ annas of the ijarah land, and did not consider the remaining 4½ annas a sufficient security. He now wishes to retain possession of this latter share as security for the balance of his bond-debt, and to pay no rent until that balance is extinguished.

The only question we have to consider in special appeal is, whether the defendant's lien is still in existence, or has been abandoned. And we agree with the Court of first instance that there is now no lien in the form in which defendant claims one.

The defendant, when he sued on his bond, elected to take a money-decree with power to execute it on the mortgaged property. He executed this decree on several occasions, not by bringing the mortgage-land to sale, but in other ways against his judgment-debtor's property, and succeeded in recovering almost all that was due to him. It was only when he was asked for rent that he fell back upon an alleged lien, his previous conduct having been altogether inconsistent with the supposition that he held, or wished to hold, any such incumbrance. The decree obtained by the defendant substitutes another means of recovery for the one previously given to him; and if he chose to recover the greater part of his due under a decree, which in the place of his farming lease gave him power to sell the property leased to him, he cannot retain his former status as well. The decree entirely changed his position; and as he sought the change, he must, we think, abide by it.

The result of his holding both positions, as the Judge thinks he does, would be that, in the question of accounts which would necessarily arise out of the circumstances of the case, the Revenue Court would be deciding a question regarding the execution of a decree of the Civil Court, in other words, interfering in a matter where it had no jurisdiction.

We think that the appeal should be allowed, and the judgment of the Deputy Collector restored with all costs.

The 15th December 1870.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Certificate under Act XXVII. of 1860—Jurisdiction.

Case No. 331 of 1870.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 29th August 1870.

Juggessur Dhur and others (Petitioners), *Appellants,*

versus

Bhugobutty Dassee (Opposite Party), *Respondent.*

Baboo Woomesh Chunder Banerjee for Appellants.

No one for Respondent.

A certificate having been granted by a Zillah Judge under Act XXVII. of 1860, application was made to have it cancelled on the ground that the Judge had no jurisdiction to grant it, inasmuch as the deceased, at the time of his death, was not ordinarily residing within the jurisdiction of the zillah.

HELD that the Judge should have called on the applicant to give evidence in support of his allegation, and that he should have served notice on the opposite party to show cause why the certificate should not be recalled.

Loch, J.—WE think that the papers must go back to the Judge. On the 25th of July 1870, the Judge granted a certificate under Act XXVII. of 1860, to one Bhugobutty, the widow of Nuttobur.

On the 29th of August following, the petitioner before us applied to have the certificate cancelled on the ground that the Judge had no jurisdiction to grant it, inasmuch as the deceased, at the time of his death, was not ordinarily residing within the jurisdiction of the 24-Pergunnahs, but in the town of Calcutta. The Judge thought that he could not re-open the case, and he therefore rejected the petition.

We think, however, that on representation being made by the petitioner to the Judge, he might have called on the petitioner to give evidence in support of his

allegations, and served notice on the opposite party to whom the certificate had been granted to show cause why it should not be recalled.

We direct that the papers be sent back to the Judge, in order that the applicant may be allowed to give evidence in support of his statement; and should he satisfy the Judge that his allegation is correct, and the other side be unable to show cause against it, the Judge will recall the certificate granted by him to Bhugobutty.

The 15th December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Mortgage—Redemption—Decree—Restitution.

Case No. 334 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 18th July 1870.

Shah Koondun Lall and another (Decree-holders), *Appellants,*

versus

Ram Rucha Singh and others (Judgment-debtors), *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

Where a decree under which mortgagors obtained possession of mortgaged property is reversed, the mortgagees are entitled to be re-placed in possession and to get complete restitution, and to be placed in the same position as they were in before the erroneous decree was made—even if the decree reversing the erroneous decree does not provide that the mortgagees should recover possession.

Jackson, J.—In this case, the pleader for the appellant and the pleader for the respondent who appear, concur in urging that the Judge has mistaken what it was his duty to do. It appears that, under the decree of the late Sudder Court, the mortgagors, who are now the parties against whom execution of the decree of the Privy Council is being carried on, got possession of the property which had been mortgaged; but the Privy Council reversing that decree directed that the suit should be dismissed and made certain orders as to costs. In the present case, the mortgagees apply to be put in possession again, and the mortgagors object that they are not entitled to recover possession as the decree of the Privy Council does not provide for that. In carrying out the decree of the Privy Council, it appears to us the mortgagees were entitled to be replaced in possession and to get complete restitution, and so to be placed in the same position they were in before the erroneous decree had been made.

It appears that a separate suit has been preferred and is now pending, in which all questions regarding the amount due for principal and interest will be decided. It is, therefore, unnecessary to go into those questions in the present case. The Judge ought to have granted execution, so as to replace the mortgagees in the same position as before the suit, and allowed them the rents and profits which they would have had if they had been in possession. It was impossible in this case to give any set-off; if the other case had been decided that might have been done, but as the other case is pending no set-off can be allowed. The Judge's decision must, therefore, be set aside, and he will be directed to carry out these instructions. The appellant is entitled to get the costs from the mortgagors.

The 15th December 1870.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Jurisdiction.

Case No. 717 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 10th February 1870, affirming a decision of the Deputy Collector of that District, dated the 24th November 1869.

Hurish Chunder Roy and others (Defendants), *Appellants,*

versus

Shonashee Dalal (Plaintiff), *Respondent.*

Baboo Luleet Chunder Sein for Appellants.

No one for Respondent.

A suit against a gomashta and others claiming under pottahs from the zeminder, in which the

party entitled to receive rent had not been sued, was held not to be cognizable by the Revenue Courts.

Kemp, J.—THIS appears to us to be a very clear case. The suit was brought by the special appellant under Clause 6, Section 23 of Act X. of 1859. He appears to have sued the gomashta and three other parties who claim under pottahs from the zemindar. The party entitled to receive rent had not been sued. This suit, therefore, was not a suit cognizable by the Revenue Courts.

The decision of both the Lower Courts must be reversed and the appeal decreed, but without costs.

The 15th December 1870.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Issues—Appeal—Witnesses.

Case No. 783 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 4th February 1870, affirming a decision of the Deputy Collector of Serampore, dated the 30th July 1869.

Punchanun Roy (Defendant), *Appellant,*

versus

Troyluckho Mohinee Dossee (Plaintiff), *Respondent.*

Baboos Bhowanee Churn Dutt and *Prosunno Coomar Roy* for Appellant.

Baboo Romanath Bose for Respondent.

In a suit for delivery over to plaintiff of papers said to be in the possession of defendant, the answer of the latter was that he had made over the papers to plaintiff's son. This plea was put in issue in the first Court, which found that some papers had been delivered as alleged, and made a decree ordering the delivery of certain other of the papers. In appeal the attention of the Judge was principally directed to the point whether the receipt of the papers by the plaintiff's son was a receipt by him as plaintiff's agent.

HELD that this point was a departure wholly from the case made below, and ought not to have been entertained in appeal.

A party to a suit is not bound to go into the enemy's camp and examine witnesses who come therefrom.

Paul, J.—IN this case the plaintiff, who is a purdah lady, sues the defendant who was her naib for delivery over to her of certain papers said to be in the possession of the defendant, and with reference to date ranging from the year 1270 to 1272 and from 1272 to 1275. The papers, I believe, are described in a most general form in the plaint, whereas they ought to have been specifically mentioned. The defendant's answer was that he had made over all the papers sued for to the plaintiff's son, Kali Prosunno. On this head the defendant was examined as a witness on his own behalf, and he stated that he had delivered over all the papers from the year 1270 to the year 1275 to Kali Prosunno, the plaintiff's son. He further examined two witnesses in support of this part of his case. The issue in the first Court was whether or not the defendant had delivered over to Kali Prosunno, the son of the plaintiff, the papers from the year 1270 to the year 1275. The first Court found that the defendant had delivered the papers from the year 1270 to 1272 to the plaintiff's son, but that the evidence as to the delivery of the remaining papers from the year 1272 to the year 1275 was not satisfactory to the mind of that Court; and hence a decree was made in respect of certain papers of the years 1270-1273, which were ordered to be delivered up by the defendant to the plaintiff. This decree is very vague. However, it is not necessary now to amend it as the case is about to be sent back for a full trial. In the Appellate Court, the mind of the Judge seems to have been principally directed to the point, whether the receipt by Kali Prosunno of the papers alleged to have been received by him from the defendant was a receipt by him as the agent of the plaintiff. On this, he found as to what I may call the papers admittedly delivered over, namely, the papers from 1270 to 1272 inclusive, that they had not been delivered to Kali Prosunno as the agent of the plaintiff, inasmuch as there was no sufficient proof of Kali Prosunno's agency. The point, namely, as to the agency of her son, thus taken was a departure wholly from the case made in the Court below, and ought not to have been entertained by the Judge on appeal. The Judge, on appeal, was restricted to the trial of the sole issue of fact in the case, namely, whether the papers from 1270 to 1275 had been delivered to Kali Prosunno or not.

On this issue, as far as I can discover, no evidence whatever was given by the plaintiff, and the defendant gave such evidence as I have previously described. I cannot find that the Judge has in any way adverted to or considered the evidence given

by the defendant and his witnesses, and, in his having omitted to do so, there has been an error of law in the investigation of the case, which may have produced an error in the decision on the merits. On these grounds, therefore, the suit must be sent back.

It is necessary to make a few observations in order to enable the Judge of the Court below to decide the case clearly and satisfactorily; and also in the event of his giving the plaintiff any decree, to frame his decree properly.

It appears that the defendant obtained a receipt from the plaintiff's son on the occasion on which he alleges he made over the papers to the plaintiff's son. This receipt should be sent for from the record of the case in which it is filed, and should be examined, carefully looked into, and considered upon such evidence as the parties may be desirous to produce. It may be observed that the fact of the defendant not having taken the evidence of Kali Prosunno, the son of the plaintiff, ought not to prevail against him; because a party to a suit is not bound to go into the enemy's camp and examine witnesses who come therefrom. Whilst the plaintiff's son was alive, and the defendant on oath had stated that he gave the papers to him, it was the bounden duty of the plaintiff to have called Kali Prosunno to contradict that evidence if liable to be controverted; and if the death of the plaintiff's son affords the defendant any facility in proving his case, the plaintiff must thank herself entirely for it.

The case is, therefore, remanded for a full trial of it upon the only issue raised, namely, whether the defendant had delivered over all, or any, of the papers from the year 1270 to the year 1275 to the plaintiff's son; and in the event of the Lower Court coming to the conclusion that the plaintiff is entitled to a decree, that the Court do clearly specify in its decree what papers are to be given up, in order that the defendant may clearly know what order he is bound to obey.

The appeal is, therefore, decreed with costs.

Kemp, J.—I entirely concur.

The 15th December 1870.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Tenancy—Rights.

Case No. 1189 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 9th May 1870, affirming a decision of the Moonsiff of Noornuggur, dated the 5th July 1869.

Ooma Lochun Mojoomdar (one of the Defendants), *Appellant,*

versus

Nittye Chand Poddar and another (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Anund Chunder Ghossal* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

A tenant holding over for some time without renewal of his lease is entitled, whether he has any right of occupancy or not, to retain possession of his tenure until either he resigns it or is ejected in due course of law.

Jackson, J.—In this case the plaintiff, alleging himself to be a tenant, sought to recover possession of 2 gundas 1 cowrie and 1 krant of land. It is not quite clear whether it is the whole of his tenure or whether it is only a portion of his tenure. The plaintiff alleged that he had been dispossessed from it by the act of one of the defendants who was a tenant on the land, but who had denied his tenancy to the plaintiff, and had attorned directly to the zemindar of the estate.

The defendant, sub-tenant, denied that he ever held land under the plaintiff, and pleaded also that the plaintiff had relinquished the land. The landlord also came in and was made a party to the suit, and he admitted that the plaintiff had formerly been a tenant, but stated that his tenancy was under a temporary lease which had expired; the landlord alleged also that the plaintiff had by written deed relinquished his right to the land.

The first Court decreed the suit in favor of the plaintiff, being of opinion that the plaintiff had proved his permanent ryotee tenure—the tenure existing from the time of his

ancestors. The first Court was of opinion, also, that the plaintiff had not resigned the land, and that the document put in as the deed of relinquishment was not a genuine document.

The original defendant in the case preferred no appeal, but the landlord appealed to the Subordinate Judge, who confirmed the decree of the Moonsiff disbelieving the deed of relinquishment, and disbelieving also that the plaintiff in any way executed or authorized the execution of the temporary lease, giving no opinion on the question as to whether this was a permanent ryotee tenure or whether it was not so.

A special appeal is preferred from that decision to this Court. Several points were urged in the course of it, referring more specially to the question as to whether the plaintiff's holding was a permanent holding and one in which he had a right of occupancy. We think that that question was not decided by the Lower Appellate Court, and it does not seem that it was necessary that it should be decided for the purposes of this suit, it being admitted that the plaintiff was the ryot, even though it may be that he had been holding over for some time without any renewal of the lease. Whether he had any right of occupancy or not, still, if he was the tenant, he was entitled to recover possession of the land from which the sub-tenant ejected him, and to retain possession of that tenure until either he resigned it or he was ejected from it in due course of law by the zemindar. There was no pretence in this case that the landlord had ejected him from the tenure, but that it was said that the plaintiff resigned it. That point was, of course, the important point as between the plaintiff and the landlord; if the plaintiff had not resigned the tenure, he would be entitled to hold it until he was ejected.

It is said that if we give a decision restoring the plaintiff to possession, the effect of it will be that in any future suit to recover possession, the plaintiff will plead that the Civil Court has determined his right under the pottah. It is quite impossible to say what view any future Court may take of this decision. But I cannot understand how if we declare that the plaintiff is now entitled to be restored to possession, it will result that no future Court will enquire whether under different circumstances the defendant can be ejected. The ground upon which the plaintiff has been restored to possession in this case is that the tenancy has not been determined. If the landlord thinks that he is entitled to determine his tenancy and to turn him out, he can take proceedings to that effect. It is impossible for us to say what the result may be.

The special appeal is dismissed with costs.

Mookerjee, J.— I concur.

The 15th December 1870.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Cause of action.

Case No. 1246 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 4th April 1870, affirming a decision of the Moonsiff of that District, dated the 21st February 1870.

Goroo Dass Nag and another (Plaintiffs), *Appellants,*

versus

Motee Lall Nag and others (Defendants), *Respondents.*

Baboo Ubinash Chunder Banerjee for Appellants.

Baboo Gopal Lall Mitter for Respondents.

Certain property having descended from R to K and from K to one B, a minor who has disappeared, a suit was instituted on the allegation that the great grandsons of K were in possession, and that they had broken down the family houses, and were about to alienate the estate, the suit being brought partly to preserve the *corpus* of the estate and partly from a fear that if the minor did not turn up within 12 years, plaintiff might be barred by limitation.

HELD that plaintiff had come into Court without a cause of action.

Kemp. J.—THIS was a suit on the part of the plaintiff, special appellant, alleging that one Biressur Nag disappeared in 1269 and has not been heard of since. The property in dispute appears by the plaint to have descended from Ram Tonoo Nag to Kalee Pershad Nag, and from Kalee Pershad Nag to Biressur, who is said to be a minor at the present time. The plaint goes on to allege that the great grandsons of Kalee Pershad Nag are in possession of the property; that they have broken down and

otherwise destroyed the family houses; and that they are about to alienate the estate. The plaintiff, therefore, partly to preserve the corpus of the estate of the minor intact, and partly from a fear that if the minor do not turn up within twelve years, he, the plaintiff, may, from that circumstance, be barred by the statute of limitation, institutes the present suit.

Both Courts have found that the suit will not lie. In this Court, Section 3 of Act XL. of 1858 has been quoted, and it has been pressed upon us that the plaintiff is entitled to be heard as next of kin, or at all events as claiming a right to have charge of the property in trust for the minor. It is further contended that the property is of small value, and that the Court may allow the plaintiff to institute this suit on behalf of the minor, although a certificate of administration has not been granted.

We think that this suit was not brought on that footing at all; for had it been so, no doubt the Court would have put the plaintiff to some terms with reference to costs. The plaintiff has come into Court without a cause of action, and the Lower Courts were perfectly correct in dismissing the suit.

The special appeal is dismissed with costs.

Paul, J.—I concur.

The 16th December 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Pre-emption—Dividing a contract.

Case No. 1222 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 26th March 1870, reversing a decision of the Moonsiff of Gindwarrah, dated the 28th December 1869.

Shaikh Izzutoolla (Plaintiff), *Appellant,*

versus

Shaikh Bhikaree Mollah (one of the Defendants), *Respondent.*

Babu Rajendro Nath Bose for Appellant.

Babu Kishen Dyal Roy for Respondent.

In suing on the ground of pre-emption for property covered by a bill of sale, a plaintiff has no right to divide the bargain; but must either take up the whole contract or give up his right of pre-emption.

Mitter, J.—We think the plaintiff had no right to divide the bargain and to sue for a portion of the property covered by the bill of sale on the ground of pre-emption. The plaintiff must either place himself in the position of the purchaser by taking up the whole contract, or he must give up his right of pre emption. This view was taken by a Division Bench of this Court in the case of Rughoonundun Singh *versus* Mujbooth Singh, reported at page 399, Volume X., Weekly Reporter, and the Lower Appellate Court was, therefore, right in dismissing the plaintiff's claim, the plaintiff having sued for possession of one out of five plots of land sold by defendant 1 to defendant 2. It is to be further observed that these five plots constitute one indivisible holding, and this fact throws an additional difficulty in the plaintiff's way, for the plaintiff cannot ask the Court to divide the jumma into two parts according to his own convenience.

It is unnecessary for us to express any opinion on the other point involved in this special appeal, *viz.*, whether the right of pre-emption under the Mahomedan Law extends to a case in which a mere right of occupancy has been sold. We may, however, remark that no case of that nature has been brought to our notice by the pleader for the special appellant, though he was asked to mention any.

We dismiss the special appeal with costs.

The 16th December 1870.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Arbitration—Procedure—Jurisdiction.

Case No. 1262 of 1870.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 4th March 1870, modifying a decision of the Subordinate Judge of that District, dated the 21st November 1868.

Taranath Chowdry (one of the Defendants), *Appellant,*

versus

Manick Chunder Doss (Plaintiff), *Respondent.*

Baboo Grish Chunder Ghose for Appellant.

No one for Respondent.

Whatever matters parties to a suit may agree to refer to arbitration, they can refer such matters, or any of such matters, as are in difference between them in the suit; and the Court, in passing judgment on the arbitration-award, must confine itself to the plaintiff's claim and give a decision thereon.

Jackson, J.—THIS suit was brought by the plaintiff to obtain from Bistoo Prea Dossee, one of the defendants, a bill of sale for certain lands which the plaintiff alleged that Bistoo Prea Dossee had agreed to sell to him for Rupees 1,000, and for which he had paid Rupees 500 as earnest money, notwithstanding which she had sold them by another deed to the other defendants, Nos. 2 and 3.

The first Court dismissed the plaintiff's claim. It was appealed, and before the case came up for trial before the Lower Appellate Court the matter was referred, at the request of the parties, to arbitration. The arbitrator decided, in the first place, that the story of the plaintiff as regards the agreement of sale was false On this award reaching the Judge, the Judge held that the award was incomplete, inasmuch as it did not decide whether Bistoo Prea Dossee had sold those lands by another deed to the other defendants, Nos 2 and 3. The Judge states that all parties had agreed that all the matters in dispute between them should be referred to the arbitrator, and considering that that was one of the points referred, he remitted the award under Section 323 of Act VIII. of 1859 to the arbitrator, and called upon him to decide whether the sale by the defendant No. 1 to the defendants Nos. 2 and 3 was good or not. The arbitrator then decided that that sale was not valid, because the actual purchaser was proved to be the defendant Tara Chand, though the deed had been drawn up in the name of Kaleeka Pershad, and because if the vendor had known the real purchaser, she would not have sold the land. Upon this finding the Judge pronounces the following judgment:—

"The arbitrator's decision is confirmed "Judgment is, therefore, passed according to "the award. As I read the award, neither "plaintiff nor any defendant is to get a ko-"balah, the moneys paid as stated in the "award are to be refunded without interest, "and every body bears his own costs of "arbitration. &c., &c., as in the award."

Defendants Nos. 2 and 3 are special appellants to this Court, and it is urged on their behalf that the Judge should have dismissed the plaintiff's claim on the first award of the arbitrator, and that he could not by law remit the case for further arbitration, and therefore that the judgment which should have been passed by the Judge in this case was simply to dismiss the plaintiff's suit.

It appears to us that the Judge went out of his way, and to say the least, if he did not go against the law, he most unnecessarily remitted this case for the second time to the arbitrator. The award of the arbitrator, on the first occasion, was quite sufficient for the disposal of the suit. Whatever matters the parties may agree to refer to arbitration, they can only apply to the Court to refer such matters as are in difference between them in the suit, or any of such matters. As between the plaintiff and the defendants in this case, the matter in difference was as to whether the plaintiff had obtained a prior agreement for sale from the defendant No. 1, and whether he was entitled to a decree that the property should be sold to him. The arbitrator having found that he not only had not obtained any prior agreement, but that he had not obtained any such agreement at all, and that the plaintiff's allegation was altogether false, there was an end of the plaintiff's case, and the Judge should have dismissed his case.

The Judge states that to save further litigation he thought it right to remit the case to the arbitrator, requesting him to decide as to whether the sale from the defendant No. 1 to the defendants Nos. 2 and 3 should stand. But as the case of the plaintiff had already been disposed off, that was no longer a matter in difference between the plaintiff and the defendants. Whether the defendant No. 1 and the defendants Nos. 2 and 3 agreed amongst themselves that any matter should be referred to arbitration, was not a matter with which the Court had anything to do: and still less is it a matter upon which the Court can pass any judgment. The Court in passing judgment must confine itself to the plaintiff's claim, and must give a decision upon the plaintiff's claim.

The decision which has been passed by the Judge, to the effect that the defendants Nos. 2 and 3 are not entitled to a kobalah

and that the money paid by them, as stated in the award, is to be refunded without interest, must be set aside; the order that the plaintiff cannot obtain a kobalah from the defendant No. 1, and that defendant No. 1 will repay the 500 rupees received from him, is confirmed. The plaintiff's suit is dismissed.

The appellant will pay his own costs in this Court, as the respondent is not to blame for the necessity under which he was to apply to this Court. But he will obtain all his costs in the Lower Courts according to the first award of the arbitrator, as well as his costs under the arbitration-proceedings.

The decision passed by the Judge is modified to that extent.

Mookerjee, J.—I concur. I would merely add that the defendant Bistoo Prea has not filed any written statement in this case in the Court of first instance, nor does it appear that she denied the execution of the kobalah in favor of the defendant Kaleeka Pershad. There was, therefore, no point at difference between the defendant No. 1 and the other defendant, and that, for that reason also, the Judge was not right in law in remitting the case to the arbitrator under Section 323. I also find that, in the first award, the arbitrator has distinctly stated that the kobalah to Kaleeka Pershad is admitted, and is proved to his satisfaction. Consequently, the first award was complete in every way, and there was no necessity of remitting the case back again to the arbitrator.

The 16th December 1870.

Present:

The Hon'ble G. Loch and G. C. Paul, *Judges.*

Resumption—Settlement—Rent.

Case No. 1511 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 30th April 1870, affirming a decision of the Deputy Collector of Satkhirah, dated the 28th December 1869.

Woomanath Roy Chowdhry (Defendant), *Appellant,*

versus

Debnath Roy Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Anund Chunder Ghossal and *Pitambur Chatterjee* for Appellant.

Mr. R. T. Allan and *Baboo Ashootosh Dhur* for Respondents.

Where land is resumed and assessed by a Settlement Officer, the tenant is bound to pay rent at the rate assessed by the Settlement Officer.

Loch, J.—We think in this case that the judgment of the Lower Courts must be confirmed.

It appears that the lands for which rent is now demanded were a resumed portion of the Soondurbuns, and after the resumption they were originally settled by Government with the defendants in this case, who claim the right of settlement as gateedars. This appears to have taken place some time in 1272 or 1273. On the application of the present plaintiffs that settlement was set aside, and a fresh settlement was made with the plaintiff of 3,750 beegahs, at the rate of 9 annas per beegah.

It is contended before us, first, that, as up to the time of the fresh settlement, the defendants had been holding these lands from the plaintiff at the rate of 6 annas 8 pie per beegah, the plaintiff cannot, on the strength of the settlement, demand a higher rate of rent.

We think this erroneous. The land having been resumed and assessed by the Government, the tenant ought to pay at the rate assessed by the Settlement Officer, and the plaintiffs are entitled to a decree at that rate.

Another objection taken is that the plaintiffs cannot sue alone, as there are other share-holders. This objection is of no weight. The defendant knew what were the shares of the co-sharers, being himself a co-sharer, and has heretofore paid rent.

Another objection is that he is not in possession of 3,750 beegahs, but only of 3,200 beegahs, and that another jotedar is in possession of the remainder. This was for him to prove. In the first Court he accepted these two issues:—

1st.—What is the amount of the defendant's rent?

2nd.—For what amount is he liable?

Having accepted these two issues as the only ones to be determined in the case, he cannot now raise this objection.

A further objection is that the plaintiff cannot demand rent at 9 annas without having served notice according to Act X. But in a case of this kind, no notice is required. The rate, as now found, being fixed by the Settlement Officer of Government, the defendant had full notice, and from the time of the assessment he was bound to pay at the rate assessed.

The appeal must be dismissed with costs.

Paul, J.—I concur. It appears to me that, had the resumption *roobakaree* been read carefully and with a mind to understand its true meaning, not distorted for the purpose of supplying specious arguments for supporting a special appeal, this appeal would never have been put upon the file.

The 19th December 1870.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Fresh suits—Jurisdiction—Section 97, Act VIII. of 1859.

Case No. 104 of 1870.

Regular Appeal from a decision passed by the Deputy Commissioner of Lohardugga, dated the 3rd March 1870.

Argoon Singh (Plaintiff), *Appellant,*

versus

Huree Hur Singh Mondah and another (Defendants), *Respondents.*

Mr. C. Gregory for Appellant.

Mr. R. T. Allan for Respondents.

Civil Courts have no power to sanction the bringing of a fresh suit, except under Section 97, Act VIII. of 1859.

Kemp, J.—THIS is a suit on the part of the plaintiff, appellant before us, who appears to be an auction-purchaser in execution of a decree, and who bought the rights and interests of one Huree Hur Singh Mondah, the defendant No. 1. He states that he got possession of the property in dispute on the 15th of May 1868 by proclamation, and that he was dispossessed on the 20th of May of the same year, so that his alleged occupancy lasted 5 days. The defendant, Huree Hur Singh Mondah, alleged that the plaintiff's claim is grossly false, that he had no right or interest whatever in the property, and that the title is with the other defendants. The other defendants also denounce the plaintiff's claim as altogether false.

It is quite unnecessary to go further into the merits of the case, because the Deputy Commissioner of Ranchee, Chota Nagpore, has dismissed the plaintiff's case, because he failed to produce his witnesses before the Court, although he admittedly offered to bring them himself into Court. The Deputy Commissioner says that, as the plaintiff has failed to produce his witnesses, he cannot expect the Court to assist him in the matter; and having failed to produce any evidence in support of his claim which is denied by the defendants, his suit must be dismissed. But at the end of his judgment, the Deputy Commissioner accords his sanction to the institution of a fresh suit by the plaintiff, provided sufficient excuse for the neglect pointed out can be made to his Court.

We find that the plaint was filed on the 11th of August 1869, the day fixed for hearing was the 1st of December of the same year, and the decision was passed on the 3rd of March 1870. As pointed out in the course of the argument by my learned colleague, Mr. Justice Paul, there are two modes by which a party can bring his witnesses into Court; he can either secure their attendance by process of Court or produce them himself. It is clear in this case that the plaintiff undertook to produce his own witnesses. It is said for the plaintiff that the witnesses were in Court, but that, owing to there being no presiding authority ready to record their evidence, their depositions were not taken on the day on which they were present. There is nothing on the record to show that this is the case; but be this as it may, the plaintiff, having throughout offered to bring his own witnesses, had ample time between the day fixed for hearing and the day on which the decision was passed to bring in his witnesses, or to move the Court to send for them through its own agency, and further he might have asked the Court to grant him further time in order

to enable him to produce them. He did not take any of these steps, nor, on the case coming on for decision, did he protest against its being taken up in the absence of his witnesses or raise any objection that he was taken by surprise when the case was taken up for decision by the Deputy Commissioner.

We do not think that this is a case in which we should assist the plaintiff who has clearly been guilty of laches. But we do not think that the Deputy Commissioner was right in giving sanction to the plaintiff to bring a fresh suit on the same matter. The Courts have no power to sanction the bringing of a fresh suit except under Section 97 of Act VIII. of 1859. Under that Section, the plaintiff was bound to satisfy the Court, before final judgment, that there were sufficient grounds for permitting him to withdraw from the suit, with liberty to bring a fresh suit for the same matter. If he had done so, it would have been competent for the Court to grant that permission on such terms as to costs or otherwise as the Court deemed proper, but this was not the course pursued by the plaintiff.

We, therefore, dismiss this appeal, and cancel so much of the decision of the Deputy Commissioner as accords sanction to the institution of a fresh suit upon the same subject-matter.

The 19th December 1870.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Set-off—Section 121, Act VIII., 1859.

Case No. 151 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 10th January 1870.

Poorno Chunder Roy (Defendant), *Appellant,*

versus

Beharee Lall Mookerjee (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Issur Chunder Chuckerbutty* for Appellant.

Baboos Ashootosh Dhur and *Kalee Mohun Doss* for Respondent.

Under Section 121, Act VIII. of 1859, a defendant, desirous of setting off against the claim of the plaintiff the amount of any payment made by him on plaintiff's account, is bound to tender a written statement containing the particulars of his demand.

Kemp, J.—This is a suit on a bond. The bond is for a sum of Rupees 25,000, of which the plaint states that a sum of Rupees 13,662 was paid on the 20th Srabun 1270, leaving a balance with interest up to that date, of Rupees 11,404-10-8, as principal, which, with Rupees 8,139-2-4 as interest to date of suit, makes up the total amount claimed Rupees 19,543-13-0. The suit was filed on the 13th July 1869. It appears from the proceedings of the Lower Court that two dates were fixed for the hearing of the case; first the 30th of September, and subsequently the 23rd of December; the suit being decided on the 10th January 1870.

The defendant, on the 25th of September, first filed a petition asking the Court to give him time to file his written statement, and time was then granted him, but no written statement was filed. On the 28th of December, another petition was filed by the defendant admitting the receipt of the 25,000 rupees, the sum recited in the bond, but stating that, subsequent to the transaction, 6,000 rupees had been paid to one Ranee Lalun Monee on an assignment of the plaintiff, and the Court was, therefore, asked to cite the said Ranee Lalun Monee as a witness; the reason given for not citing her before being that her name was omitted from the list of witnesses by mistake.

The Subordinate Judge decreed the plaintiff's suit, and, on review, adhered to his first judgment.

The appellant has been heard through Mr. Allan. We think that this appeal must be dismissed. The defendant, in his petition of 28th December, distinctly admits the debt, but he states in that petition that by an assignment of the plaintiff he paid 6,000 rupees to the aforesaid Ranee Lalun Monee. Now, under Section 121 of Act VIII. of 1859, if the defendant desired to set off against the claim of the plaintiff the amount of any debt due to him by the plaintiff for any payment by him on the plaintiff's account, he was bound to tender a written statement containing the particulars of his demand. It is clear to us that the defendant wilfully evaded this Section, and attempted by an unverified petition to obtain a set-off which

he was bound under the Section already quoted to verify by written statement.

If we thought that there was anything in this statement of the defendant with reference to this set-off, we should perhaps have been disposed to give him an opportunity to prove it; but from his conduct in the Court below, we have no doubt in our minds that this was merely an attempt to put off the plaintiff's just claim. Had there been any truth in the plea of set-off, the defendant would, no doubt, have tendered under Section 121 a written statement containing the particulars of his demand. Not having done so, we think that the Court below was right in refusing to summon the Ranee, or to admit the alleged set-off of the defendant. The appeal is, therefore, dismissed with costs.

Paul, J.—I am of the same opinion.

The 19th December 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Plaint—Technical defects—Section 42, Act X., 1859.

Case No. 1114 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 3rd March 1870, affirming a decision of the Deputy Collector of that District, dated the 27th September 1869.

Syud Reza Ali (Plaintiff), *Appellant,*

versus

Poornanund Chuckerbutty (Defendant), *Respondent.*

Mr. C. Gregory for Appellant.

Mr. R. E. Twidale for Respondent.

A suit under Act X. of 1859 should not be dismissed, after the plaint has been admitted and the parties have appeared, on such a technical ground as that the plaint does not specify the quantity of land in the defendant's possession, for the plaint may be returned under Section 42 or allowed to be amended.

Mitter, J.—We do not think that the first ground taken by the appellant is of any force. There is no proof given to show that the petition for re-hearing was filed more than 15 days after the first process in execution was *executed.* But we are clearly of opinion that the Lower Courts have committed an error in law in dismissing the plaintiff's suit simply on the ground that the plaint did not contain a specification of the quantity of land in the possession of the defendant, and that there was some error in the plaint as to the description of the defendant's place of abode. If the plaint did not contain any specification of the quantity of land alleged to be in the defendant's possession, the Court might have, under Section 42 of Act X. of 1859, returned it to the plaintiff or allowed it to be amended. But after the plaint had been received and admitted, and after the defendant had appeared, the Lower Courts had no right to dismiss the suit on such a technical ground.

The other objection as to the mistake in the statement relating to the defendant's place of abode is also too technical. It is clear that the defendant has appeared to answer to the claim of the plaintiff, and whether there was any mistake in the description of the defendant's place of abode, or not, could not affect the decision of the case on the merits.

We, therefore, reverse the decision of the Lower Appellate Court, and remand the case to the first Court for a fresh trial. Costs to abide the ultimate result.

The 19th December 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Jumma-bundee papers—Evidence.

Case No. 1294 of 1870 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 7th April 1870, affirming a decision of the Deputy Collector of Monghyr, dated the 31st August 1869.

Gujjo Koer (Defendant), *Appellant.*

versus

Syud Aalay Ahmed (Plaintiff), *Respondent.*

Baboo Boodh Sein Singh for Appellant.

Mr. R. E. Twidale for Respondent.

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Jumma-bundee papers can only be used as corroborative evidence of the same value as that which is attached to books of account under Act II. of 1855.

Mitter, J.—THIS was a suit for arrears of rent.

The defence set up was that the defendant was *not in possession* of the quantity of land mentioned in the plaint, and that the *rate* at which rent was claimed was not the true rate.

In this state of the pleadings, it is quite clear that it was for the plaintiff to make out that the defendant was really in occupation of the whole quantity of land mentioned in the plaint, and that he was liable to pay rent for those lands at the rate specified therein. The only evidence which the plaintiff thought proper to file (if evidence it may be called) consists of the examination of his agent. The statements of that agent are as follow: "I swear to the truth of the facts stated in the plaint and to the authenticity of the jumma-bundee filed which I wrote." Now, there is nothing in this to show that the plaint was even read to the witness at the time he made this statement, nor was there one single question put to him either by the plaintiff or the Court to show when and under what circumstances the jumma-bundee papers were prepared, and whether the agent, under examination, had any knowledge whatever as to the rate of rent at which the defendant was bound to pay, or what were the facts, whether all or how many, stated in the plaint to the correctness of which he intended to swear. But be that as it may, the case has been decided by both the Lower Courts solely and exclusively on the strength of these jumma-bundee papers. It is true that the agent of the plaintiff swears that these papers are authentic documents, and that he wrote them. But assuming this statement to be correct as far as it goes, the jumma-bundee papers may be only used as corroborative evidence, *viz.*, of the same value as that which is attached to books of account under Act II. of 1855. These papers were admittedly prepared by the zemindar's own agent in the absence of the ryots; and if the mere fact of the agent coming forward to swear that he wrote the papers is to justify a Court accepting every fact recited therein as true against the ryots, no ryot in this country would be safe. The Court of first instance appears to have laid some stress upon the fact that the jumma-bundee papers in question were filed and accepted in previous suits, but it is admitted that the defendant in this case was not a party to those suits; and whether the jumma-bundee papers were held genuine in those cases or not, the defendant cannot be bound by the decisions passed in those cases, nor can the fact of the jumma-bundee papers having been accepted in those cases relieve the plaintiff of his responsibility to prove this case *de novo* as against the defendant who was not a party to those proceedings.

For the above reasons, we are of opinion that the decisions of both the Lower Courts are erroneous; and as there is no other evidence on the record, and as we have reason to think that the parties have been misled by a too early expression of its opinion by the first Court on the question of onus of proof, we think that the case should be remanded to that Court for further investigation. The parties will be at liberty to produce such further evidence as they think fit. It will be for the plaintiff to make out clearly and satisfactorily that the defendant is really liable to pay to him at the rate claimed in the plaint. This he may do by producing his collecting agents or his cashier, or tendering his own testimony or by any other evidence in his power. It is not for

us to advise him which course to take, but he must recollect that, before he can obtain a decree, he must satisfactorily prove his case, and that the onus of proving it is entirely on him.

The costs of this appeal will abide the result.

The 19th December 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Separate estates—Pre-emption.

Case No. 1329 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 18th April 1870, reversing a decision of the Moonsiff of Soorujgurrah, dated the 11th January 1870.

Joobraj Singh (Plaintiff), *Appellant,*

versus

Tookun Singh and others (Defendants), *Respondents.*

Mr. G. A. Twidale for Appellant.

Baboo Russick Chunder Banerjee for Respondents.

Properties bearing separate numbers in the Collector's rent-roll are separate estates in the legal sense of the word "estate," implying such a separation as bars a claim to pre-emption on the ground of co-parcenary.

Bayley, J.—We think this special appeal must be dismissed with costs.

The contention put before us here now is substantially this, *viz.*, that whereas there was no division of the property, *viz.*, the 14 beegahs and the 164 beegahs, by metes and bounds, and whereas the survey-department recorded the two estates in one and the same *hulkabundee*, therefore, in fact, there was no separation of the original co-parceny, and as to co-parceners there would be a right of pre-emption.

We think that the Lower Appellate Court has rightly held that, whereas the two properties bear separate numbers in the rent-roll of the Collector, and must be, therefore, separate estates in the legal sense of the word estate, there is such a separation as would prevent the plaintiff claiming pre-emption as a co-parcener.

It is further urged that in the plaint reference is made of the two properties being watered by the same *ahur* or reservoir, or in other words, that there is a right of pre-emption by reason of plaintiff being a co-parcener in appendages; but this ground is not taken in the petition of special appeal; and if that was really the point on which the special appellant intended to base his title of pre-emption, he ought to have taken this objection in a distinct manner as the law of special appeal requires. Under the circumstances, we are not inclined to allow this objection now at the last stage. The other ground of special appeal failing, we dismiss this special appeal with costs.

The 19th December 1870.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Execution—Limitation.

Case No. 355 of 1870.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 25th July 1870, affirming an order of the Subordinate Judge of that District, dated the 26th January 1870.

Suroop Chunder Roy (Decree-holder), *Appellant,*

versus

Goluck Chunder Dhur (Judgment-debtor), *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Anund Chunder Ghossal for Respondent.

Where a contest is raised between a decree-holder and a judgment-debtor as to service of notice, execution-proceedings cannot be carried on further till the question is decided, and limitation in respect to future proceedings must run from the date of such decision.

Jackson, J.—THIS is an application for execution of a decree. The decree is dated the 5th December 1861. It appears that there were proceedings in the course of the year 1866; the decree-holder was then attaching certain property, stating that it belonged to the judgment-debtor. Objections were raised that that property was in the possession of other persons, and, on the 2nd July 1866, that property was released.

At the same time that objections were raised by third parties, objections were also raised by one of the judgment-debtors that execution-proceedings could not go on against him, because notice had not been served upon him. The contest between them on the question of notice appeared to have gone on up to the 6th October 1866, when the defendant produced evidence to show that notice had not been served upon him, plaintiff's witnesses having been examined some months previously. The decision after the examination of the defendant's witnesses was against the defendant, and the Court, after having passed an order on the question, struck the case off the file, telling the decree-holder that if he wished to adopt any further proceeding, he might re-commence it and put in fresh application. The decree-holder now sought again to execute his decree on the 11th September 1869, and both Courts have held that the date on which the plaintiff examined his witnesses, that is, some time in June 1866, is the date from which the limitation is to be calculated; the examination of the plaintiff's witnesses being held to be, in fact, the last proceeding which he took in the former execution-proceeding.

A special appeal is preferred to us, urging that the decree-holder is within time, as he has taken out fresh proceedings within three years from the 6th October 1866, when the decision on the contest between him and the judgment-debtor was passed on the question of notice. We think this contention is correct, and the decision of the Lower Court on this point is in error. It is very possible that that error may have been produced by certain former rulings of this Court on this question. It has now been finally decided by the Privy Council, that when there is a contest pending on any point between the parties to execution-proceedings, such as will prevent any further proceeding being taken until that contest is decided and until the date of the decision, the decree-holder must be held to be pressing his point and to be carrying on his execution-proceedings, so that the date of the limitation of the future proceeding will be calculated from the date of the decision so passed. There was very clearly a contest between the judgment-debtor and the decree-holder of that description; and until he had proved that the judgment-debtor had been served with notice the decree-holder could not carry on further proceedings against him. The decision on that point bearing date the 6th October 1866, the plaintiff is within time.

We think the decision of the Judge should be set aside and the case be remanded. The respondent will pay the costs of this appeal, pleader's fees being assessed at sixteen rupees.

The 19th December 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Onus probandi.

Case No. 1396 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 14th May 1870, reversing a decision of the Moonsiff of that District, dated the 29th January 1870.

Mr. R. Walker (one of the Defendants), *Appellant,*

versus

Atna Ram Mundur (Plaintiff), *Respondent.*

Mr. M. L. Sandel for Appellant.

Mr. R. E. Twidale and *Baboo Grish Chunder Ghose* for Respondent.

In a suit for possession of land where plaintiff's title and previous possession are both denied, it is not proper for a Court to start with the case put forward by the defendant, the onus of proof being primarily on plaintiff.

Mitter, J.—We think that the Subordinate Judge has committed an error in law in throwing the onus of proof on the defendant.

The plaintiff sued for possession of 15 beegahs of land.

The defendant denied the title of the plaintiff as well as his previous possession.

Under such circumstances, it was for the plaintiff to start his case.

The Court of first instance dismissed the suit upon the ground that the evidence produced by the plaintiff was not entitled to belief, and gave several reasons in support of this conclusion.

The Lower Appellate Court, without taking any trouble to show that those reasons or any of them were erroneous, starts its judgment with the case put forward by the defendant, and being of opinion that *that case had not been proved* to its satisfaction, just adds a sentence towards the close of its judgment to the effect that the defendant having failed to prove his defence, it could "*then*" rely on the evidence produced by the plaintiff.

We think that this is not the proper mode of dealing with the case, and without expressing any opinion whatever as to its real merits, we think that the judgment of the Lower Appellate Court is erroneous in law, and that the case ought to be remanded to the Lower Appellate Court for a fresh decision. The Lower Appellate Court will bear in mind that the onus of proof in this case is primarily on the plaintiff. If the plaintiff can prove that he was in possession, and that the defendant dispossessed him in the manner alleged in the plaint, the defendant might then be called upon to rebut the *primâ facie* case made out by the plaintiff. If, on the other hand, plaintiff fails to prove either his title or possession, his suit must be dismissed.

The costs of this appeal will follow the result.

The 20th December 1870.

Present:

The Hon'ble J. B. Phear and the Hon'ble G. C. Paul, *Judges.*

Jurisdiction—Small Cause Court, Calcutta—Special Registration—Sections 52 and 53, Act XX. of 1866.

Case referred to the High Court by the First Judge of the Small Cause Court at Calcutta.

Nilcomul Banerjee

versus

Mudoosoodun Chowdhry and others.

No one for the Plaintiff.

Mr. Phillips for the Defendant.

The Small Cause Court in Calcutta has no jurisdiction to pass a decree in cases of special registration under Sections 52 and 53 of Act XX. of 1866.

Case.—THE plaintiff Nilcomul Banerjee in person filed in this Court and presented before me the warrant of attorney, bond, translation of bond, and petition, severally herewith transmitted.

I declined to receive the documents or to act upon them till I had taken the opinion of the High Court on the two following points, *viz.* :—

1st.—Whether the Legislature intended to give this Court jurisdiction in cases of special registration under Act XX. of 1866, Sections 52 and 53.

2nd.—Whether the stamps affixed to this petition are sufficient.

With regard to the first point, no doubt, the words "any Court which would, &c." in the first Clause of Section 53 seem to include the Presidency Small Cause Courts in all cases in which the amount secured or the instalment sought to be recovered is less than Rupees 1,000. But, on the other hand, the last Clause of the same Section which provides for the enforcement of the decree only under the Code of Civil Procedure seems to indicate that by the preceding words "any Court" the Legislature intended any Court whose procedure is regulated by that Code. By the terms of Section 382 of the Code, the Small Cause Courts of the Presidency Towns are specially exempted from the operation of it.

Moreover, the object of these Sections of the Registration Act was obviously to provide a speedy remedy in those special cases which come under them. The remedy provided is speedy as compared with the ordinary operation of the Civil Procedure Code. As compared with the ordinary procedure of the Small Cause Courts for the Presidency Towns, it is tardy, and it is made so by the last Clause of Section 53.

It is to be observed that the construction which I am disposed to put on the words "any Court which, &c.," would not destroy, in cases under Rupees 1,000, the remedy which the Legislature has sought to create, but would merely confine it to the High Court which has also jurisdiction in such cases, and to which, under that construction, sole jurisdiction would be given in that particular class of cases. The summary nature of the remedy provided seems to render it credible that the High Court alone can enforce it.

As to the second point, I would point out that Schedule III. of Act VII. of 1870 (The Court Fees Act) repeals the words in Section 53 of Act XX. of 1866 under which fees were formerly charged in such cases. I am not aware that there is any other provision under which fees can be charged, unless it be Sections 19 and 20 of Act IX. of 1850. It seems doubtful whether these Sections are applicable to special registration-cases. Those cases are provided for in Schedule I. and Section 4 of the Court Fees Act as regards the High Court, but in Section 4 of the Court Fees Act all mention of the Presidency Small Cause Courts is omitted. (This also appears to me an additional reason for considering that the latter Courts were not intended to have jurisdiction in special registration-cases.) It seems to me, therefore, that the fee should either be 2 annas in the rupee or none.

A further difficulty arises as to the fee if this Court is to execute decrees in such cases, but not to execute them under its own Act, but under the Code of Civil Procedure.

I have the honor to solicit the opinion of the Honorable the Judges of the High Court on the two points above stated.

The judgment of the High Court was delivered by—

Phear, J.—I think the learned First Judge was right in holding that the Legislature did not intend to give the Court of Small Causes jurisdiction to pass decree under the provisions of Sections 52 and 53 of Act XX. of 1866.

The words of the first Clause of Section 53 are, no doubt, if taken alone, large enough to include the Court of Small Causes on the facts stated to us. But it seems clear from the second Clause of the same Section that the summary procedure by petition based on the registered obligation is solely a substitute for the regular procedure by plaint, and was not intended to have operation in such a Court as the Court of Small Causes, which does not proceed by verified plaint. The direction in the last Clause relative to the enforcement of the decree in accordance with the provisions of the Code of Civil Procedure confirms this view.

The petitioner's application must be rejected.

The 20th December 1870.

Present:

The Hon'ble E. Jackson and Onookool Chunder Mookerjee, *Judges.*

Limitation—Cause of action.

Case No. 1330 of 1870.

Special Appeal from a decision passed by the Judge of Dacca, dated the 13th April 1870, reversing a decision of the Subordinate Judge of that District, dated the 13th April 1869.

Bimola Dabee (one of the Defendants), *Appellant,*

versus

Tara Soonduree Dabee (Plaintiff), *Respondent.*

Baboos Sreenath Dass, Romesh Chunder Mitter, and *Bhugobutty Churn Ghose* for Appellant.

Baboos Unnoda Pershad Banerjee and *Kalee Mohun Dass* for Respondent.

The widow of a member of a joint Hindoo family, having been made liable in execution of a decree for more than her own portion of the debts contracted for the benefit of the family, sued to recover such excess.

HELD that the cause of action arose, not when the borrowed money was expended, but when plaintiff was forced to pay up in execution.

Jackson, J.—WE have heard this case at some length, and I need not say that I have given very careful consideration to all what Baboo Romesh Chunder Mitter has so ably urged, but I must say that he has not been able to satisfy us that the decision of the Lower Appellate Court is wrong in any way in law.

The question which was before the Judge was whether one Bimola Dabee was liable to pay her share of certain debts which were contracted when she was living with her brothers-in-law as a joint Hindoo family, those debts having been found to have been incurred for the benefit of the joint family, and the widow of one of the brothers having subsequently been made liable in execution of decree for more than her own portion of those debts.

There were three brothers, Nil Madhub, Grish Chunder, and Huro Chunder. The widow of Nil Madhub sues the widow of Grish Chunder. Her allegation is that, on three several occasions, her husband, Nil Madhub, in connection with Huro Chunder, as managing members of the joint family, borrowed certain sums of money for the purposes of that family, and expended them on account of that family; that the creditors brought actions upon the loans so incurred; and that she, as the widow of Nil Madhub, has had to pay money, which was in excess of her husband's share, and for which the widow of Grish Chunder is liable.

The fact has been found by the Appellate Court that the money was borrowed and expended for the purposes of the family, though the Lower Courts have come to different conclusions on the question. We are more concerned at present with the decision of the Lower Appellate Court.

The Appellate Court, as regards the question of limitation as pleaded by the defendant, held that the plaintiff's cause of action arose when she was forced to pay up the money in execution of decree. On the merits, the Lower Appellate Court held that he was satisfied upon the evidence that the money was borrowed for the family and expended for the family, and that it was not necessary, under such circumstances, to show that there was any actual necessity to make such expenditure, and that the conduct of the present defendant, Bimola Dabee, with regard to a document which is said to be the will of Nil Madhub (though it is not perhaps exactly a will as regards all the property therein stated) supported him in his conclusion that the whole property of Nil Madhub, even that standing in his name, was the joint-family property.

It is on each of these three points that it has been pleaded before us that the Lower Appellate Court is wrong. First, as regards limitation, it is said that the cause of action to Nil Madhub arising out of this transaction commenced when he expended the money which he had borrowed, and that no fresh cause of action arose to the present plaintiff, his widow, when she was called upon to pay up the money borrowed by her husband, even though it was in excess of the share of the loan for which he was liable. A judgment, to be found in 12 Weekly Reporter, page 194, was quoted in support of this argument. That case is somewhat a peculiar case. It was there found that the person who there stood in the position in which Nil Madhub stands in this case

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borrowed certain money on his own private account. In this case, although it has been attempted to be argued that Nil Madhub here also borrowed money in his own private account, yet it is quite clear that the money was not borrowed on his private credit and for his own purposes. It was borrowed for the family, and was expended for the family. One of the persons, who joined in the borrowing, gives distinct evidence upon it, and gives the reasons for which the different loans were contracted. The Judge has believed that evidence, and we see no reason to doubt it; and this evidence certainly takes this case out of the facts of the case quoted from the 12th volume of the Weekly Reporter.

The limitation which, it is now alleged, ought to be applied to this case is not the limitation which the defendant set up in her answer. She there declared that the limitation commenced from the date of the decree against the plaintiff, and not from the date on which she was obliged to pay up the money in execution. A cause of action arose, we think, to the plaintiff when the plaintiff suffered damages in being obliged to pay money beyond what she was properly liable to. She suffered no damages whatsoever until she was made to pay up the money which she thought ought not to have been paid by her. Her cause of action arose when she paid that money.

The next question which is raised is that the plaintiff has not sufficiently shown that there was a necessity for her husband's borrowing this money. The fact is, no doubt, that it was borrowed for the family and expended for the family at the time when the present defendant was actually a member of the family and was living jointly with them. It seems to me impossible to suppose that she was not acquainted with the fact of the expenditure.

The only objection which is apparently raised is that it was somewhat extravagant expenditure. It does not appear that she at any time protested against it. It does not appear that, even after the expenditure was made, she thought in any way of separating herself from her husband's brothers: she continued to remain with them joint for many years subsequently. Now that one of the brothers is dead, she tried to repudiate her share of the expenditure and to fasten it upon the widow of the brother who is dead. It seems to us that, on the facts as found by the Judge, there can be no doubt that there was at least a tacit consent on the part of the defendant to this expenditure.

It was urged in the course of the argument that the defendant must be considered in the same position as a minor, and that every act undertaken on her behalf must be considered with the same strictness as the acts of a guardian acting for a minor. I cannot, however, admit that this widow is in any way in the same category as a minor. The widow is perfectly competent to act for herself, whereas the minor cannot. She could at any moment demand separation and possibly an account. She did nothing of the sort, and even in her answer she does not allege that she objected to the extravagant expenditure of the money. Her answer is that the plaintiff's husband and the other manager Huro Chunder borrowed and spent the money for some other matter, and she even charges the husband of the plaintiff with having appropriated a sum beyond his share. It would appear that these assertions were mere assertions, and they certainly have not been proved to the satisfaction of the Lower Court.

Lastly, it was urged that the Judge could not draw the inference, which he has drawn, from the conduct of the present defendant with reference to the alleged will of Nil Madhub. In that will the debts are alluded to, and the whole family-property is alluded to; and it is distinctly stated that all the property, whether standing in his own name or in other's name, is joint, and that all the family are entitled to share in whatever is due to the family, and they are to pay what is due from it. The defendant has several times made use of this document, has put it into Court, and has put it forward as her title-deed. These debts are not categorically mentioned in that deed, and under those circumstances it is in no way final or conclusive proof as against the liability of the defendant. But it shows that she then accepted the statement of Nil Madhub as regards the state of the family-property, and it certainly does not look as if she then was protesting that Nil Madhub had been appropriating a large portion of her share of the property. There seems to be no reason, as far as we can see from the facts of the case, that the transactions were anything but honest and fair, and that the debts were incurred for the benefit of the family.

We think, therefore, that the Judge was right in making the defendant liable for her share of the debt.

The appeal is dismissed with costs.

Mookerjee, J.—I concur.

The 20th December 1870.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Witnesses—Evidence.

Case No. 1518 of 1850.

Special Appeal from a decision passed by the Officiating Judge of Dinagepore, dated the 26th April 1870, reversing a decision of the Sudder Moonsiff of that District, dated the 31st January 1870.

Latore Mistree (Plaintiff), *Appellant,*

versus

Agamuddee Nushyo (Defendant), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Grish Chunder Ghose for Respondent.

The principle that a plaintiff is bound to produce the best evidence in his power was held not to justify a Judge in omitting to consider the weight and legal effect of the remaining witnesses, where plaintiff had failed to produce the most important witness.

Bayley, J.—THE one ground pressed before us in this special appeal by the pleader for the appellant is that the Lower Appellate Court should not have rejected the evidence adduced by the special appellant on the ground that he, the special appellant, had failed to examine Shook Mahomed as a witness on his behalf.

It is contended that the Lower Appellate Court was in error in declaring the whole of the evidence adduced on the part of the special appellant to be untrustworthy, because of the absence of the most important witness, Shook Mahomed: and that the evidence on the part of the plaintiff was not duly considered by the Lower Appellate Court.

We must read the Judge's judgment according to the ordinary signification of the words he uses. He says: "I cannot agree "with the finding. The sole evidence pro-"duced by the plaintiff is that of the wit-"nesses, among whom Shook Mahomed does "not appear. It is clear he was the most "important witness for plaintiff's case, and "should have been produced to prove the "facts upon which plaintiff bases his right, "as also to attest the dakhilas which are "filed by plaintiff, and which are alleged to "have been granted by him.

"I do not consider this as evidence. On "the principle, therefore, that the plaintiff "has failed to produce the best evidence in "his power, I am of opinion he is not enti-"tled to a decree, and that the Moonsiff's "decision must be reversed."

These words do not contain any finding of the Judge on the weight and legal effect of the testimony of the remaining witnesses adduced by the special appellant. The principle of law that he cites does not justify the omission of all consideration or record of opinion as to the legal effect of the evidence of the other witnesses.

It was the duty of the Lower Appellate Court to weigh that evidence also, and state the grounds for believing or disbelieving these witnesses either singly or collectively.

The case is remanded to him for that purpose. Costs to abide the ultimate result.

Mitter, J.—I am of the same opinion.

The principle relied upon by the Judge is not, in my opinion, applicable to this case.

The evidence of the witnesses examined by the plaintiff, if believed, would be as good in law as the evidence of Shook Mahomed: and it was, therefore, incumbent upon the Judge to find specifically whether the evidence of those witnesses is worthy of belief or not. No question of primary or secondary evidence arises in this case. The evidence of the witnesses produced by the plaintiff is direct; and that evidence, if believed, would be quite sufficient to prove his case.

The costs will abide the ultimate result.

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The 21st December 1870.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Decree—Section 20, Act XIV., 1859.

Case No. 318 of 1870.

Mistellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 18th June 1870, affirming an order of the Subordinate Judge of that District, dated the 30th May 1870.

Mookta Kashee Dabee (Decree-holder), *Appellant,*

versus

Gunga Dass Roy and another (Judgment-debtors), *Respondents.*

Baboos Ashootosh Dhur and *Bama Churn Banerjee* for Appellant.

Baboo Umbica Churn Banerjee for Respondents.

An application by a decree-holder for issue of notice and for enforcement of the decree by possession is a proceeding to keep a decree alive within the meaning of Section 20, Act XIV. of 1859.

Kemp, J.—THE decree in this case was passed on the 15th of March 1867. On the 8th of April 1868, the decree-holder applied to the Court to issue notice to the judgment-debtor, and also to enforce the decree by giving to the decree-holder possession of the property decreed. The Lower Courts have both held that the mere service of a notice by the decree-holder would not keep a decree alive.

I am of opinion that the finding of both Courts is wrong under Section 20 of Act XIV. of 1859. The decree-holder appears to me to have taken proceedings to keep his decree in force within three years from the date of the decree.

We have been referred to some cases by different Divisional Benches of this Court, but the facts of these cases are not before us. There is not one definite peculiarity applicable to all cases, and the varying circumstances of each case must be taken into consideration to guide our judgment in each particular instance.

Now, in this case, there can be no doubt that the decree-holder has, within the meaning of Section 20, taken effectual steps to keep his decree in force within the meaning of that Section.

We, therefore, reverse the decision of the Lower Court, and decree this appeal with costs.

Paul, J.—In this case, the proceeding taken is, on its very face, one which has for its object the keeping of the decree in force. That being so, it clearly falls within the provisions of Section 20, Act XIV. of 1859, and consequently the execution of this decree is not barred. The appeal is decreed with costs.

The 21st December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble W. Ainslie, *Judges.*

Registered purchase—Unregistered bond.

Case No. 1502 of 1870.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 27th April 1870, affirming a decision of the Moonsiff of Bowfal, dated the 22nd January 1870.

Ali Azim Khan (Defendant), *Appellant,*

versus

Islam Khan and another (Plaintiffs), *Respondents.*

Baboo Kalee Mohun Doss and *Kashee Kant Sein* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

In a suit by a purchaser of a howla tenure which defendant was proceeding to sell under an *ex-parte* decree which he had obtained upon a mortgage-bond executed by plaintiff's vendor:

HELD that plaintiff's registered purchase, though of a subsequent date, must take effect as against defendant's unregistered mortgage, which might have been registered.

Norman, C. J.—IT appears to us that the points which have been argued in this case do not admit of any doubt at all.

The plaintiff sues, alleging that he purchased a howla tenure on the 20th of May 1868. The defendant, who is the appellant

before us, purchased a mortgage of this same tenure, alleged to have been executed by the plaintiff's vendor in 1865, and, having obtained a decree *ex-parte* as against the vendor upon that mortgage, was proceeding to sell the howla. The consideration in the mortgage-bond was 50 rupees, and the mortgage-bond under which the defendant makes title was not registered.

It is clear that, under Clause 1, Section 16 of Act XVI. of 1864, the mortgage set up by the defendant might have been registered. Under Section 68 of the same Act, such an instrument, if unregistered, would be postponed to a registered instrument, though of a subsequent date.

Act XVI. of 1864 was repealed before the date of plaintiff's purchase, and the instrument of sale to the plaintiff, the consideration of which is said to have been 60 rupees, was registered under Clause 1 of Section 18 of Act XX. of 1866. By Section 50 of this Act, it is enacted that: "Every instrument of the kinds mentioned in Clauses 1, 2, and 3 of Section 18 shall, if duly registered, take effect, as regards the property comprised therein, against every unregistered instrument relating to the same property, whether such other instrument be of the same nature as the registered instrument or not."

It is clear, therefore, that under this Section the plaintiff's *registered* purchase-deed must take effect as against the *unregistered* mortgage of the defendant.

There is no ground whatever for this appeal, which is accordingly dismissed with costs.

The 21st December 1870.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Admission—Evidence—Joint Hindoo family—Separate occupation.

Case No. 1606 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Moorshedabad, dated the 31st May 1870, affirming a decision of the Moonsiff of Kanderah, dated the 29th September 1869.

Gour Lall Singh and others (Defendants), *Appellants*,

versus

Mohesh Narain Ghose and others (Plaintiffs), *Respondents*.

Baboo Mohinee Mohun Roy for Appellants.

Baboos Kalee Mohun Doss and *Motee Lall Mookerjee* for Respondents.

In a suit by the grandchildren of the deceased daughter of a member of a joint Hindoo family, who, though not entitled to his property as his heirs, had been long in possession, the surviving daughter, in whom, according to Hindoo Law, her father's interests would now be legally vested, admitted by a petition filed in this suit that by her gift or relinquishment plaintiffs had a title to her father's share. The admission was held to be evidence that such title existed anterior to the commencement of the suit.

Where there is joint occupation of some portions of a joint-family dwelling-house, and the separate occupation of other portions of the same property appears to be merely permissive, such separate occupation does not necessarily imply that the properties occupied are separate properties.

Norman, C. J.—It appears to us that there are no grounds for this appeal. The facts of the case, so far as they are material to the points which we have to consider, are these.

Huro Kishto Singh had two sons, Brojo Kishore and Nund Lall. Nund Lall left one son, Haradhun, who died many years ago without issue; the date of his death has not apparently been proved.

Brojo Kishore left three sons, Kasheenath, Lokenath, and Prannath. The interests of Kasheenath and Lokenath have now become vested in the defendants, who are the grandsons of Kasheenath. Prannath left two daughters, Bhugobutty now alive, and Jadubmonee, whose grandchildren, son's children, Mohesh Narain, and others, are the present plaintiffs. Mohesh Narain sued for the partition of a dwelling-house and of one beegah and some eleven chittacks of land; also of two pieces of lakheraj land, consisting in all of 16 cottahs.

The plaintiffs, as the grandchildren of the daughter of Prannath, would not be entitled as heirs of Prannath. But it appears that they have been in possession for many years, and that Bhugobutty, the surviving daughter of Prannath, in whom, according to Hindoo Law, Prannath's interests would now be legally vested, has, by a petition in this suit, admitted that they have been long in possession, and that they have a title to the share of Prannath.

The first objection taken on special appeal is that the declaration of Bhugobutty did not give the plaintiffs any right to sue.

No doubt, if the declaration of Bhugobutty was a mere waiver of her right, or a mere gift to the plaintiffs of that which belonged to her, it would not give them such a title as would enable them to sustain the present suit. But in truth, and in fact, she admits that by her gift or relinquishment they had a title to that which, in ordinary course, would have descended to her; and her statement in this suit is merely evidence that such title existed anterior to the commencement of it. The case is the same as if Bhugobutty had executed a deed of sale or gift to the plaintiffs many years ago, and in this suit admitted that she had done so.

The appellant's next objection was that the suit was barred by limitation, because the plaintiffs and defendants were occupying separate residences within the same compound. But this objection fails, because the Lower Courts have both found that the parties were in joint occupation of the same homestead, using in common the yard and the front and back doors.

Such separate occupation of portions of a joint-family dwelling-house is very common in Hindoo families; and where the circumstances of the case show that the separate occupation, so far as it exists, is merely *permissive*, and that there is joint occupation of portions of the same property, there is no necessary inference that the parties are holding those portions which they occupy separately as separate properties, or otherwise than as a joint property, using the separate portions separately by mutual permission and for mutual convenience.

We dismiss this appeal with costs.

The 22nd December 1870.

Present:

The Hon'ble F. B. Kemp and G. C. Paul, *Judges.*

Compromise—Decree—Right of suit.

Case No. 338 of 1870.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Hooghly, dated the 30th July 1870.

Tara Monee Dassee (Judgment-debtor), *Appellant,*

versus

Radha Jeebun Mustafee (Decree-holder), *Respondent.*

Baboos Chunder Madhub Ghose and *Khettur Nath Bose* for Appellant.

Baboos Mohesh Chunder Chowdhry and *Mohinee Mohun Roy* for Respondent.

In a suit between two brothers, a compromise was arranged and a decree passed on the footing of its terms, defining the rights of the parties to certain properties, and declaring that, on the death of one of the brothers (S), a certain property should vest in the other (R). S died, and R was kept out of possession.

HELD that R had a valid cause of action to sue for possession and mesne-profits, but that the decree itself was not an award of possession.

Paul, J.—IN this case, Radha Jeebun Mustafee and Surbesshur Mustafee, being two brothers, had certain dissensions existing between them, in consequence of which Radha Jeebun Mustafee sued Surbesshur Mustafee for possession of certain lands. Pending the suit, a compromise was arranged between the parties, the terms of which, as far as they affect this contention, were shortly these: that Radha Jeebun and Surbesshur were either to take immediate possession of certain lands or to keep possession of them; that Surbesshur Mustafee should enjoy certain other lands (the subject-matter of this execution) during his life; and that, upon his death, these lands, in the event of his pre-deceasing Radha Jeebun, were to devolve upon Radha Jeebun. A decree was passed in the suit on the footing of the terms of this compromise.

Surbesshur died, and his widow not having given to Radha Jeebun possession of the lands (subject of this execution), Radha Jeebun applied for execution, claiming possession of the lands as well as mesne-profits from the death of Surbesshur to the time of getting possession.

The Subordinate Judge has decided this case, entirely relying on a certificate which was forwarded to him by another Court, a certificate which states that the decree is to be executed for possession and mesne-profits. This certificate has no efficacy beyond so far as it states that the decree has not been satisfied, and the decree itself

must be looked to for the purpose of ascertaining what is to be executed in accordance therewith. On looking at the decree, we find no mention made of mesne-profits; therefore, so far as the decision of the Court below has proceeded, it may be at once said that that decision was erroneous.

It is contended on behalf of the appellant by Baboo Chunder Madhub Ghose, *1st*, that the decree itself awarded no possession to Radha Jeebun; and, *2ndly*, that, if the decree awarded possession, it was silent as to mesne-profits, and, if capable of being executed as to possession, the decree was not capable of execution as regards mesne-profits. In support of that position, a great many cases have been quoted, particularly a case published in Volume VI., Weekly Reporter, page 109, Full Bench Rulings, and Volume XII., page 15, another Full Bench decision. On the other side, Baboo Mohesh Chunder Chowdhry has contended that, by a decision of the Privy Council to be found in Volume XIV., page 23, Privy Council Rulings, it has been held that a decree for possession means decree which involves the right to take possession with the necessary attendant consequences, and therefore it also gives a right to mesne-profits. That decision of the Privy Council appears to me to lay down a reasonable principle, and, though at variance to a certain extent with the decisions of the High Court, is apparently quite compatible with a construction of Section 11, Act XXIII. of 1861, which has been put upon it by the Chief Justice of the Agra High Court, and with a construction which appears to me to be reasonable; and if the case stopped here, whilst bound to bow to the authority of the Full Bench decision, I certainly would not have given my opinion without expressing some doubt as to the soundness of the general proposition of law therein enunciated. But the difficulty which Baboo Mohesh Chunder Chowdhry has to contend with is this—that the decree founded on the compromise was not an award of possession; it was simply a decree which defined the rights of the parties to certain properties, and declared that, on the happening of a certain contingency, the lands (subject of this execution) should vest in Radha Jeebun Mustafee. This being so, the decision of the Privy Council would have no applicability to the present case, and it is quite clear to my mind that even execution for the property in dispute would not lie under that decree. In the state of things which have occurred, the person who is declared entitled under the decree, upon being kept out of possession at the death of Surbesshur, would have a valid cause of action to sue both for possession and mesne-profits, and to have enforced such cause of action by regular suit. He appears, however, to have adopted an irregular form of proceeding, and attempted to obtain by it that which he should have sought in a regular suit, and he must consider himself very fortunate to have been to a certain extent successful. but having so far succeeded, we must take care that, with this partial success, he should not get other advantages which by the law he is clearly not entitled to obtain. Therefore, having regard to the decree itself, I am of opinion that Radha Jeebun Mustafee cannot take out execution for mesne-profits, as he desires in this case. It would, no doubt, have been very advantageous, if, for the purpose of avoiding future litigation, Radha Jeebun could have been allowed to take execution with mesne-profits, but the arrangement which would facilitate this is apparently one which does not suit the defendant, the representative of Surbesshur: and as she relies on the law as it stands, we can do nothing but to apply the law which we do, and declare that the execution as to mesne-profits cannot be allowed.

We, therefore, decree this appeal with costs.

Kemp, J.—I concur in this judgment. It appears to me that in the decree, which is founded on a ruffanamah and solehnamah, it is declared that the terms of the ruffanamah and solehnamah are to be carried out. The suit itself, which ended in that ruffanamah, was not a suit for any specific share; it was a suit with reference to certain debuttur lands, and Surbesshur, who is entitled to an equal share with Radha Jeebun, appears to have made certain concessions to the effect that during his lifetime he was to enjoy a 2-annas share, and after his death Radha Jeebun and his heirs were to enjoy the aforesaid share. I do not wish in this case to make any remarks as to the decisions of the Full Bench, inasmuch as I think that this is a case in which, as shown by Mr. Justice Paul, the principles laid down in the Full Bench Rulings do not apply.

I concur in reversing the decision of the Lower Court, and decreeing the appeal with costs.

The 22nd December 1870.

Present:

The Hon'ble J. B. Phear and G. C. Paul, *Judges.*

Calcutta Small Cause Court—Cause of action—Technical objection—Amendment—Section 27, Act IX. of 1850.

Case submitted for the opinion of the High Court by the First Judge of the Small Cause Court at Calcutta.

Mackenzie Lyall and Co., *Plaintiffs,*

versus

L. W. Dover, *Defendant.*

Neither party was represented in the High Court.

In a suit under a count for goods bargained and sold, and under a count for goods sold and delivered, in which the defendant took a highly technical objection to the form of the plaintiffs' cause of action, it was held that it was the duty of the Judge of the Small Cause Court at Calcutta, under Section 27, Act IX. of 1850, to rectify the mistake in the plaintiff's claim, whether the plaintiff made such a request or not, the Legislature never having intended to introduce the niceties of special pleading into the practice of the Court of Small Causes.

Case.—In this case the plaintiffs sued for Rs. 150 for goods sold and delivered, and for goods bargained and sold.

The advertisement under which the sale took place was in the following terms, *viz.*—

"Mackenzie Lyall and Co. will sell by auction on the spot, at noon this day, Wednesday, the 23rd March 1870, under instructions from William Duff Bruce, Esquire, Officiating Executive Engineer, 1st Presidency Division, the materials of the old Money Order Office building situated between the Town Hall and Treasury.

"*Conditions.*

"I. Cash in full, if required, on the fall "of the hammer; otherwise, a deposit of 25 "per cent.

"II. The purchaser to dismantle and "remove the materials within three months "from date of sale."

The original Exhibit, an extract from the Calcutta Exchange Gazette, is forwarded herewith.

Mr. Brock, the assistant of the plaintiffs' firm who conducted the sale, stated that the articles which he sold under this advertisement were nothing more than the shell of the house, with the doors and windows taken out; the standing walls and floors, in fact, affixed to the earth. He also said that these were what he delivered, it being the purchaser's business to take them out of the earth and carry them away.

The defendant's attorney raised the objection that the price of such articles so sold could not be recovered under either of the two counts contained in the cause of action. He said he had other matters to urge on the merits, as the whole of what had been sold had not been delivered, and nearly all of what had been delivered had been paid for. But he insisted on the objection which he had taken, as he considered it was fatal.

The plaintiffs' pleader expressed no desire to amend, but insisted that the cause of action was rightly framed, and left the objection in the hands of the Court to decide.

I nonsuited the plaintiffs. Subsequently the plaintiffs' pleader moved for a rule to show cause why there should not be a new trial.

I agreed with the Second Judge in granting the rule, mainly on the ground of the following passage, which is to be found at page 138 of Addison on Contracts, 6th Edition, *viz.*—

"If an article affixed to the freehold is sold with a view to its immediate severance therefrom, the contract is simply a contract for the purchase and sale of a chattel."

Cause was shown, and the plaintiffs' pleader replied, and I was finally of opinion that my original decision was correct. I thought that, if the walls had been dug up by the plaintiffs and delivered by them to the defendant subsequently to dismantlement, they would have become chattels personal, and the price of them could have been properly sued for under the term "goods." But inasmuch as the bricks and mortar were still fixtures at the time of the sale, I considered that the plaintiffs could clearly not recover under the second count.

I also was of opinion that they could not recover under the first count, because the bricks and mortar were still fixtures (as, in fact, they must have been by the very terms of the contract) at the time of delivery also.

For the doctrine which I have quoted from Mr. Addison's work, no authority is there quoted, nor have I been able to find any. If, however, the intention of the parties is sufficient to transform bricks and mortar from fixtures into chattels, I apprehend that they will be chattels real, and that they can still, as savouring of the realty, not be sued for under the term "goods."

It is lamentable that, in the latter end of the 19th century, refinements such as these should be insisted on, but the plaintiffs had ample time and opportunity to move to amend their cause of action; and if they had expressed any wish to amend, I would willingly have acceded to it, but it is a simple question of costs. If they are right, they are entitled to mulct the defendant for taking so purely technical an objection. If they are wrong, they cannot complain of being themselves fixed with the costs, inasmuch as the Legislature had provided, and the Court would have been perfectly ready to exercise, a remedy by way of amendment by which all doubt and difficulty might have been very simply removed.

As the Second Judge was of opinion that the plaintiffs' cause of action was rightly conceived, and that the rule for a new trial ought to be made absolute, I have the honor to request the opinion of the Honorable the Judges on the question:—

Whether the price of the materials mentioned in the advertisement above set forth was, under the state of facts above detailed, correctly sued for either under a count for goods bargained and sold, or under a count for goods sold and delivered.

I may add that we were requested by the defendant's attorney to refer this point for the opinion of the High Court, even if we agreed in considering that the defendant's plea was bad, and that there ought to be a new trial.

The Second Judge's views on the point referred were as follows:—

1. "I think that, if the objection taken "by the defendant to the cause of action, "as stated in the plaint, was a valid objec-"tion, the misstatement of the cause of ac-"tion might have been rectified by the Court "under the provisions of Section 27 of Act "IX. of 1850, and that the plaintiff should "not have been nonsuited on so purely tech-"nical a plea.

2. "I think that the objection was not va-"lid, inasmuch as what was sold was not a "house to be used as a house, and so to be re-"garded as appertaining to the freehold, but "the *materials* of a house to be dismantled "and removed. Under such circumstances, "it would, I think, have been incorrect for "the plaintiff to have sued for the price of a "house or for the price of fixture. The pas-"sage cited from Mr. Addison's work on "Contracts, 6th edition, page 138, seems to "me sufficient authority for this view. The "case of *Lee* vs. *Ridson*, 7 Taunt. 188, which "was relied on by the defendant as establish-"ing that the price of fixtures cannot be re-"covered under a count for goods sold and "delivered, may, I think, be easily distinguish-"ed from the present case. There fixtures "were sold as fixtures to remain where they "stood, and not as materials with the express "object and condition of severance and re-"moval."

With regard to the 1st paragraph of the Second Judge's opinion, I would only remark that the Court is not authorized, according to my view, in altering the cause of action except at the plaintiff's desire and on his motion; otherwise it would have the power of ruining the plaintiff's case against his will, and casting him in costs by making him sue on a cause of action which did not represent his own view of his own grievance.

The judgment of the High Court was as follows:—

Phear, J.—In this case the plaintiff sued the defendant in the Court of Small Causes for Rupees 150 for goods sold and delivered and for goods bargained and sold. The subject of the sale made by the plaintiffs to the defendant was described in an advertisement as follows:—

"The materials of the old Money Order "Office building situated between the Town "Hall and Treasury," and one of the conditions of sale was—

"The purchaser to dismantle and remove "the materials within three months from "date of sale."

From the case stated to us, we learn that the defendant's attorney raised the objection that the price of such articles so sold could not be recovered under either of the two counts contained in the cause of action. The plaintiffs' pleader expressed no desire to amend, but insisted that the cause of action was rightly framed, and left the objection in the hands of the Court to decide. Thereupon the learned First Judge nonsuited the plaintiffs.

The plaintiffs afterwards obtained a rule for a new trial, and at the return of this rule, the two Judges were divided in opinion as to whether it ought to be made absolute or not. It therefore became necessary, under Section 55 of Act IX. of 1850, that the questions on which the Judges differed should be referred to this Court. These questions were two, namely:—

1. Whether or not the price of the materials mentioned in the advertisement above referred to was, on the facts stated in the case, correctly sued for either under a count for goods bargained and sold, or under a count for goods sold and delivered.

2. If the price was not correctly sued for, ought the learned First Judge to have rectified the misstatement of the plaintiffs' cause of action?

The objection which is embodied in the first question is in the highest degree technical, for if in either count the words "and fixtures" were inserted after the word "goods," it could not be contended that the plaintiffs' cause of action was not expressed with technical accuracy; and this being so, we think it quite unnecessary to discuss the matter of the first question at all. The case of Lee *versus* Ridson, upon which the learned First Judge based his decision, takes us some way back in the history of pleading and practice in the Courts of Westminster Hall, and a great many years have passed since the time when it was possible either there or in the Supreme Court of Calcutta to make this objection with success. Nothing short of express words of enactment would lead us to believe that the Legislature imposed upon the Court of Small Causes those technical obstructions to its proper action which long ago were found intolerable in the superior Courts of England and this country, and we think it clear that no such words are anywhere to be found. It seems to us certain that the Legislature never intended to introduce the niceties of special pleading into the practice of the Court of Small Causes. The parties to a suit in that Court do not themselves declare and plead in technical fashion. There is no other declaration than the summons, which is filled up by the officer of the Court on the oral statement of the complainant, and no plea except that which the Judge takes down from the mouth of the defendant or his pleader. In the case before us, there was no dispute whatever between the parties as to the nature of the plaintiff's claim; the only mistake, if any mistake there was, amounted to nothing more than the misuse, or non-use, of a technical term by the clerk of the Court when he filled up the summons; and the relative position of the parties in Court was altogether unaffected by it. It appears to us that it is the duty of the Judge, under the provisions of Section 27 of Act IX. of 1850, to rectify such a mistake as this, whether the plaintiff makes the request or not, and so to take care that the case of the plaintiff be not prejudiced in the merits by an objection which is purely frivolous and vexatious in its character.

The rule for a new trial must be made absolute, and at the trial each count in the summons should be amended by inserting the words "chattels and fixtures" after the word "goods."

The 2nd December 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Putnee rents—Sale for arrears—Notice—Clause 2, Section 8, Regulation VIII., 1819.

Case No. 1260 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 30th March 1870, affirming a decision of the Sudder Moonsiff of that District, dated the 31st December 1868.

Raghub Chunder Banerjee and others (Plaintiffs), *Appellants,*

versus

Brojonath Koondoo Chowdhry and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee, Bipro Doss Mookerjee, and *Issur Chunder Chuckerbutty* for Appellants.

Baboos Kalee Prosunno Dutt, Mohinee Mohun Roy, and *Obinash Chunder Banerjee* for Respondents.

Where an arrear of putnee rent is due, the zemindar, in applying to the Collector to bring the property to sale, need not recognize any one except the registered putneedar.

The object of a notice of sale for arrears of rent is to give information, not merely to parties wishing to purchase, but to the defaulter; and if the notice is not stuck up in the manner prescribed by law (Clause 2, Section 8, Regulation VIII. of 1819), it is open to the defaulter to plead that he has been endamaged, and the sale becomes illegal.

Loch, J.—THE present suit is for setting aside the sale of a putnee and for the recovery of possession of the plaintiff's share in the said putnee.

The objections taken by the plaintiff to the sale are that it has been informally made, and that the zemindar, when asking the Collector to bring the property to sale, should have recognized all the putneedars, and that the sale has been brought about by collusion between the zemindar and some of the co-sharers of the putnee.

The Lower Courts have found that the sale was properly conducted by the zemindar, that there was no proof whatever of the collusion, and so dismissed the suit.

A special appeal has been preferred on the grounds:—

First, that the zemindar, when applying to the Collector for the sale of the putnee tenure, was bound to recognize all the co-sharers of the putnee.

And, *secondly*, that the sale-proclamation was not issued as prescribed by law, and therefore the sale should be reversed.

On the first point we think it is unnecessary to say much. It is clear that there was an arrear of putnee rent due, and that the zemindar need not have recognized any one except the registered putneedar as the person from whom the rent was due, and the mere fact that in the application to the Collector he did mention the names of one or two of the parties in possession, though not registered in the zemindary books, and omitted to mention the names of others, does not in any way vitiate the sale or render the proceedings invalid.

On the second point, we find that the law (Clause 2, Section 8, Regulation VIII. of 1819) requires that "a copy or extract of "such part of the notice as may apply to "the individual case shall be by him (zemin-"dar) sent, to be similarly published at the "cutcherry or at the principal town or "village upon the land of the defaulter."

By the words "similarly published" is meant that the notice is to be stuck up as appears from the previous words of the Section in the cutcherry, or, if there be no cutcherry, in the principal town or village upon the land of the defaulter.

Then the law goes on to say that the notice is to be served by a single peon, who is to bring back the receipt of the defaulter, or of his manager, for the same; or if unable to procure this, he is to obtain the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot.

And further the law prescribes that in case if the people of the village should object or refuse to sign their names in attestation, the peon shall go to the "cutcherry of the nearest Moonsiff, or if "there should be no Moonsiff to the nearest "thannah, and there make voluntary oath "of the same having been duly published. "certificate to which effect shall be signed "and sealed by the said officers and deliver-"ed to the peon."

Now, looking at the evidence which has been read to us, we think the Lower Courts are wrong in holding that the notice was duly published. The evidence in support of the due publication of the notice is to the effect that the peon of the zemindar, who could neither read nor write, proceeded to the spot, found some people sitting together in the village, and asked where the cutcherry was; on being told that there was no cutcherry, asked where was the gomashta: on being told that the gomashta was not in the village, he opened the notice given to him by the zemindar, and showed it to five or six people, who were sitting there, none of whom could read or write; and he then proceeded to the thannah, and obtained from the Head Constable a certificate on the back of the said document, to the effect that he made such and such a statement of the publication of the notice.

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This is clearly not such a publication as the law requires. The notice should be stuck up in the cutcherry, or, if there be no cutcherry, in some conspicuous part of the principal village upon the land of the defaulter. It is evident from the evidence that the notice was not stuck up at all, and in fact the peon took it away with him, and had the certificate endorsed by the Head Constable.

Now, the object of the notice appears to be not merely to give information to parties wishing to purchase, but to give information to the defaulter that, unless the arrear be paid by a certain day, the property will be sold; and the defaulter might well plead that he has been endamaged from the want of the proper publication of the notice as required by law.

We think, therefore, that the Lower Courts are wrong in finding that the notification had been published according to law, and we think also that the sale is consequently illegal.

But it has been said that the suit cannot be brought in its present form, because the title of one of the parties who brings this suit, Raghub Chunder, who claims one anna and some gundas, is disputed, and Judoonath and others are entitled to only 8 gundahs share more or less. We think the mere fact that the plaintiffs' share in the property is small is no reason why they should be prevented from bringing an action for setting aside the sale on establishing their right. If they have, as they allege, a share in the property, the mere fact of the other shareholders not joining them does not in any way prevent their bringing a suit to preserve their own rights.

As, however, the auction-purchaser does not press to be indemnified by a refund of his purchase-money, we think it sufficient to declare that, the notice not having been published as prescribed by law, the sale is not binding upon the plaintiffs in this case, and that they are entitled to recover their share in the putnee. With regard to Judoonath and others, their share of 8 gundas more or less is undisputed. The share to which Raghub Chunder is entitled has been questioned by the defendants in this case, and as his right to the share he claims has not been determined by the Lower Courts, we must remand the case to the Court of first instance, in order that it may determine what is his share, and to give him a decree for the possession of his share.

The question of costs which the plaintiffs will recover from the zemindar will be determined by the Court below, and the auction-purchaser will recover his costs from the zemindar.

The 22nd April 1870.

Present:

The Hon'ble J. P. Norman and E. Jackson,

Judges.

Mortgage—Redemption—Incumbrances.

Case No. 2690 of 1869.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 9th July 1869, reversing a decision of the Moonsiff of that District, dated the 5th March 1869.

Gournarain Mojoomdar and another (two of the Defendants), *Appellants,*

versus

Brojonath Koondoo Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Ashootosh Dhur, Umbika Churn Banerjee, and *Dwarkanath Sein* for Appellants.

Baboos Kalee Prosunno Dutt and *Mohendro Nath Seal* for Respondents.

In September 1840, R, by a deed in the English form, mortgaged his zemindary with other property to S. In October 1844, he mortgaged the same lands to plaintiff, who, after obtaining a decree for the redemption of the former mortgage, and paying it off, obtained a final decree in 1862 for foreclosure as against R. He now sues to set aside a putnee granted by R subsequent to the date of the first mortgage and before the date of the mortgage to himself.

HELD that, as plaintiff had not kept on foot the first mortgage to S as a distinct and distinguishable security, the debt to S must be treated as paid off and extinguished and the defendant's putnee lease was valid and binding on plaintiff.

Norman, J.—ON the 26th January 1840, Unnoda Pershad Roy, zemindar of Basoodebpore, granted kismut Basoodebpore in putnee to Huree Narain Mojoomdar, ancestor of the defendant, at a rent of Rupees 145-7-3; and

"consists of the depositions of a number of "witnesses who deal in mere generalities, "and are not so precise in their statements "as in any way to establish the prescriptive "nature of the right sought. Most of them "do not say at all how long the plaintiff has "exercised the right. Those who do, use ge-"neral words, such as 'from old times,' 'all "along,' 'since the building of the aqueduct,' "without specifying a single date or period of time."

Mr. Bourke's argument is that the plaint is specific, and that witnesses Nos. 8 and 24 do prove the fact. We have had the plaint read, and we think that it very indistinctly raises the question of the level of the lands. Then I think the Lower Appellate Court says substantially, not that the plaint is not specific at all, but only that it is not so specific as it ought to have been. Then as to the evidence of the witness No. 8, that witness only says this: "And from the cutting "of the *grandees*, the water of the reservoir "of Nurtooa goes back to the pyne of Se-"limpore. The *reservoir* is higher than the "pyne, and for this reason that the waters "receded." The witness No. 24 speaks nothing more than this, that "when the pyne is full of water, the *bukhla* runs. I cannot say from this evidence that the Lower Appellate Court was wrong in saying that there was no evidence to show that the plaintiff's *villages* were on a higher level than that of the reservoir, for the witness No. 8 does not say that the *villages* were on a higher level. He only says that the *reservoir* is higher than the pyne. The other witness No. 24 also does not directly prove the plaintiff's allegation.

The next point urged is that the Ameen's report has been improperly rejected by the Judge. Upon this point, as shown from the passage above quoted from the Judge's decision, the Judge only says this: "The only evidence adduced by plaintiff (*for his documentary evidence is altogether inadmissible*) consists of depositions of witnesses," &c. Now, I do not read the word "*inadmissible*" as meaning that it ought not to have been received on the record, for it is already on the record and apparently without objection to its admissibility on the record, but only that it cannot be used to prove the plaintiff's case. The Ameen in this case was only a Commissioner under the Procedure Code to see what the amount of the *damage* was. His report, therefore, could be only evidence on the point to which the commission referred, and in this case the commission referred to no other point than damages. The report, therefore, of the Ameen in this case, which treated on the relative rights of the plaintiff as to cutting of the dams or not, was, under the law, no legal evidence in the case. It is true that witnesses were examined by the Ameen. The Lower Appellate Court deals with the evidence of the witnesses, comments on their depositions, and ends by saying, "In short, a host of "serious inconsistencies and omissions quite "stamp their testimony as he result of very "clumsy tutoring on that side of the case "which they have come into Court to sup-"port." It is not for us to say in special appeal what the value of the evidence of witnesses ought to have been. The refusal to credit them constitutes no error in law, and I may here mention that the Lower Appellate Court has, on the other hand, believed the defendant's witnesses.

It is next contended that there were certain Act IV. decisions passed between the ticcadars and the ancestors of the defendants on the 26th June 1850, which have been improperly rejected as evidence, and that such proceedings are evidence and bind the defendants in the case. The defendants, on the other hand, contend that the fouzdaree proceedings are no evidence against them, as neither they nor the parties from whom they derived their title were parties to those proceedings. It is alleged by the learned Counsel for the appellant that they (defendants) were proprietors of Oghur, which is a dakhilee village of Munearee, which was in dispute in that case; but this fact is not proved, and even if it were so, it is still clear that the proprietorship of a dakhilee village may remain in the hands of one or two or more parties, whereas the proprietorship of an uslee village may remain in the hands of different proprietors altogether with separate rights and interests.

The learned Counsel then refers to two survey-maps as evidence in the case, but it is clear that the survey-maps cannot prove the right of proprietorship to lands, much less to watercourses and the right of cutting dams. The survey-maps, therefore, are no evidence against the defendants.

Then it is urged that the onus of proof has been wrongly put upon the plaintiff, and that, as the defendants admit that the *bukhlas* are in existence, and the plaintiff's witnesses show that his villages stand on a higher level, it was for them to show that the plaintiff's right was confined to the *bukhlas*, and did not extend to the closing of the watercourse. Now, it is true that the defendants did admit

the existence of the *bukhlas*, but it is not true that the evidence of the plaintiff's witnesses prove that the plaintiff's villages were on a higher level. Irrespective, however, of this, we find that the whole allegation of the plaintiff was that he had a right to make the dams in the water-course for his own purposes, and that that was the main issue between the parties in the Lower Appellate Court. It was quite within the power of either party, if he considered that the main issue was not that of prescriptive right to dam the water, to object before the Judge that that was not the main issue. That there was such an objection is not shown to us. I think, therefore, that the question of prescriptive right alleged by the plaintiff was the main issue in the case, and as the plaintiff claimed that right, the burthen of proof was on him; but beyond this I do not think that the plaintiff had the whole burthen placed upon him. It is quite clear that the Lower Appellate Court did not decide the case solely on failure of the plaintiff's proofs, but went into the defendant's case, and remarked that the defendant's witnesses were credible, and rebutted the plaintiff's case.

We are, lastly, asked by the Counsel for the special appellant to allow him to take a point which was not raised in the Lower Court, *viz.*, that whereas the decision of the Judge was passed on the 28th January 1868, the plaintiff had on the 26th July 1867 petitioned to the Court that seven of his witnesses, three of whom were present in Court, might be examined, but that his prayer was rejected. It appears, however, that this petition was put in after the plaintiff's own case had closed, and when the defendant's case had almost come to a termination, and the defendant's witnesses had been examined. I think that, under these circumstances, the Lower Court was quite justified in refusing to allow the plaintiff, after his case had closed, to supplement his evidence at that late stage.

On the whole, I see no ground to interfere in special appeal with the judgment of the Lower Appellate Court as wrong in law; and would, therefore, dismiss this appeal with costs.

Markby, J.—I also think that this special appeal ought to be dismissed.

Upon the first ground, which is that the Judge is wrong in stating that there was no evidence regarding the level of the land, what he really does state is that there is no evidence that the plaintiff's village is on a higher level than the level of the aqueduct. It does not appear to me necessary to consider whether or not the plaintiff made such an allegation in his plaint, because whether he made such an allegation or not, that would be no evidence. I think all that we have to do is to look to what the witnesses say, and it appears to me that what the witnesses say is perfectly consistent with what is stated by the Judge. The witnesses only say that the reservoir on the plaintiff's land is higher than the aqueduct, and that is, as stated by the appellant, the reservoir in which the water is led from the aqueduct, and I should expect to find that the reservoir was, as the Judge assumes it, not on the general level with the plain lands, but higher than that. This fact, therefore, does not support the plaintiff's case.

The second point merely raises the first objection in another form.

The third ground is that the Judge was wrong in rejecting the Ameen's report and the evidence under it, but it seems to me that he was quite right in doing so. I do not think that it necessarily follows that because the Judge says he rejects all the documentary evidence, therefore he rejects not only the Ameen's report, but also the evidence of the witnesses whom the Ameen examines; but it is quite unnecessary to consider this point in the present case, because for the purpose for which the Judge considers it he was not only right in rejecting both the report and

the evidence, but in my opinion he was bound to reject them. The point which the Ameen was ordered to investigate was whether there was any, and, if so, what damage by the cutting of the drains, and any enquiry which the Ameen chose to make on any other point, and any report which he chose to give upon the rights of the parties, was absolutely useless, and the Judge was perfectly right in rejecting it. A person in the position of an Ameen is wholly unfit to make such an investigation. It seems to me that it does not follow from what the Judge states on this point that he considered the report of the Ameen so far as it was confined within the scope of the enquiry which he was directed to make, might not be referred to as evidence, that is, on the question of damages if it should arise. All that the Judge says is that it could not be made use of as evidence of the rights of the parties.

The fourth ground raises the question whether a certain proceeding under Act IV. of 1840 is receivable as evidence. I will assume for the moment, when the Judge says that it is inadmissible that he means to say that by law he ought not to draw any inference from that document.

Now, I am inclined to think that under the strict rule of English Law he was right, but whilst on the one hand we have authority from the highest Court of Appeal for saying that the strict rules of English evidence should not be applied in this country; and though I have myself refused to say that a Judge is wrong in receiving evidence very similar to this, still I am not able to say that there is any rule of law which would enable this Court on special appeal to go the length of saying that the Lower Court is wrong in refusing to give effect to such evidence. I think it is absolutely necessary in the present state of the law of evidence to leave something to the discretion of the Court below, and I do not think he went further than in his discretion he was justified in doing in rejecting this document. When we look at what this document really was, I think it is plain that under the circumstances it was very nearly worthless. All that appears from it is that the plaintiff and some other persons connected more or less with the defendants were in dispute as to the possession of the right now claimed, and that the Criminal Court interfered and for the moment kept the plaintiff in possession, but no enquiry was made in it as to the rights of the parties. The real test of the value of the document is to see what followed, and when we find that there was no exercise of that right by the plaintiff ever since that time, it seems to me idle to suppose that the document establishes any thing in favor of the plaintiff's case.

On the question of onus, as is generally the case when witnesses on both sides are examined, and the case is decided on their evidence, it is difficult to see how any such question can arise. I entirely agree with Mr. Justice Bayley in thinking that the Judge did not decide the case laying the onus on any particular party, but that he decided the case upon the whole evidence before him. But even if he had said that the plaintiff, who came into Court to assert his prescriptive right, was bound to prove his allegations, I do not think that he would be wrong.

On the last point, I would only observe that when the plaintiff had closed his evidence and the defendants had commenced their evidence, it was entirely a matter of discretion with the Court to refuse to allow the plaintiff to adduce any further evidence, unless the defendants, besides contradicting the case of the plaintiff, had set up a wholly new case which the plaintiff had had no opportunity to rebut. But this is not alleged to have been the case here, and the Judge was perfectly right in not allowing the plaintiff to supply then any evidence which he had omitted to give before.

FULL BENCH RULINGS

The 8th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Knight, Chief Justice,* and the Hon'ble F. B. Kemp, L. S. Jackson, E. Jackson, and W. Markby, *Judges.*

Mahomedan Law—Pre-emption—Vicinage—Partner.

Cases Nos. 1660 and 1663 of 1869.

Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 18th March 1869, affirming a decision of the Moonsiff of Monghyr, dated the 24th August 1868.

Shah Mahomed Hossein (Plaintiff), *Appellant,*

versus

Shah Mohsun Ali (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Moonshee Mahomed Yusuf for Respondent.

Case No. 298 of 1869.

Application for review of judgment passed by the Hon'ble Justices J. P. Norman and E. Jackson, on the 19th July 1869, in Special Appeal No. 158 of 1869.

Chutternath Jha *alias* Jhinga Jha (Respondent), *Petitioner,*

versus

Bhojoo Singh (Appellant), Opposite Party.

Baboo Tarucknath Sein for Petitioner.

Mr. R. E. Twidale for Opposite Party.

The right of pre-emption on the ground of vicinage does not extend to estates of large magnitude, but only to houses, gardens, and small parcels of land.

A partner, not in a house or small enclosure, but in a considerable estate, has a right, according to Mahomedan Law, to pre-emption when one of his co-sharers in such estate sells his share to a stranger.

Cases Nos. 1660 and 1663 were referred to the Full Bench by Loch and Hobhouse, JJ., with the following remarks:—

Hobhouse, J.—These cases had best, we think, be referred to the Full Bench. The question is when the claim for pre-emption is founded on vicinage, will that claim extend to any property of the description of a share in a village?

Understanding that a cognate case has been referred to the Full Bench by Mr. Justice Norman and Mr. Justice E. Jackson, let these cases be also referred to the same Full Bench.

Loch, J.—I concur.

Case No. 298 was referred to the Full Bench by Norman and E. Jackson, JJ., with the following remarks:—

Norman, J.—We refer this case to a Full Bench for the consideration of the following points:—

By several recent decisions of this Court, it has been established that under Mahomedan Law, the right of pre-emption possessed by a neighbour extends only to houses and small parcels of land, and not to considerable estates.

In two recent cases, 11 Weekly Reporter, 71, and 10 Weekly Reporter, 314, it has been held that the right of a shareholder to pre-emption exists, whether the parcel of land sold, and in respect of which the claim is made, be large or small.

There are many prior decisions to the same effect. But we doubt whether it can be shown that, under the Mahomedan Law, there is any ground for that distinction; whether under that law, there is any case in which a partner has a right of pre-emption in which, if he fails to exercise it, a neighbour may not also claim to exercise such right.

The question is whether, according to Mahomedan Law, a partner not in a house or small enclosure, but in a considerable estate consisting of a mouzah with five puttees, has a right to pre-emption, when one of his co-sharers in such estate sells his share to a stranger.

The judgment of the Full Bench was delivered as follows by

Couch, C. J.—The question referred to the Full Bench in special appeals No. 1663 and No. 1660 of 1869, is as follows: "When the claim for pre-emption is found-"ed on vicinage, will that claim extend to "any property of the description of a share "in a village?"

It appears that there are a great many decisions of the Courts of this country in which an opinion has been expressed, that when the claim for pre-emption is founded on vicinage, the right is limited to property of small extent.

In 1856, the Judges of the Agra Sudder Court, when considering the right of pre-emption on the ground of vicinage, said (page 396): "There can be no doubt "that in the Mahomedan Law, lands are "included amongst the articles concerning "which *shuffa* or pre-emption operates; "but it may admit of question whether "entire mehals or estates were intended, "or merely parcels of lands, gardens, and "the like. The latter view appears to be "supported by a passage in the Hedaya "which quotes a saying of the Prophet "to the effect that *shuffa* affects only houses "and gardens." This case is referred to by a Full Bench of this Court in 1863 (Sutherland's Special Number, page 143), where the Judges say that they would not on the mere ground of vicinage support a claim of pre-emption in respect of an entire estate.

In 2 Weekly Reporter, page 261, we find the Court says: "Plaintiff claims on the "ground of vicinage alone. Now, it is clear "that, if the Mahomedan Law does not bear "out his claim, there is no other custom "which does; and we are of opinion that, "even supposing the Mahomedan Law in all "its integrity to apply to the case, plaintiff's "claim cannot be supported. A claim found-"ed on joint tenancy is, no doubt, good; "but as regards vicinage not accompanied "by joint tenancy, the law is unfavorable, "and construes strictly such claims. The "authorities are even at variance as to their "admissibility; but assuming it to be settled "that some claims on mere vicinage are "good, the principle seems to be that, when "either houses or small holdings of land "make parties, in fact, such near neighbours "as to give a claim on the ground of con-"venience and mutual servience, the claim "in right of pre-emption will lie; but this "principle does not apply to large estates "which are not, in fact, such that any real "vicinage of the proprietors results."

This decision is approved of and adopted in 8 Weekly Repoter, page 310, and again in the same Volume at page 413. In a case reported at page 356 of the 10th Volume of the Weekly Reporter, Mr. Justice Loch says: "Looking at the chap-"ter on *shuffa* in the Hedaya, the right "appears to be limited to parcels of land, "houses, &c., and does not contemplate "the right to purchase a separate estate, "because a part of it is contiguous with "that of the *shuffee*. It is true that a "person may have a bad neighbour as a "zemindar, and so suffer as much vexation "from him as from a bad neighbour next "door or holding the next field; but still "it appears to me that the law was intend-"ed to prevent vexation to holders of "small plots of lands, who might be an-"noyed by the introduction of a stranger "among them. I think I would apply the "ruling laid down in the judgment of the "Court quoted* above to the present case, "and allow the judgment of the Lower "Court to stand; for the property to "which the right of pre-emption is claimed, "is a separate estate paying revenue to "Government."

Mr. Justice Mitter says: "The property "in dispute is an estate paying revenue to "Government, and I am not prepared to "say that this case is not governed by the "decision relied upon by the respondent."

These cases are all referred to, and concurred in, in a case reported in 11 Weekly Reporter, page 251.

The Arabic word used to describe the subject-matter of pre-emption is âkár. There has been a considerable discussion during the argument of this case upon what is the true meaning of that word. The Counsel for the appellant has contended that it applies to estates of all descriptions and magnitude; that there is under the Mahomedan Law no limit whatever; that the right exists whether the estate sold be large or small, provided that any portion of it is contiguous to the estate of the party claiming the pre-emption, and that the decisions of this Court which put a limit on the right in this respect are wrong.

* 2 W. R., p. 261.

We are, however, not prepared to say that there is not some ground for the limit which this Court has, in the above cases, put upon the right even on the words of the text of the law itself. It is probably impossible now to discover the precise meaning which was put upon the word âkár at the time when the Arabic texts were composed. Looking, not merely at the words used in the Hedaya, but at the illustrations given in the second and third chapters of the same book, at the state of society when the law was first uttered, and at the inconveniences against which it was probably directed, the better opinion might be that âkár should be construed to mean houses and small enclosures of land. But we rely rather on the uniform series of decisions, which very clearly recognize that the right of pre-emption on the ground of vicinage does not extend to estates of large magnitude, but only to houses, gardens, and small parcels of land. We do not consider that there is any thing before us which would justify us in disturbing that long series of decisions.

In review No. 298 of 1869 on special appeal No. 158 of 1869, the question is referred to us in the following terms: "By "several recent decisions of this Court, it "has been established that under Mahomedan "Law the right of pre-emption possessed "by a neighbour extends only to houses "and small parcels of land, and not to con-"siderable estates. In two recent cases "(Weekly Reporter, Volume XI., page 71, "and Weekly Reporter, Volume X., page "314) it has been held that the right of a "shareholder to pre-emption exists whether "the parcel of land sold and in respect of "which the claim is made be large or small. "There are many prior decisions to the same "effect. But we doubt whether it can be "shown that under the Mahomedan Law "there is any ground for that distinction; "whether, under that law, there is any case "in which a partner has a right of pre-"emption in which, if he fails to exercise "it, a neighbour may not also claim to "exercise such right.

"The question is, whether, according to "Mahomedan Law, a partner not in a house "or small enclosure, but in a considerable "estate consisting of a mouzah with five "puttees, has a right to pre-emption when "one of his co-sharers in such estate sells his "share to a stranger."

In the case referred to in 10 Weekly Reporter, page 314, the question does not (according to the report) appear to have been raised; but in the other case (11 Weekly Reporter, page 71) the question was raised, and the Judges (Kemp and Glover, JJ.) say that they find nothing in the Mahomedan Law which restricts the right of pre-emption of a co-parcener to small parcels of land.

We find that this decision is in accordance with the law as recognized from a very early period. In a case which occurred as early as the year 1811 (reported in I. Select Reports, page 350) the right of pre-emption was claimed and established by a shareholder in respect of a share in an entire *pergunnah*. In another case, which occurred two years after (reported in Volume II., Select Reports, page 85), the right was applied to a whole *mouzah*.

Again, in 1840 (VI. Select Reports, page 277) we find it applied to a whole village, which, from the price, was evidently a considerable one. In 1857 (Sudder Decisions, page 454) it was applied to a *talook;* and again, in 1858 (Sudder Decisions, page 1754) to a *village*.

It is true that in none of these cases was any question raised as to the extent of the right; but the absolute silence of the reports upon any such limit as is now contended for, notwithstanding the numberless instances in which the right of pre-emption must have been claimed by a partner in respect of a share in a large estate, strongly shows that for a very long period no such limitation has been supposed to exist.

It was urged upon us that the two lines of decision as to a neighbour and a partner could not be reconciled; that the right was given by the Arabic texts to both in the same terms; and that if the right was limited in the one case it ought also to be so in the other, the only respect in which the three classes of claimants differ being the right of priority. Now, if we are to look exclusively at the language of the law as it appears in the Hedaya, there is certainly ground for this contention. But we think that we should not be justified, merely for the sake of logical consistency, in overruling what appears to have been the law consistently applied in this Court for a great number of years, and never until very recently questioned.

This view of the Mahomedan Law of pre-emption in the case of partners has, no doubt, been acted upon in a great number of cases and is in conformity with modern usage; and to disturb it now would be to disturb a great many titles. Moreover, the distinction between the case of a neighbour and in the case of a partner does undoubtedly proceed upon a very sound principle, *viz.*, that the right should be co-extensive with the inconvenience which it is intended to avoid.

The result is that we answer the question in special appeals 1663 and 1660 of 1869 in the negative, and the question in review No. 298 of 1869 in special appeal No. 158 of 1869 in the affirmative.

The 13th July 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, F. B. Kemp, L. S. Jackson, J. B. Phear, Dwarkanath Mitter and Sir Charles Hobhouse, *Bart.*, *Judges*.

Jurisdiction—Landlord and tenant—Measurement of land—Standard pole—Appeal—Sections 9 and 11, Act VI. of 1862, B. C.

Cases Nos. 2299, 2300 and 2306 of 1869.

Special Appeals from a decision passed by the Officiating Judge of the 24-Pergunnahs, dated the 30th June 1869, affirming a decision of the Deputy Collector of that District, dated the 8th March 1869.

Mon Mohinee Chowdhrain (Plaintiff), *Appellant*,

versus

Prem Chand Roy and others (Defendants), *Respondents*.

Baboo Kalee Mohun Dass for Appellant.

Baboos Opendro Chunder Bose and *Mohendro Lall Seal* for Respondents.

HELD (*Couch, C.J., and Bayley and Jackson, JJ., dissenting*) that when the right of a proprietor to make (under section 9 of Act VI. of 1862 B. C.) a measurement of a tenure is disputed solely on the ground that the pole with which the measurement is intended or attempted to be made is not the standard pole of measurement of the pergunnah (as provided in Section 11), and the parties are at issue as to what is the length of the standard pole, the Collector has jurisdiction to enquire into, and decide the question as to what is the true length of the standard pole.

HELD (*Couch, C.J., expressing no opinion*) that if the Collector decides that question, an appeal lies from his decision.

These cases were referred to the Full Bench by Macpherson and Mitter, JJ., with the following remarks :—

Macpherson, J.—SECTION 11 of Act VI. of 1862 (B. C.) directs that all measurements under that Act shall be made by the standard pole of measurement of the pergunnah in which the land is situated. Section 9 enacts that if any one intending to measure any land, which he has a right to measure, is opposed in making such measurement, the Collector shall, upon application made to him, "inquire into the case in the manner provided for suits under Act X. of 1859, and shall pass a decision either allowing or disallowing the measurement," &c. In Section 10 it is declared that "save as aforesaid, the decision of the Collector on all matters enquired into and determined by him under this and the last preceding Section shall be final, unless the same shall be reversed on appeal therefrom to the Civil Court. Such appeals shall lie to the Zillah Judge or to the High Court subject, &c."

In the present suit, the defendant did not dispute the plaintiff's right to measure, but opposed him in making the measurement, because the rod with which he intended to measure was not (the defendant alleged) the standard pole of measurement of the pergunnah.

The Deputy Collector went into the question as to what was the true length of the standard pole of the pergunnah, and decided that question.

Against this decision the plaintiff appealed to the Judge, who held that no appeal would lie as the Deputy Collector's decision was final, as ruled by a Division Bench of this Court in a case reported in Volume V., Weekly Reporter, page 17 (Act X).

In special appeal it is contended, *first*, that the decision referred to is wrong, and that an appeal did lie to the Judge; and, *secondly*, that if there was no appeal to the Judge, the Deputy Collector acted without jurisdiction in deciding the question as to the length of the measurement rod.

In two cases reported in the 11th Volume of the Weekly Reporter (Ramanath Rakheet *versus* Dookhee Sham Bhooya, page

510, and Brojo Kishore Sein *versus* Kassim Ali, page 562), it has been held that no appeal lies to the Judge, and that the Collector has no jurisdiction to decide what is the standard pole.

In two earlier cases—Tarucknath Mookerjee *versus* Meydee Biswas, Volume V., Weekly Reporter, page 17 (Act X.), and Rakhal Doss Mookerjee *versus* Tunoo Puramanick, Volume VII., Weekly Reporter, page 239—it has been held that the Collector has jurisdiction to decide what is the length of the standard pole, but there is no appeal from his decision.

For myself I incline to the opinion that according to the true construction of Sections 9, 10, and 11 of Act VI. of 1862 (B. C.), the Collector ought to decide what is the standard pole, and that there is an appeal from his decision. It seems to me that inasmuch as Section 11 expressly directs that all measurements shall be made by the standard pole of measurement of the pergunnah in which the land is situated, the fact that it is intended or attempted to measure with a pole other than that which is the standard of the pergunnah, is a very good reason for "disallowing the measurement" within the meaning of Section 9.

I would refer the case for the decision of a Full Bench.

The question referred is this: When the right of a proprietor to make (under Section 9 of Act VI. of 1862 B. C.) a measurement of a tenure is disputed solely on the ground that the pole with which the measurement is intended or attempted to be made, is not the standard pole of measurement of the pergunnah (as provided in Section 11)—and the parties are at issue as to what is the length of the standard pole—Has the Collector jurisdiction to enquire into and decide the question as to what is the true length of the standard pole? And if the Collector does decide that question, is there any appeal from his decision?

The same questions and no other arise in special appeals Nos. 2300 and 2306; we, therefore, pass the same order in those appeals as in No. 2299.

The following are the judgments of the Full Bench:—

Hobhouse, J.—The plaintiff in this instance sought to measure as zemindar certain lands held by the defendant, proposing to use in that measurement a rod of 80 cubits in length. The defendant, the ryot, opposed the measurement on the ground that the rod with which the plaintiff was entitled to measure was a rod, not of 80 cubits, but of 90 cubits in length.

The zemindar meeting with this opposition to his intended measurement, applied to the Collector, basing his application upon the provisions of Section 9, Act VI. of 1862 B. C., and prayed the Collector to permit him to measure the defendant's land with a rod of 80 cubits, averring that that was the *procholit* প্রচলিত or prevalent rod of the pergunnah. The defendant opposed the plaintiff's application on the ground that the *procholit* প্রচলিত or prevalent rod of the pergunnah was not a rod of 80 cubits, but was a rod of 90 cubits.

The Collector tried the case between the parties, after evidence had been adduced on either side, and passed a decree directing that the measurement might proceed, the plaintiff, the zemindar, being directed to use a rod of 90 cubits in making such measurement.

The plaintiff appealed to the Judge against this decision, and the Judge dismissed the appeal on the ground that, under the rulings of this Court, no appeal lay to him from the decision of a Collector, in so far as that decision declared what was the standard pergunnah rod with which a measurement was to be made.

A special appeal was preferred to this Court, and the Judges of the Division Bench of this Court before whom the appeal was preferred, referred this and the other special appeals before them to a Full Bench of this Court under the following order:—

"The question referred is this: When "the right of a proprietor to make (under "Section 9, Act VI. of 1862 B. C.), a "measurement of a tenure is disputed solely "on the ground that the pole with which "the measurement is intended or attempted "to be made is not the standard pole of "measurement of the pergunnah (as provided "in Section 11), and the parties are at issue "as to what is the length of the standard "pole, has the Collector jurisdiction to "enquire into and decide the question as to "what is the true length of the standard "pole? And if the Collector does decide "that question, is there any appeal from his "decision?"

The first question, therefore, that we have to decide is: "Has the Collector jurisdiction to enquire into and decide the question as to what is the true length of the standard pole? And if the Collector does decide that question, is there any appeal from his decision?"

The law applicable to the case is to be found in the provisions of Sections 9, 10, and 11 of Act VI. of 1862 B. C. These provisions are as follows:—

Section 9.—"Every proprietor of an estate or tenure, or other person in receipt of the rents of an estate or tenure, has a right of making a general survey and measurement of the lands comprised in such estate or tenure, or any part thereof, unless restrained from doing so by express engagement with the occupants of the lands. If any person intending to measure any land which he has a right to measure, is opposed in making such measurement by the occupant of the land; or if any under-tenant or ryot, having received notice of the intended measurement of land held or cultivated by him which is liable to such measurement, refuses to attend and point out such land, such person may make application to the Collector, and the Collector shall thereupon proceed to enquire into the case in the manner provided for suits under Act X. of 1859, and shall pass a decision either allowing or disallowing the measurement, and, if the case so require, enjoining or excusing the attendance of any such under-tenant or ryot. If any under-tenant or ryot, after the issue of an order enjoining his attendance, neglects to attend and to point out the land, it shall not be competent to him to contest the correctness of the measurement made, or any of the proceedings held in his absence."

Section 10.—"If the proprietor of an estate or tenure, or other person entitled to receive the rents of an estate or tenure, is unable to measure the lands comprised in such estate or tenure or any part thereof, by reason that he cannot ascertain who are the persons liable to pay rent in respect of the lands or any part of the lands comprised therein, such proprietor or other person may petition the Collector in respect of the lands which he cannot measure as aforesaid; and the Collector thereupon, and on the necessary costs being deposited with him by the applicant, shall proceed to measure the land and to ascertain and record the names of the persons in occupation of the same, or on the special application of the proprietor or other person as aforesaid, but not otherwise, shall proceed to ascertain, determine, and record the tenures and under-tenures, the rates of rent payable in respect of such lands, and the persons by whom respectively the rents are payable. The provisions of Section 67 of Act X. of 1859 shall apply to any proceeding of the Collector instituted under this Section. If after due enquiry the Collector shall be unable to measure the land, or to ascertain or record the names of the persons in occupation of the same; or if he shall (in any case in which such special application shall have been made as aforesaid) be unable to ascertain who are the persons having tenures or under-tenures in such lands or any part thereof, then and in any such case he may declare the same to have lapsed to the party on whose petition he has made the enquiry. If any person within 15 days after the Collector shall have recorded the name of such person as being in occupation of such land or any part thereof, or shall have declared a tenure to have lapsed, shall appear and show good and sufficient cause for his previous non-appearance, and shall satisfy the Collector that there has been a failure of justice, the Collector may, upon such terms or conditions as he may think proper, alter or rescind his declaration according to the justice of the case. Save as aforesaid, the decision of the Collector on all matters enquired into and determined by him, under this or the last preceding Section, shall be final, unless the same shall be reversed on appeal therefrom to the Civil Court. Such appeals shall lie to the Zillah Judge or to the Sudder Court, subject to the provisions and conditions contained in Sections 160 and 161 of Act X. of 1859."

Section 10.—"All measurements made under this Act shall be made by the standard pole of measurement of the pergunnah in which the land is situated."

The material parts of the Sections I have quoted with which we have to do in these appeals are, I think, the first part, and the general tenor of Section 9 of the Act—that part of Section 10 which refers to the appellate jurisdiction of the Courts and the provisions of Section 11.

The first part of Section 9 is declaratory; and it lays down that "every proprietor of an

"estate or tenure, or other person in receipt "of the rents of an estate or tenure, has a "right of making a general survey and mea-"surement of the lands comprised in such "estate or tenure or any part thereof, unless "restrained from doing so by express engage-"ment with the occupants of the lands." Then the Section goes on to say: "If any "person intending to measure any land which "he has a right to measure is opposed in "making such measurement by the occupant "of the land, * * * * such person may "make application to the Collector, and the "Collector shall thereupon proceed to en-"quire into the case in the manner provided "for suits under Act X. of 1859, and shall "pass a decision either allowing or disallow-"ing the measurement."

Then, by the last Clause of Section 10, it is provided that, "save as aforesaid," *i. e.*, saving certain matters with which we have nothing to do in this case, "the decision of "the Collector on all matters enquired into "and determined by him under this and "the last preceding Section (*i. e.*, Section "9) shall be final, unless the same shall be "reversed on appeal therefrom to the Civil "Court. Such appeals shall lie to the Zillah "Judge or to the Sudder Court subject to "certain provisions."

Then Section 11 declares generally that "all measurements made under this Act "shall be made by the standard pole of "measurement of the pergunnah in which "the land is situated."

The pleader on the part of the special appellant and the pleader on the part of the special respondent, both contend that the Collector has jurisdiction to enquire and to determine, for the purpose of the measurement prescribed by Section 9, what is the standard pole of measurement of the pergunnah; and the only point on which these pleaders differ is the second point submitted for our decision, namely, the point as to whether, when the Deputy Collector has decided this question, there is any appeal from his decision. I really, therefore, do not know upon what the contention is based, when it is said that the Collector has no jurisdiction to determine in such a case as this as to what is or what is not the standard pole of measurement of the pergunnah. I can only gather these objections from certain recorded opinions of Division Benches of this Court, to which I shall now *seriatim* refer.

The first is a case to be found in 5 Weekly Reporter, Act X. Rulings, page 17. In that case, it was held that the order of the Collector, under Section 11, Act VI. of 1862 B. C., was not appealable; and it further seems to have been held that so much of the decision of the Collector in a case like the one we have before us, as declared what the standard pole of measurement was, was in the nature of an order, and not of a decision, the Collector being, it was said, the depository of the standard pole of the pergunnah, and it being, therefore, exclusively within his province to declare what that standard pole was.

This decision is followed up by the same Judges in another case to be found in 7 Weekly Reporter, page 239. In this case, it was said that the Collector had come to a judicial decision upon an issue properly raised, as to what was the standard pole of measurement. The zemindar had appealed to the Judge upon this question of the standard pole, and the Judge had given a judgment upon the question. This Court held that the Judge had no jurisdiction to give any such judgment, and the learned Judges seem to have held that this was so; because in the first instance there was no provision in Section 11 giving an appeal to the Judge upon the question of the standard pole of measurement of the pergunnah; and because that question would seem to be one of which the judicial determination would more properly arise at the time of executing the award of the Collector; and therefore the Judges thought that the decision of the Deputy Collector as to the standard pole of measurement was not a matter open to appeal, and they dismissed the special appeal before them.

Then, in a decision to be found in page 510 of the 11th Volume of the Weekly Reporter, a Division Bench of this Court, in which one of the Judges who had been a Judge in the Division Benches in the cases above mentioned took a somewhat different view of the law, and came to a determination that neither the Collector, nor the Judge, on appeal from the decision of the Collector, had any jurisdiction to determine what was the standard pole of measurement of the pergunnah. The Judges were of opinion "that the functions of the Collector, as well "as the provisions for appeal, were strictly "defined in the 9th and 10th Sections of "the Act; and that the direction contained "in Section 11 was one obligatory on the

"zemindars or persons making the measurement; but that it was not for the Collector "to lay down *à priori* in orders made under "Section 9 with what pole the measurement "was to be made, but that all questions "arising out of the pole with which the "zemindar might measure must be reserved "for after proceedings when any action was "taken upon the result of the measurement "obtained." And the Judges were of opinion "that the order of the Collector ought to be "cut down to an order allowing the zemindar "to measure, and that the responsibility of "measuring with the proper standard must "be left entirely to the zemindar." "The "authority," the Judges remark, "given to "the Collector in this matter, vexatious as "is the nature of the proceedings, seems to "be strictly limited to enabling the zemindar "to carry out the power, which is supposed "by law to reside in all proprietors, of "measuring the lands within his estate. "It can matter very little to the ryot by "what standard his lands may be measured, "because the mere measurement does not "conclude either him or the landlord as to "any further question."

This decision is followed by one to be found in page 562 of the same volume of the Weekly Reporter, in a case in which I was one of the Judges. Mr. Justice Bayley concurred in the judgment which I delivered on that occasion; but the reasons for it were given by myself, and I cannot, therefore, of course, say to what extent those reasons were concurred in by my learned colleague. I was then of opinion that, had the case before us "been a case of application for "measurement under Section 10 of the Act, "the Collector might have had jurisdiction "to declare the length of the standard rod, "and the Judge might have had jurisdiction "to entertain and determine an appeal from "the Collector's decision on this point. But "the application here was an application "under the provisions of Section 9, and in the "words of the law the Collector was bound to "proceed to enquire into such application "and to pass a decision *either allowing or "disallowing the measurement.* The point, "therefore, and the sole point before the "Collector under the provision of Section 9, "was whether the measurement should be "allowed or not, and there was not and "could not be before the Collector the point "as to the length of the measurement-rod, "because, until the zemindar had been "permitted to measure, and had proceeded "to measure, there could be no issue as to "the measurement-rod that he was to be "permitted to use."

These are the decisions in favor of the contention that the Deputy Collector has no jurisdiction to enquire into the question of the standard pole of measurement. But, on the other hand, there is a case to be found at page 59 of the Gap Number of the Weekly Reporter, Act X. Rulings, which held a contrary doctrine. This goes to the full extent of declaring as well that the Collector has jurisdiction to enquire into such a question as that an appeal will lie to the Judge on such a question against the decision of the Collector.

On re-considering the whole question, I have come to the conclusion that the answer to the questions before us should, in both cases, be made in the affirmative. I think that this decision must be given, not from any considerations outside the law, such as, it seems to me, were many of those which influenced the Judges in the cases I have quoted, but I think that within the exact terms of the law the jurisdiction lies with the Collector, and the appeal lies to the Judge. I observe that every zemindar may measure unless he is restricted by express engagement from measuring. Then the law seems to me to say that, if the zemindar goes to do that which, in the first part of the law, he has been declared entitled to do, namely, goes to exercise his rights to measure, and if he is opposed in making such measurement by the occupant of the land, then he may make an application to the Collector, and the Collector shall enquire into and determine the case. It is the opposition, then, of the tenant to the measurement which gives the zemindar his cause of action, and it would seem to follow that it would be the subject-matter of the opposition which would form "the case" between the parties on which the Collector was to determine whether there should be measurement or no measurement.

Then this opposition on the part of the tenant is not declared to be opposition on any one or more particular grounds, such as that the zemindar was restrained by express engagement with the occupant from the measurement, or that generally the zemindar had no right to measure, and so forth; but it is declared to be opposition generally and without specification of grounds, so that it is hard to see why, if the Collector had jurisdiction to determine for measurement or the

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contrary when the opposition of the tenant is based upon one ground, why the Collector should not equally have such jurisdiction when the opposition is based upon another. It is, I would repeat, the opposition generally, and on whatever ground it may be based, which gives the cause of action, and that opposition once made, the Collector, it seems to me, is bound to determine whether that opposition is justified or not, on whatever ground he may find it to be based, so that he may eventually determine whether the measurement may proceed or not.

It has been suggested to me that the opposition to which the law has reference must be to give the Collector jurisdiction—an opposition in the shape of a denial of the zemindar's right to measure, but, as I read the law, there is no such restriction in it. The law simply says that, "if the zemindar is opposed," not on this ground or on that ground, but "is opposed" generally in making the measurement, then he may apply to the Collector, and the Collector shall enquire into and pass a decision allowing or disallowing the measurement. So that it seems to me that, if the zemindar is opposed on *any* ground by the occupant in making the measurement, whether it be on grounds such as I have above referred to, or the ground in the matter before us, namely, the ground that the zemindar desires to use that as the standard pole of measurement which is not the standard pole of measurement, then I think that the law distinctly declares that the zemindar is at liberty to make application to the Collector, and the Collector must proceed to enquire into the case and to pass a decision either allowing or disallowing the measurement. And so in this case, as Mr. Justice Macpherson has suggested in his order of reference, I think that, when the Deputy Collector had determined that the zemindar had applied to measure with a pole which was not the standard pole of measurement of the pergunnah, then the Collector should perhaps more properly have given a decision disallowing the measurement. At the same time, I am not prepared to say, and it is not necessary that I should say, that the Collector might not give the decision that he has given in this case, namely, allowing the measurement, but only allowing it on terms. If the Collector had jurisdiction, as I think he had, either to allow or to disallow the measurement in this case, then also I think that the words in the latter part of Section 10 are conclusive on the point, that an appeal in such a matter will lie to the Judge, because the words of the law are that "the decision of the Collector on all matters enquired into and determined by him under this or the last preceding Section (*i. e.*, Section 9) shall be final, unless the same shall be reversed, on appeal, therefrom to the Civil Court.

It is said, however, that there is no appeal, because the Collector is the depository of the standard pole of measurement, and it is, therefore, exclusively within his province to declare what the standard pole is. This argument, however, is, I think, based on an assumption that that is the fact which is not always the fact; and I will venture further to say that it is a begging of the whole question. It is possible, and, in fact, it seems to be generally the case; and my own observation and experience is that it is the case, that the Collector is in one sense the depository of a pole of measurement of the pergunnah; but it does not at all follow that, because he is sometimes and under certain circumstances the depository of such a pole, that it is, therefore, the standard pole, or that he should always be the depository; nor that, if he be always the depository, he must also be exclusively the Judge to declare what the standard pole is.

The same experience which has taught me that the Collector is generally the depository of a pergunnah pole of measurement has also taught me that this pole has emanated, in most instances, from the zemindar, and has been filed on record in the Collectorate behind the ryot's back and without his knowledge and consent; that such pole is not filed on record in the case of every pergunnah; and that, even when it has been so filed, it has often been tampered with.

But even if the Collector were invariably, or wherever he may be, the depository of a standard pole of measurement, that pole might, and perhaps in every case ought, on production of the record of it, to be at once held to be the pole by which only a measurement should be effected; but that, it seems to me, would follow, not because the Collector is the Judge of the standard pole *qud* Collector, but because his record, when produced, is (if it is) conclusive evidence of what the standard pole is.

And indeed I find nothing in the law declaring the Collector to be "exclusively the Judge" of the standard pole.

I remember well a suit in which on the evidence the standard pergunnah pole was part of a certain door-post in the house of a certain zemindar, and I imagine that in all cases the question of what is the standard pole must be a question of evidence.

It is, however, again said that the Collector has no jurisdiction to determine this point, because none is given by the provisions of Section 11 of the Act. Those provisions, however, in my judgment, are simply declaratory. They simply declare what shall be the rod by which the measurement, under the Act, shall be made; and although those provisions do not declare who is the person to determine what the standard pole of measurement is, neither, on the other hand, do they forbid the Collector to be the person to determine that question. And the case seems to me to turn, not so much as to what is or what is not comprehended in the provisions of Section 11 of the Act, but what is comprehended in the provisions of Sections 9 and 10 of the Act: Section 11 being, as I have said before, simply a declaratory Section, declaratory of the rod by which, whenever and by whomsoever, measurements under the Act are made, they must be made.

The other objections that have been made to the existence of this jurisdiction in the Collector are based rather, it seems to me, on considerations outside the law than on considerations connected with the law itself; and as, I think, there is jurisdiction given by the words of the law, I think it unnecessary to discuss any question outside it.

I would, as I have said before, answer both questions in the affirmative.

Miller, J.—The first question which we have to determine in this case is whether, in a suit for measurement brought in the Court of the Collector, under the provisions of Section 9, Act VI. of 1862, of the Bengal Council, that officer is competent to determine the length of the rod with which the measurement is to be made. I am of opinion that this question ought to be answered in the affirmative.

The whole law relating to the subject of measurement is contained in Sections 9, 10, and 11 of the Act; and as these Sections are intimately connected with one another, I think it necessary to quote them *in extenso* at the very outset of my judgment for facility of reference.

Section 9 says: "Every proprietor of "an estate or tenure, or other person in "the receipt of the rents of an estate or tenure, "has a right of making a general survey "of the lands comprised in such estate or "tenure or any part thereof, unless restrained "from doing so by express engagement "with the occupants of the lands. If any "person intending to measure any lands "which he has a right to measure is opposed "in making such measurement by the occupant of the land; or if any under-tenant or "ryot, having received notice of the intended "measurement of land held or cultivated "by him which is liable to such measurement, refuses to attend or point out such "land, such person may make application "to the Collector, and the Collector shall "thereupon proceed to enquire into the "case in the manner provided for suits "under Act X. of 1859, and shall pass a "decision either allowing or disallowing the "measurement; and, if the case so require, "enjoining or excusing the attendance of "any such under-tenant or ryot. If any "under-tenant or ryot, after the issue of "an order enjoining his attendance, neglects "to attend and to point out the land, it "shall not be competent to him to contest "the correctness of the measurement made "or any of the proceedings held in his "absence."

Section 10 runs as follows: "If the "proprietor of an estate or tenure, or other "person entitled to receive the rents of an "estate or tenure, is unable to measure the "lands comprised in such estate or tenure "or any part thereof, by reason that he "cannot ascertain who are the persons liable "to pay rents in respect of the lands or any "part of the lands comprised therein, such "proprietor or other person may petition the "Collector in respect of the lands which he "cannot measure as aforesaid, and the Collector shall thereupon, and on the necessary costs being deposited with him by "the applicant, shall proceed to measure the "lands and to ascertain and record the "names of the persons in occupation of "the same; or on the special application of "the proprietor or other person as aforesaid, "but not otherwise, shall proceed to ascertain, "determine, and record the tenures and "under-tenures, the rates of rent payable "in respect of such lands and the persons "by whom respectively the rents are payable. The provisions of Section 67 of "Act X. of 1859 shall apply to any

"proceeding of the Collector instituted "under this Section. If after due enquiry "the Collector shall be unable to measure "the land, or to ascertain or record the "name of the person in occupation of the "same; or if he shall (in any case in which "such special application shall have been "made as aforesaid) be unable to ascertain "who are the persons having tenures or "under-tenures in such lands or any part "thereof, then and in any such case he may "declare the same to have lapsed to the "party on whose petition he has made the "inquiry. If any person within 15 days "after the Collector shall have recorded "the name of such person as being in oc-"cupation of such lands or any part thereof, "or shall have declared a tenure to have "lapsed, shall appear and show good and "sufficient cause for his previous non-"appearance, and shall satisfy the Collector "that there has been a failure of justice, "the Collector may, upon such terms or "conditions as he may think proper, alter or "rescind his declaration according to the "justice of the case save as aforesaid. The "decision of the Collector on all matters "enquired into and determined by him under "this or the last preceding Section shall be "final, unless the same shall be reversed on "appeal therefrom to the Civil Court. "Such appeals shall lie to the Zillah Judge "or to the Sudder Court, subject to the "provisions and conditions contained in "Sections 160 and 161 of Act X. of "1859."

Section 11 declares: "All measurements "made under this Act shall be made by the "standard pole of measurement of the per-"gunnah in which the land is situated."

Such then being the state of the law which is to guide us in this enquiry, the first question which suggests itself is whether the measurement referred to in Section 9 is to be considered as a "measurement made under the Act;" for if this question is answered in the affirmative, such measurement *must be* made by the standard pole of the pergunnah under the express provisions of Section 11. I am of opinion that this question does not admit of any other answer. The right of the landlord to measure the lands held by his ryots is declared by the first part of Section 9; and as this Section is nothing but a part of the Act, it seems to me to be perfectly clear that every measurement made in the exercise of that right must be considered as a measurement made under that Act, and therefore subject to the provisions of Section 11, which Section peremptorily lays down that "*all measurements* "*made under this Act shall be made by the* "*standard pole of the pergunnah in which* "*the lands are situated.*" When a particular right is created or declared by a particular law, every act done in the exercise of that right must be necessarily considered as an act done under that law; and it must, therefore, be done in the mode which that law prescribes. In the present case, we find that the landlord is authorized to measure his lands by one part of Act VI. of 1862; but by another part of that very Act it is peremptorily laid down that all measurements made under it must be made in a particular manner. How, then, can it be said that the measurement made in the exercise of such a right is not a measurement made under Act VI. of 1862; or that such a measurement can be made in a manner different from that which that Act requires. Such a construction would, in my opinion, completely nullify the provisions of Section 11; for if the landlord is entitled to measure his lands with any arbitrary rod of his own selection, where was the necessity for making a provision to the effect that all measurements made under the Act which gives him that right must be made by a fixed pole, namely, the standard pole of the pergunnah? The right to do an act is, in my opinion, inseparable from the mode in which that act is required to be done; and if this is once conceded, it would follow, as a matter of course, that every measurement made by a landlord, under the power vested in him by the first part of Section 9, must be considered as a measurement made under the Act of which that Section is a part; and it must, therefore, be made by the standard pole of the pergunnah only.

In the next place, the Collector is required by the second part of Section 9 to "enquire into the case in the manner provided for suits under Act X. of 1859," and then to pass a decision allowing or disallowing the measurement; and it is further declared by the last portion of Section 10 "that the decision of the Collector *on all matters* enquired into aud determined by him" under Section 9 "shall be final, unless reversed on appeal therefrom to the Civil Court." It is clear from these provisions that the decision of the Collector, under Section 9, has the full force of a judicial decree between the parties: and every measurement made by the

landlord on the strength of such a decree must be considered in the same light as if it were made in execution thereof. Whether this measurement is made with or without any further assistance from the Collector does not seem to me to be very material; for the Collector would be bound to give such further assistance if the landlord is still opposed by the tenant in making such measurement. If then we are to consider that this measurement is a measurement made in execution of a decree passed under Section 9, can it be possibly contended that it is not a measurement made under Act VI. of 1862, when it is perfectly clear that the said Section is nothing but a part of that Act? And if this proposition is once admitted, does it not necessarily follow that the landlord is bound to make the measurement according to the provisions of Section 11, which says that "*all measurements made under Act VI. of 1862 must be made by the standard pole of the pergunnah?*" If the measurement made under the provisions of Section 9 is not a measurement under Act VI. of 1862, I am aware of no other law under which such measurement could be made so long as that Act was in force.

The preceding observations are, I believe, sufficient to show that every measurement made under Section 2 is a measurement made under Act VI. of 1862; and that the landlord is, therefore, bound to make that measurement by the standard pole of the pergunnah under the provisions of Section 11 of that Act. Let us apply this conclusion to the determination of the particular question under our consideration.

The landlord in this case came before the Collector on the allegation that he wanted to measure the lands held by the defendant with a particular rod, which he asserted was the rod current in the pergunnah, but that he was opposed in making such measurement by the defendant. The defence set up was that the rod mentioned in the plaint was not the current rod of the pergunnah, and that the plaintiff had no right to measure the lands in question with such a rod. In this state of the pleadings, the only point in issue between the parties was whether the rod alleged by the plaintiff or that alleged by the defendant was the standard pole of the pergunnah within the meaning of Section 11. Now, if the landlord is bound to make the measurement by such a pole, as I have already shown in the previous part of my judgment, the Collector is bound to determine this issue before he can pass a decision allowing or disallowing the measurement. If the rod with which the plaintiff sought to measure the lands in question was not the standard rod which he was bound to use, the defendant was fully justified in resisting the measurement upon that ground, and the Collector would be necessarily bound to determine what the proper rod ought to be before he can decide the case one way or the other.

It has been said that there is but *one* question which the Collector has jurisdiction to decide under Section 9, namely, whether the plaintiff has a right to measure the lands or not. With reference to this argument, I wish to observe in the first place that there is nothing in the words of that Section to restrict the number of questions to be decided to one. All that it says is that "the Collector shall proceed to *enquire* "*into the case* in the manner provided for "suits under Act X. of 1859, and then pass a "decision either allowing or disallowing the "measurement." The number of questions to be decided must necessarily depend upon the pleadings in each particular case; and the Collector is, therefore, bound to determine every one of them, so long as such determination is essential to the right determination of the case itself. Then, again, the last portion of Section 10 declares that "the decision of the Collector on *all matters*" arising in suits under Section 9 shall be final, &c.; and this language is sufficient to show that the Legislature must have thought that the Collector will have to enquire into more "matters" than one in such suits. But, be this as it may, it seems to me to be perfectly clear that the right of measurement given to the landlord by Act VI. of 1862 is necessarily subject to the limitations prescribed by Section 11 of that Act, and the question of the rod must, therefore, be considered as inseparable from that of the right itself. When the law creates a particular right, and at the same time requires that that right should be exercised in a particular manner, the Court through the assistance of which that right is sought to be enforced *is bound* to see that it is exercised in *that* manner, and in that manner only. In the case now before us, the only right which the law has vested in the landlord is to measure the lands held by his tenants with the standard pole of the pergunnah, and the Collector would be certainly

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wrong if he allows him to measure those lands with any other pole. And yet this would be the inevitable result if we hold that he has no jurisdiction to determine what this standard pole is when that question is distinctly raised before him.

Again, the last portion of Section 9 declares that, "if an under-tenant or ryot, after the "issue of an order enjoining his attendance, "neglects to attend and to point out the "land, it shall not be competent to him *to "contest the correctness of the measurement "made or any of the proceedings held in "his absence.*" But if the landlord is to be permitted to measure the lands with any rod he likes, I am at a loss to understand why the latter should be visited with such a severe penalty as this for refusing to attend during such a measurement. The object of the measurement must be presumed to be the ascertainment of the exact quantity of land in the occupation of the tenant, and this object can be *directly* attained by the measurement, only when it is made with the proper rod—that is to say, with the standard of the pergunnah in which the lands are situated. Why, then, the ryot might justly say, am I to waste my time in waiting upon my landlord when I see that he is going to measure my lands with an improper rod? And why again is he to be precluded from *contesting the correctness of that measurement or of the proceedings connected with it* if he refuses to attend? The Legislature might have, if it liked, allowed the landlord to measure the lands with any arbitrary standard of his own, leaving the question of the proper rod as well as that of the area which depends upon it to be determined in some future litigation between him and the tenant. But when it positively declares that all measurements made under the Act *shall* be made according to the standard pole of the pergunnah, there can be no doubt whatever that it had some object in view in making such a provision. Suppose, for instance, that the landlord wishes to measure the lands according to the mode of measurement prevalent in Turkey. The Bengal ryot is not expected to understand anything of such a process of measurement, and yet, as the law stands, he is to be visited with the severe penalties above referred to, if he refuses to attend while his landlord is going through a process which is perfectly unintelligible to him.

It has been said that the words "it shall "not be competent to him to contest the "correctness of the measurement or of any "proceedings held in his absence," do not mean that he will not be permitted to raise the question of the rod in any future litigation. I confess that I am by no means prepared to admit the correctness of this construction. The words "correctness of the measurement" evidently mean *the correctness of the result arrived at by the measurement*, and the Section makes no exception whatever as to any particular ground upon which the correctness of this result can be impugned. The words are absolute as they stand, and the recusant ryot would be precluded, in my opinion, from contesting the result of the measurement, whether it be upon the ground that an improper rod has been used or upon any other ground whatsoever. At any rate, it seems to me to be perfectly clear that the words "or any of the proceedings held in his absence" must necessarily cover all possible grounds of objection; for, as these proceedings evidently refer to those held after the decision of the Collector, they must, as a matter of course, include the matter of the rod with which the measurement is made subsequent to that decision.

The above view appears to me strongly corroborated by the provisions of Section 10. According to this Section, the Collector himself is required to make the measurement, and it follows, therefore, that this measurement must be considered as a measurement made under the Act. If then a question is raised before the Collector as to what the standard pole of the pergunnah is, he would be bound to determine that question before he can proceed with the measurement; for this measurement, being a measurement under the Act, must be made by the standard pole of the pergunnah under the express provisions of Section 11. It has been said that, because the Collector would be bound to enquire into the length of the measuring rod in suits arising under Section 10, it does not necessarily follow that he would be bound to do the same thing in suits arising under Section 9. But the two Sections are evidently cognate to one another. The right of measurement claimed under both the Sections is one and the same, and indeed it is in the first part of Section 9 that that right is declared for the purposes of both the Sections. The only material difference that I find between the suits instituted under these two Sections is, that in the one case the landlord knows who his tenants are, whilst in the other he is obliged to invoke the assistance of the Collector to ascertain

them for him. But this circumstance cannot, in my opinion, constitute any valid reason for making any distinction between them so far as the particular point now before us is concerned. If the right claimed in both cases is one and the same, it cannot be reasonably supposed that the Legislature intended to allow that right to be exercised in two different modes under two Sections so intimately connected with one another.

It has been said that there is no such thing in existence as the standard pole of the pergunnah. There may be some foundation for the argument if we are to take the word *standard* in its strictest signification. But as we have no right to ignore the provisions of Section 11 altogether, we must put the best interpretation upon the words of that Section we can. I am inclined to think that those words were intended to signify the *customary pole used in the pergunnah for the purpose of measuring lands held or occupied by under-tenants and ryots.* This view is fully supported by the decision of a Division Bench of this Court reported in page 124 of the 3rd Weekly Reporter; and I may also add that it is in this sense that the words *standard pole of the pergunnah* have been uniformly understood by all persons concerned, including the parties to the present litigation. But be this as it may, I do not think that this argument can in any manner affect the question now before us. The law requires that all measurements under Act VI. of 1862 shall be made by the *standard pole of the pergunnah*, and if no such pole is in existence, the Collector would be bound to disallow the measurement upon that ground, leaving the party aggrieved to apply to the Legislature for the abrogation of a law which is incapable of being carried out in practice.

It has been further said that the Collector himself is the sole custodian of the standard poles of measurement in use in the different pergunnahs situated within his Collectorate; and as every question relating to such poles of measurement can only be determined by the inspection of his own records, every such determination must be taken to be a determination made in his ministerial and not in his judicial capacity. I confess that I am altogether unable to accede to the correctness of this proposition. There is no law that I am aware of which says that the Collector is the custodian of such poles, or that the records of his office are the only evidence upon which the length of such poles can and ought to be determined. Those records are frequently referred to, it is true, whenever there is a dispute about the length of the measuring rod; but there is no law which says that they are to be taken as conclusive evidence for the determination of such disputes. From what materials, it may be asked, have those records been prepared? And who were the parties by whom those materials were supplied to the Collector? Every one who has any experience on the subject will admit that they are nothing more or less than the statements made to the Collector from time to time by the zemindars themselves; and even if we allow them to be admitted in evidence against the ryots who were no parties to them, either on the ground of their antiquity, or on the ground that they have been admitted as such by a long and uniform course of practice, I do not see the slightest reason for holding that we are bound to accept them as conclusive evidence on a question of such vital importance. But assuming for the sake of argument that they are entitled to the fullest weight which is sought to be attributed to them, I am still at a loss to understand why the decision of the Collector on the length of the standard pole should be considered as a decision passed in his ministerial capacity, merely because that decision is based upon such materials. The records of a Court of justice or of any other public office might be legally entitled to be considered as conclusive evidence on a particular question of fact; but I am utterly at a loss to understand why the determination of that question should be held to be a determination made in a ministerial capacity, merely because it is made on the strength of such records. The officer making the determination might misinterpret those records in various ways, or he might mistake some other records for them; and it would, therefore, be certainly wrong to contend that such a determination does not require any judicial discrimination. Again, if the length of the measuring rod is to be at all determined by the Collector before he passes a decision under Section 9, this determination must be considered as a determination made during the trial of the suit instituted under that Section. How, then, can it be said that a part of the proceedings held by the Collector during the trial of such suits is to be taken as a proceeding held judicially; and that another part of those very proceedings relating to a question of the highest importance to the parties is to be considered

as a proceeding held in his ministerial capacity? At what particular stage of the trial, it may be asked, does the Collector cease to be a judicial officer; and what reasonable ground is there for making such a distinction? It has been said that the order passed by the Collector on the length of the measuring rod is to be considered as an order, not passed in the course of the trial held under Section 9, but as a separate order passed under Section 11. I am of opinion that there is no force whatever in this argument. There is nothing in the wording of Section 11 which provides for the passing of any separate order of any kind whatever. All that it says is that every measurement under the Act shall be made by the standard pole of the pergunnah; and if we read these words apart from those of Sections 9 and 10, there is not the slightest ground for holding that the Collector is to pass any order whatever as to the length of the measuring rod. If the provisions of Section 11 do not apply to the suits brought under Sections 9 and 10, there is no other Section of Act VI. of 1862 to which those provisions can apply; and this one fact is sufficient to show that the three Sections must be read together as constituting the entire law on the subject of measurement.

Lastly, I wish to observe that the question of the measuring rod is the only question which can arise in the majority of suits instituted under Sections 9 and 10. The abstract right of the plaintiff to measure, apart from the question of the rod with which that measurement is to be made, is put in issue in those cases only in which his right as a landlord is denied *in toto*, or in which express engagement barring such measurement is put forward as a defence. These cases, it must be admitted, are comparatively rare. Why then are we to suppose that the Legislature went to the length of providing for such a class of suits as those contemplated by Sections 9 and 10, if it did not intend to provide for the disposal of the only question which ordinarily arises between landlords and tenants in this country in connection with the subject of measurement.

It has been said that the decision of this question might be conveniently deferred until a suit for enhancement is actually brought by the landlord. I confess that I am wholly unable to find any valid foundation for this argument. If the question of the measuring rod is determined in the present suit, and the lands are actually measured with the proper rod thus determined, it might be reasonably expected that the parties would come to an amicable settlement between themselves, and thereby obviate the necessity for further litigation either for enhancement or for abatement of rent. Why then are we to leave an important question like this unsettled and thereby multiply litigation, when it is perfectly clear from the above remarks that that question can be determined as satisfactorily in the present suit, as in any other suit which the parties might afterwards choose to bring against one another? Surely the duty of the Court is to prevent multiplicity of suits, if it can properly do so without usurping jurisdiction; and I see nothing in the provisions of Act VI. of 1862 to justify the contention that the Collector has no jurisdiction to determine the length of the measuring rod in a suit brought under Section 9 of that Act.

The next question to be determined in this case is whether the decision of the Collector on the length of the standard pole is appealable or not. With reference to this question, I have but very little to say. I have already shown that the Collector is fully competent to determine the length of the standard pole in his judicial capacity; and it would, therefore, follow that this determination would be liable to be appealed to the Civil Court under the express wording of the last portion of Section 10, which says that the decision of the Collector *on all matters* enquired into or determined by him under the last preceding Section (namely Section 9) shall be final, unless reversed *on appeal therefrom to the Civil Court*. In the face of these words, it is impossible to contend, if the Collector has jurisdiction to enquire into and to determine the length of the standard pole, that his decision on that point would not be liable to an appeal to the Civil Court.

For the above reasons, I am of opinion that both the questions referred to the Full Bench ought to be answered in the affirmative.

Phear, J.—The question referred to us is as follows:—

When the right of a proprietor to make (under Section 9 of Act VI. of 1862, Bengal Council) a measurement of a tenure is disputed solely on the ground that the pole with which the measurement is intended or

attempted to be made is not the standard pole of measurement of the pergunnah (as provided in Section 11), and the parties are at issue as to what is the true length of the standard pole, has the Collector jurisdiction to enquire into and decide the question as to what is the true length of the standard pole? And if the Collector does decide that question, is there any appeal from his decision?

The 8th Section of Act VI. of 1862, Bengal Council, is in these words: "Every proprietor of an estate or tenure, or "other person in the receipt of an estate or "tenure, has a right of making a general "survey of the lands comprised in such "estate or tenure, or any part thereof, "unless restrained from doing so by "express engagements with the occu-"pants of the lands. If any person "intending to measure any lands which he "has a right to measure is opposed in making "such measurement by the occupant of the "land; or if any under-tenant or ryot having "received notice of the intended measure-"ment of land held or cultivated by him "which is liable to such measurement re-"fuses to attend or point out such land, such "person may make application to the Collec-"tor, and the Collector shall thereupon pro-"ceed to enquire into the case in the man-"ner provided for suits under Act X. of "1859, and shall pass a decision either allow-"ing or disallowing the measurement, and, "if the case so require, enjoining or excusing "the attendance of any such under-tenant or "ryot. If any under-tenant or ryot, after "the issue of an order enjoining his attend-"ance, neglects to attend and to point out "the land, it shall not be competent to him "to contest the correctness of the measure-"ment made or any of the proceedings held "in his absence."

There is, no doubt, a want of precision in the language which is here employed; and it is not at first sight very clear by what considerations the Collector is to be guided to his decision either allowing or disallowing the measurement, and "if the case require, "enjoining or excusing the attendance of "any such under-tenant or ryot." Taking by themselves the words which apply only to the first mentioned of the two alternatives, and disembarrassing ourselves for the moment of the rest of the Section, we have:

"If any person intending to measure any "land *which he has a right to measure* is "opposed in making such measurement by "the occupant of the land, such person may "make application to the Collector, and the "Collector shall thereupon proceed to en-"quire into the case, and shall pass a deci-"sion either allowing or disallowing the "measurement."

The expression "enquire into the case" is undoubtedly large and somewhat indefinite. I understand it as being equivalent to "enquire into the grounds of the opposition;" and I cannot gather from the passage itself the smallest indication that the opposition referred to is confined to a simple denial of the right to measure.

It therefore seems to me that this passage standing thus alone gives the Collector a discretion to disallow the measurement, notwithstanding that the applicant has the right to measure which is spoken of in the immediately preceding words. If this be so, I can discover nothing in the context to limit its operation in this respect. And clearly there may very well be good reasons why the proposed measurement should not be allowed to take place, independently of the general right of the applicant to measure such—for instance as may be afforded by the state of the crops. I suppose the Legislature intended that the Collector should give effect to these, because it has used words sufficient to endow him with the requisite power, and has said nothing to qualify them. If then the Collector may, in coming to his decision, look at matters other than those which bear upon the question whether or not the applicant has a legal right to measure as defined in the 9th Section, is the length of the rod, with which it is proposed to measure one of them? *A priori* one might certainly be disposed to imagine that it would be of small consequence to the ryot or to any one else, what particular length of rod the proprietor selected for his suit of measurement. If only the actual length of that rod be known in terms of a given unit, the numerical results obtained by employing it could, of course, be readily converted into any desired scale by an arithmetical process. The Legislature, however, has made it imperative on the proprietor to use a particular unit of measure; for the 11th Section declares that "all "measurements made under this Act shall "be made by the standard pole of measure-"ment of the pergunnah in which the land "is situated." The purpose of this Section is, as it seems to me, to give in some sort a protection to the under-tenant or ryot or

occupant of the land. It is clearly implied, I think, in Section 9 that it is the duty of the under-tenant or ryot to be present on the occasion of making the measurement, and that he may be in some way bound by that measurement, unless he has earned a right to object to its correctness by having contributed, so far as lay in his power, towards making it accurate. In this view, it seems to be only just that he should not be called upon to work with or to assent to the use of any other instrument of measurement than one with which he is already familiar; and it appears to me to be part at least of the object of Section 11 to secure to him protection in this respect. If I am right in this opinion, it follows, I think, that the Collector in the case of any application to him under Section 9 is bound to give effect to Section 11, and therefore to consider as an element material to his decision whether or not the proposed measuring rod is the standard pole of measurement of the pergunnah, whenever this question is raised by the opponent of the application. If Section 11 is to be disregarded by the Collector, it must become, so to speak, a dead-letter, for there is, as far as I know, no other tribunal which can enforce it; and it will be hardly disputed that the recognized rules of construction forbid our coming to such a conclusion as this if we can reasonably avoid it. And, indeed, I am unable to perceive any reason why Section 11 should be excluded from the Collector's consideration in this matter. It is undoubtedly part of the law which the Collector must have before his eyes, whenever he entertains an application under Section 9. And I cannot find any ground for holding that the only issue which can arise on such an application is the issue whether or not the right to measure as specified in the first part of the Section exists. On the contrary, as I have already pointed out, the primary meaning of the words of the Section seem to me to imply, that in the view of the Legislature there might be a good reason why the Collector should disallow the measurement even though the applicant possesed such a right to measure.

But, further assuming that the right to measure is the only matter upon which the Collector has jurisdiction to adjudicate, it appears to me that the Legislature has made the length of the measuring rod an element in it. If Section 11 has any operation at all, it necessarily, I think, affects the generality of the words which constitute the definition of the right to measure in Section 9 While Section 9 says that "every proprietor of an estate, &c., has a right of making "a measurement of the lands comprised in "such estate unless restrained from doing "so by express engagement with the occupants of the lands;" Section 11, as I understand it, states just as positively and without any qualification whatever that every measurement made in exercise of this right "shall be made by the standard pole of measurement of the pergunnah in which the land is situated." What is this but a limitation on the general right to measure? It appears to me as the effect of the two Sections that the proprietor thus obtains a right to measure in a particular mode only; and consequently if he proposes to measure in any other mode, he is attempting to do that which the Act gives him no right to do; and upon objection made by the occupant of the land the Collector ought to disallow the measurement.

Whether, therefore, the Collector can or cannot under Section 9 take cognizance of any other form of opposition to the making of the measurement than a denial of the right to measure, it appears to me in either alternative that the first question put to us must be answered in the affirmative.

It is with great hesitation and diffidence that I have come to this conclusion, because I know that three out of the seven Judges by whom this case has been heard dissent from it; and that circumstance alone necessarily obliges me to distrust the soundness of my own views. Actuated by this feeling, I have re-considered with my best attention the Sections upon which the question depends; and I am bound to say that I find myself still unable to put any other construction upon them than that which I first arrived at, and which I have now endeavoured to justify. So far as my knowledge in the English language enables me to speak, I should say confidently that the framers of Section 9 designed to submit to the adjudication of the Collector other issues than the mere right to measure, as that right is in that Section defined. The words seem to me very distinctly to enunciate that the application of a person who has such a right to measure may under some circumstances be properly disallowed by the Collector. I do not forget that common sense (which is sometimes supposed to be quickened in its operation by being veiled under the phraseology of well-known judicial writers) re-

quires us to regard the *intention* of the Legislature as the end which judicial interpretation of legislative enactments should be directed to effect. In truth, if the intention of the Legislature is manifest, I need no authority to convince me that it furnishes the safest clue to the sense in which the Legislature desires particular words to be understood. But unfortunately, in the instance before us, the language which we are called upon to interpret and to give effect to is itself the only source from which we can gather the intention of the Legislature. The task of discovering this intention is, therefore, none other than that of interpreting the language; and the fulcrum of the lever which is to remove our difficulty is without a point of support.

We are not now concerned with the "standard pole" itself. What may or may not be the standard pole of measurement in any given pergunnah must be a mixed question of fact and law, such as admits of being determined in the ordinary way by any tribunal which is properly called upon to entertain it. And it is quite possible in some pergunnahs the Collector may have within his own cutcherry matter of record or quasi record which may afford conclusive evidence on the point. Some desultory discussion on this topic took place during the argument of the case before us; but I only refer to it here for the purpose of saying that, in my opinion, it is not material to our decision on this reference.

The answer to the second question which has been put to us flows almost immediately from the answer given to the first. If it falls within the jurisdiction of the Collector to hear and determine an objection to the length of the measuring rod, his decision thereon may, by virtue of the last provisions of Section 10, be appealed against by an application to the Civil Court, unless it is expressly saved from such appeal—and this it clearly is not. Hence I am of opinion that the second question also should be answered in the affirmative.

Jackson, J.—We have not had in this case the advantage of argument on both sides, because the vakeel for the defendant, respondent, has joined the plaintiff, appellant's vakeel in seeking to obtain from the Court a recognition of the Collector's power to determine judicially the "pole" by which a zemindar is to carry out a measurement ordered under Section 9, Act VI. of 1862, B. C.

As I have been concerned in several of the decisions which have been cited, I wish in the first place to advert to what appears at first sight to be an inconsistency in those decisions; and I feel the more necessary, because I find myself quoted by Mr. Justice Macpherson in his referring order as having held in the 11 Weekly Reporter that the Collector had *not*, and in the 5 and 7 that he *had*, jurisdiction to decide the point.

In the earliest case in 5 Weekly Reporter, page 17 (Act X. Rulings), I shortly stated my opinion that the *order* of a Collector under Section 11 was not subject to appeal; and I rested this opinion on the statement that the Collector was the depository (as the fiscal chief of the district) of the standard pole of each pergunnah, and that his declaration on this point is binding.

I believed at that time, and I still believe, that almost everywhere there is in the Collectorate an actual standard for each pergunnah, or part of a pergunnah, which the Collector could produce if called upon to do so.

In the next case, in which as well as in the preceding case I had the benefit of Mr. Justice Kemp's assistance, I used, in giving judgment, the word "decision" in respect of the determination by the Collector or Deputy Collector, and according to the marginal note we appear to have held that this was a decision without appeal.

I would call attention, however, to the words near the bottom of the second column (page 239, Volume VII., Weekly Reporter). I there speak of the question as to the standard pole as one of which the judicial determination would properly arise *in executing the award of the Collector*. The word "judicial" appears to have crept in by inadvertence; because in the very next paragraph, over the page, I point out that it is in a suit for enhancement that the parties will have the opportunity of establishing judicially what the standard pole of the pergunnah is.

It has thus been my view throughout, though certainly more fully and distinctly stated in the case in 11 Weekly Reporter, that the size of the pole was not a matter to be tried judicially under Section 9 of Act VI. of 1862, but one to be certified by him as a public officer or settled in the execution of his award.

I have always affirmed that the real contest on this point must arise when the land-

lord proceeded to make use of the results of his measurement by enhancing the ryot's rent.

To the opinion thus gradually and maturely formed I now fully adhere; and I regret to find that the opinion of the majority of this Bench is the other way, because while a decision affirming my view would have finally disposed of the point (the wording of the recent Act being so much more unmistakeably in favor of that view), the point will inevitably arise again in cases under the Bengal Act VIII. of 1869, and the present decision will conclude nobody.

The whole question resolves itself into this, what is the connection between Section 11 and Section 9 of Act VI.?

The appellant's argument is that Section 11 is to be read in direct bearing upon the declaratory part of Section 9, as an express limitation of the zemindar's right to measure, that this right is only a right to measure by the standard pole of the pergunnah; and if the ryot can show that the zemindar intends to measure by a pole other than the standard, he puts him out of Court, and shows that he is not entitled to the aid of the Collector.

Now, the first idea which presents itself to me upon this contention is that, if the Legislature meant this, it was so very easy to say so.

The provisions relating to measurement in a less stringent form were embodied in the Imperial Act X. of 1859, Section 26.

The Lieutenant-Governor's Council were not satisfied with these provisions, and they repealed the Sections as to the Lower Provinces of Bengal, and inserted in the amending Act three new Sections, 9, 10, and 11, of which the first (Section 9) is an alteration of the repealed Section 26, and the other two contain fresh matters.

It is rather remarkable that Section 9, while it leaves virtually unaltered the procedure part of the old Section, very materially alters the terms in which the right to measure is declared.

The original Section first laid down the cases in which the zemindars should be entitled to measure the lands of particular under-tenants or ryots, and then affirmed the right to make a general measurement of the lands in his estate, unless restrained, &c.

Instead of this, the new Section 9, striking out the provision for measurement in particular cases, declared a right to make general measurements of the lands comprised in estates or tenures *or any part thereof*, unless restrained by express engagement.

Now, as the Bengal Council were altering the form in which the right to measure was declared, if they had intended to limit that right by making it a condition precedent that the zemindar should intend to measure with the standard pole of the pergunnah, surely the inference is irresistible that they would have inserted this restriction in Section 9, instead of placing it where it is to be found in Section 11 with a distinct Section intervening.

And not only so, but in this case the succeeding parts of the Section must likewise have been altered, and provision must have been made for an award upon a dispute as to the pole of measurement; but the Section, precisely like Section 26, provides two orders for two contemplated cases, *viz.*, where the measurement is opposed, the Collector is to allow or disallow measurement, and where the ryot refuses to attend, is to enjoin or excuse his attendance at such measurement.

From the absence of any such words, I am justified in concluding that, as the words "enquire into the case" occur in both the Sections, they mean the same thing in both situations, and that the case to be enquired into is that which the Section itself in both cases suggests; namely, in the first class of cases, whether the applicant is entitled to measure, and is not restrained by express engagement from so doing; and in the second, whether the under-tenant is bound to attend on the measurement, and has refused after notice.

Both Sections conclude with the provision that an under-tenant neglecting to attend shall be debarred from contesting the correctness of the measurement made in his absence; and the amending Act adds the words "or any of the proceedings held." What the precise efficacy of these added words may be I cannot tell. They cannot refer to the enquiry, because the penalty does not attach until after the issue of an order enjoining his attendance, and the order must follow the enquiry.

Then it is clear that no argument can be founded on the use of the words "correctness of the measurement," because they occur in the first Act which was silent as to the pole as well as in the Act by which the pole is introduced.

I do not feel myself under any necessity of suggesting the purpose for which the 11th Section was introduced into the Act, or in what mode it was to be applied; but I can certainly see nothing which induces me to believe that it was intended by coupling that Section with the last words of Section 9 to bind an under-tenant who has absented himself as to the pole by which the area of his land is to be determined. What, indeed, is the meaning of the words "standard pole" as used in this Section? In what sense is the word "*standard*" employed? If in its strict technical sense, then the standard must exist somewhere to refer to; and it must be decisive, leaving no room for evidence to be adduced by the parties. But if in a more popular sense, to denote the *customary* pole, what is the result? Let us suppose that a zemindar in Mouzah Gopalpore wishes to measure the lands of a ryot, is not opposed, and measures actually with a *russee* of 80 cubits; he then proceeds to measure another holding, is opposed, applies to the Collector, obtains an adjudication that the standard is of such dimensions that the *russee* measures 85 cubits. He then goes on to a third case in which the ryot absents himself, and profiting by his absence, the zemindar measures by a *russee* of 60 cubits, by which result, according to one view of the case, the ryot is bound.

Which of these is the correct standard, and by which of them is the zemindar to measure on the next occasion, as he is bound by law to measure by the standard pole?

Or if three suits or fifty are commenced against different ryots, the Collector must determine according to the evidence in each case; and one ryot may succeed in making out a pole of 8, one of 9, and others of 10 cubits; which of these is the standard pole?

The chittas of a measurement made under this Act should, I take it, set forth that the pole or *russee* employed had been one of so many cubits or feet, as the case may be, being the standard pole or *russee* of the pergunnah.

Now, let us suppose, the notice and application being silent as to the pole, that the ryot either does not oppose the measurement or contests the right to measure on grounds unconnected with the standard pole; and that, in the latter case, the Collector has simply affirmed the right to measure. The zemindar procee ls to measure assuming the standard or customary pole to be as above-stated. Suppose the ryot then to say: "I do not admit or deny the pole or *russee* with which "you are measuring," and in these circumstances the area is recorded in the chittas. Can it be argued that the ryot would be bound by the measurement so made? If he signed the chittas, he would probably be taken to have admitted that the land measured did actually contain so many beegahs measured by a *russee* or pole of a particular kind, but no more. If he did not sign the chittas, I apprehend he would not be bound by them in any particular case, but the zemindar would have to prove his measurement.

Now, when the law directs that a ryot absenting after notice to attend shall not be permitted to question the correctness of the measurement made, I conceive it is only intended to place him in the same position as if he had signed the chittas. No difference is made between cases in which the standard has been put in issue, and those in which it has not. Can it be contended that the Legislature intended to punish the ryot for his contumacy by allowing an *ex-parte* decision against him of a question of which he had no previous notice?

But if the question of standard may be so decided, so may other questions, such as rates, the quality of the land, the advantages of position, and even the right of occupancy.

For it is contended that, because the Act prescribes by what pole measurements shall be made, if the zemindar gives out that he intends to measure by a specified pole, and the ryot disputes his liability to be measured with such pole, this gives the Collector jurisdiction to determine judicially, not only whether the zemindar has a right to measure, but also whether the pole by which he intends to measure is the standard pole of the pergunnah.

But the Act in another place declares that certain ryots have a right of occupancy; hence if a zemindar gives notice that he intends to measure the lands of tenants not having such right, and those of A B among them, and if A B asserts that he has such right, this by parity of reasoning will give the Collector jurisdiction to determine, on an application to measure, whether A B has or has not a right of occupancy. And in like manner if A B was described as a ryot not having a right of occupancy, and after an order to attend the measurement absented himself and had his land measured under that description, he would be concluded by the entry in the chittas.*

* *Note.*—Of course it is clear that if the law declared that the zemindar should have a right to measure by a particular rod at a particular time of year, or to measure the lands of certain ryots, the Collector would have to determine whether the ryot in question belonged to such class, and would order a measurement by such rod at such time of year.

Here if the zemindar asked for leave to measure by a rod other than the pergunnah rod, the Collector, I presume, would simply dismiss his application on the ground that he wished to do something which the law forbade.

So, if Section 11 directed that measurements made under this Act should be made in the month of December, and the zemindar applied for an order to measure in June, the Collector would dismiss the application; or if having obtained an order allowing measurement with or without specification of time, the zemindar went on to measure in June, his measurement would probably be void, and so perhaps it might if the ryot afterwards showed that he had measured with another than the pergunnah rod.

Again, Section 17, Act X. of 1859, declares what shall be grounds for enhancing the rents of ryots having a right of occupancy. Suppose that the zemindar gives notice of his intention to measure the land held by A B on the ground, say, that he holds more land than he pays rent for, and the ryot denies this allegation, is the Collector to try this question also? And yet these questions, all arising out of provisions of the Act, would find a place in a proposition for measurement just as naturally as a declaration of the pole with which, if the measurement was allowed, the landlord intended to measure.

And suppose that after the contest and adjudication, the ryot absenting himself—the zemindar after all measured with a different pole from that found by the Collector! Or suppose that after an adjudication by a Deputy Collector in the mofussil upon evidence that 8 cubits made a pole, it turned out that there was a standard pole in the Collector's records of 10 cubits!

The illustrations of what this theory would bring us to are endless, and I cannot believe that any such thing was intended by those who framed the Act.

What the Legislature designed in enacting the procedure, as well as the declaration contained in Section 26 of Act X., appears to me very comprehensible and very simple.

The last Clause of Section 17 had declared it to be a ground of enhancing the rent of a ryot having a right of occupancy (and it might also doubtless be a ground for enhancing other ryots under Section 13,) that the quantity of land held by him *had been proved by measurement* to be greater than the quantity for which rent had previously been paid by him.

It was, consequently, necessary to enable zemindars to lay the foundation for such suits. The right to measure was, therefore, in certain cases (afterwards more loosely) declared, and to provide for cases in which the exercise of the right might be resisted, the Collector was empowered to receive the application and to enquire into the case, and after inquiry to allow or disallow the measurement.

This was the scope of the Collector's inquiry both under Act X. of 1859 and under the amending Act.

But the latter Act required that all measurements *made* under this Act should be made by the "standard pole," not that Collectors allowing measurements should order them to be made with such poles.

And as the Act stands, the zemindar would not be bound to disclose by what pole he intended to measure, nor the ryot to raise the issue, and if it were not a matter of convenience we should not hear a word upon the subject at this stage of the proceedings.

For, evidently, according to my reading of the law, the real contest on this point would arise when the zemindar having assured himself of his ground gave his notice, and commenced his suit for enhancement.

But it suits both parties to obtain some expression of opinion as to the real standard, though I greatly doubt whether they contemplate being bound by that opinion.

The Judicial Committee of the Privy Council in the Hutwa case* (12 Moore, page 22) speak of "those summary proceedings

* 9 W. R., p. 15.

"touching the fact of the right of possession "which are in India the ordinary prelude to "a regular suit for the determination of a "disputed title."

This is a characteristic of Indian litigation, parties continually seek to obtain irregular decisions on a question in dispute by availing themselves of a procedure contrived for a different purpose. Precisely in the same manner, under the guise of an application for a certificate under Act XXVII. of 1860, petitioners and opponents both endeavour to lead the Courts (and they often succeed) into an adjudication of the right to property.

But it is asked, why are we to remit the parties to another suit when they are before the Collector, and in this case the applicant's vakeel, Baboo Kalee Mohun Doss, pathetically asked our consideration for the poor ryot, the respondent, who asked for a decision *now*.

The answer is that the law does not contemplate and does not allow it.

As for the sake of determining titles to property, so in the case of claims to enhancement of rent, the law prescribes a regular suit, upon an *ad valorem* stamp, in which suit all the issues necessary to be determined for a decision upon the right are to be raised, and has allowed *application* to the Collector upon an 8-annas stamp only for the purpose of having a measurement allowed or disallowed.

We have nothing to do with the *policy* of the Act, nor, I think, ought we greatly to concern ourselves with the result of our decision, which we are bound to give upon a right construction of the law. But it does add to the strength of my convictions in this case to believe that the decision I propose to give would keep such proceedings within their proper limits, and that we should hear less applications to measure, and the apprehensions of ryots would thus be greatly quieted if extraneous questions were rigidly excluded.

I have stated thus my own views of the matter, but I desire to add that I entirely concur in the judgment of the Chief Justice, which I have had the advantage of seeing, upon the mere construction of the Sections, and in the answer which he would give to the question put.

The second question whether, if the Collector has authority to determine the pole of measurement in a judicial way, an appeal will lie to the Judge, must, of course, be answered in the affirmative. This really does not admit of an argument.

Kemp, J.—The questions referred are, 1st—When the right of a proprietor to make (under Section 9 of Act VI. of 1862, B. C.) a measurement of a tenure is disputed solely on the ground that the pole with which the measurement is intended or attempted to be made is not the standard pole of the pergunnah (as provided by Section 11), and the parties are at issue as to what is the length of the standard pole, has the Collector jurisdiction to enquire into and decide the question as to what is the true length of the standard pole? 2nd—If the Collector does decide that question, is there any appeal from his decision?

I am of opinion that both questions must be answered in the affirmative.

In the case before us, the plaintiff, the zemindar, instituted a suit under Section 9, Act VI. of 1862, B. C., claiming the right to measure the land of the defendant.

The defendant did not in any way question the right of the plaintiff on the ground of any contract prohibiting the plaintiff from measuring his lands. On the contrary, the defendant did not dispute the right of the plaintiff to measure, but he opposed the measurement simply because the plaintiff wished to measure the land, not by the standard pergunnah rod, but by a rod of a smaller dimension. The parties were at issue on the question of the length of the standard rod.

The defendant, I may observe, obtained from the Collectorate the measurement of the standard rod.

Section 9 of Act VI. of 1862 gives every proprietor of an estate or tenure, or other person in the receipt of the rents of an estate or tenure, the right to measure.

There is no dispute as to the plaintiff being the proprietor, and his right to measure is admitted; but it is a right which must be exercised properly and not arbitrarily.

What did the opposition of the ryot consist in? He opposed the measurement because the zemindar, the proprietor, was about to measure his tenure, not by the standard rod of the pergunnah, but by an unauthorized rod of his own creation.

It was the opposition of the ryot which led to the reference to the Collector.

The Collector under the law must pass a decision either allowing or disallowing the measurement; and before he can do so, he must, in my opinion, decide upon the issue raised between the parties, *viz.*, what is the standard rod. I do not find any thing in the law restricting the Collector's jurisdiction to cases in which the ryot opposes the zemindar, because under the terms of the pottah the latter is not entitled to measure. This may be the most common form of objection; but the law does not say that this is the only form in which an objection to a measurement can be made. The Collector is to try and decide all cases in which there is an opposition to the right of the zemindar to measure.

It may be that in some Collectorates the standard pergunnah pole is deposited, while in others such may not be the case. But in either case, the Collector must decide what is the standard pole, taking evidence, if necessary, to enable him to pass a decision on the question.

Any decision passed by the Collector is under Section 10 of Act VI. of 1862, B. C., appealable to the Zillah Judge.

Bayley, J.—I concur in the judgment delivered by Mr. Justice L. S. Jackson. I consider that his construction of Sections 9, 10, and 11 of Act VI. of 1862, B. C., is the correct construction, and that it is so for the reasons given by the learned Judge. I think too that Section 11 is quite distinct from Sections 9 and 10.

I further think that the provisions of Sections 37, 38, and 41 of Act VIII. of 1869 B. C., support this view.

I would answer both the questions as proposed by Mr. Justice L. S. Jackson.

Couch, C. J.—The question referred to us is a general one: "When the right of a "proprietor to make (under Section 9 of Act "VI. of 1862, B. C.) a measurement of a "tenure is disputed solely on the ground "that the pole with which the measurement "is intended or attempted to be made, is not "the standard pole of measurement of the "pergunnah (as provided in Section 11), and "the parties are at issue as to what is the "length of the standard pole, has the Col-"lector jurisdiction to enquire into and "decide the question as to what is the "true length of the standard pole? And "if the Collector decides that question, is "there any appeal from his decision?"; and I therefore answer it without reference to the facts of the case in which it has been raised by the Division Court. In my opinion, it ought to be answered in the negative.

Section 9 of Act VI. of 1862, B.C., begins by declaring that every proprietor of an estate or tenure has a right of making a general survey and measurement of the lands comprised in such state or tenure, or any part thereof, unless restrained from so doing by express engagement with the occupants of the lands. It then provides that if any person intending to measure any land which he has a right to measure is opposed in making such measurement by the occupant of the land; or if any under-tenant or ryot, having received notice of the intended measurement of land held or cultivated by him which is liable to such measurement, refuses to attend or point out such land, such person may make application to the Collector, and the Collector shall thereupon proceed to enquire into the case in the manner provided for suits under Act X. of 1859. It appears to me that this part of the Section is to be interpreted by reference to the introductory part, and that the right to make a measurement unless restrained by express engagement having been declared, the intention was to provide for the right being disputed, and to give a means of enforcing it. The case which the Collector is to enquire into is a case of a right to measure, and not any case which the person opposing may set up as the ground of his opposition. Here the ground of opposition was that the rod with which the measurement was intended to be made was not the standard pole of measurement of the pergunnah; but if we go beyond the right to measure the case cannot be limited to this, and the Collector must have jurisdiction and be bound to enquire into any ground of opposition that may be set up. A vague and indefinite jurisdiction would be given to the Collector instead of a well defined one of deciding upon the right to measure. The words which follow—"and shall pass a decision either allowing or disallowing the measurement," I think appear from the context to refer to the right to measure. The words—"and, if the case so require, enjoining or excusing the attendance of any such under-tenant or ryot," show that the allowance is to precede the making of the measurement, and this part must be read as if the words "to be made" were inserted after measurement, and the Section ran thus: —"either allowing or disallowing the measurement to be made." I do not see that the provision which follows, that if the under-

tenant or ryot neglects to attend and to point out the land, it shall not be competent for him to contest the correctness of the measurement made in his absence, can make any difference in the construction of the previous part of the Section. That seems to refer to the mode of using the measuring rod and the land it is applied to, rather than whether it is the standard pole of measurement.

In Domat's Civil Law, Prel. Book, para. 36 (and I refer to this work, because I have seen it has been quoted in this Court as an authority for the interpretation of acts of the Legislature) it is said: "This principle of interpreting the laws by equity "does not only respect the laws of nature, "but reaches likewise to the arbitrary laws, "they being all of them founded on the "laws of nature, as has been observed in "the 11th Chapter of the Treatise of Laws. "But to this principle of equity, we must "add, in so far as concerns the interpretation of arbitrary laws, another principle "which is peculiar to them, and that is *the "intention of the lawgiver which determines how far the arbitrary laws regulate "the use and interpretation of this equity.* "For, in this kind of laws, the temperament "of equity is restrained to what is agreeable to the intention of the lawgiver, and "is not extended to whatever might have "appeared to be equitable before the arbitrary law was enacted."

To use the words of an eminent writer, Mr. Austin: 'In the case of a statute the "primary index to the law which the lawgiver intended to establish, is the grammatical sense of the words in which the "statute is expressed;" and after a frequent study of the words of Section 9, I am unable to see that there was any other intention than that the Collector should decide upon and enforce the right to measure. It may be said that the words are not explicit, and when the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion. But I think the conduct of the Legislature shows that no ground of this kind exists for interpreting Section 9 in a different way from what I do. In Section 37 of Act VIII. of 1869, B. C., the Legislature has expressly said that the Court shall hear and determine the right to make the measurement, which I cannot suppose it would have done if there was an occasion or necessity for the exercise of the jurisdiction which the other construction of Section 9 would give to the Collector. If I had any doubt as to the construction of the Act of 1862, this and the 41st Section in the Act of 1869 would make me hesitate in construing it as the majority of the Court does.

The latest decisions of this Court were both pronounced in May 1869, one on the 17th, and the other on the 31st, by different Judges. Act VIII. of 1869 received the assent of the Lieutenant-Governor on the 21st of August; and it may, therefore, be that it was passed in its present form on the supposition that it would be interpreted in accordance with those decisions, which being on such a question, probably became generally known immediately; and I should hesitate the more, because Act VI. of 1862 is repealed wherever Act VIII. of 1869 has taken effect, except so far as regards suits or proceedings which had been instituted. and our decision will not be a binding decision upon the law now in force.

My opinion has been formed upon a consideration of the words of Section 9, and I see nothing in Section 11 to lead to a different opinion. That says—that all measurements made under the Act shall be made by the standard pole of measurement of the pergunnah in which the land is situated. The zemindar when he makes the measurement is bound to use the standard pole of the pergunnah, if there be one; and the consequence of his not doing so may be that when he seeks to enhance, he cannot make use of the measurement, and a fresh measurement would have to be made. But if it had been intended that the Collector should decide what is the true length of the standard pole, I think it would have been provided for in Section 11. If it is construed as qualifying Section 9, and restricting the right to measure therein declared, the consequence will be that if it should happen that in any case that it cannot be determined what is the standard pole of the pergunnah, the right to measure will be lost.

The opinion I have come to is that the first question should be answered in the negative, and that being so, I give no answer to the second question which I presume means that the Collector decides the question, having jurisdiction to do so.

b

The 17th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, F. B. Kemp, L. S. Jackson, and J. B. Phear, *Judges*.

Chur land—Island—Ownership—Clause 3, Section 4, Regulation XI. of 1825.

Case No. 474 of 1870.

Special Appeal from a decision passed by the Officiating Additional Judge of Backergunge, dated the 13th December 1869, reversing a decision of the Moonsiff of that District, dated the 23rd June 1868.

Budroonissa Chowdhrain and others (some of the Defendants), *Appellants*,

versus

Prosunno Coomar Bose and others (Plaintiffs), *Respondents*.

Baboos Onookool Chunder Mookerjee, Gopal Lall Mitter, and *Sreenath Dass* for Appellants.

Baboo Kalee Mohun Dass for Respondents.

In a suit regarding the right to a chur or island thrown up in a large navigable river originally surrounded by deep unfordable water, but between which and the estate of the zemindar a fordable channel has since been created, the state of things existing at the time when the chur or island is thrown up or formed is the criterion by which the right either of the Government or of the owner of the contiguous land is to be determined, with reference to Clause 3, Section 4, Regulation XI. of 1825.

This case was referred to the Full Bench by L. S. Jackson and Glover, JJ., with the following remarks:—

Jackson, J.—It appears to me that the point arising in this case must be referred for the decision of a Full Bench.

The suit relates to a chur or island which originally formed in the bed of the river Titoolia and which, at the time of its formation, was surrounded by a channel unfordable on either side. The defendants appear to have claimed this chur on its appearance, on the ground of its being a re-formation of land formerly belonging to their estate, and also as an accretion to the same, although this ground of claim is somewhat indistinctly stated, and, apparently, as an afterthought, interpolated in the written statement in this suit.

The Collector on behalf of Government appears to have caused some enquiry to be made into the formation of this chur, and, in consequence of some misconception as to the meaning of a report submitted to him by the Deputy Collector, to have abandoned the claim of Government and relinquished the land, leaving it in the hands of the defendants.

Subsequently to these proceedings by a recent silting up of the river, the channel between the chur or island thus formed and the estate of the plaintiff, appears to have become fordable, and the plaintiff now claims the island as having, in this manner, become an accretion to his original estate, and, therefore, his property under Clause 3, Section 4, Regulation XI. of 1825.

The Lower Appellate Court has favored the claim of the plaintiff, and given him a decree against which the defendants appeal specially to this Court.

I am bound to say, on looking at the case made by the parties to this suit respectively, I was inclined to consider that the defendants had the better case, inasmuch as this chur, which, at the time of its first formation, unquestionably, by the terms of the Clause already cited, was the property, or, to use the words of the Regulation, at the disposal of Government, could not, it seemed to me, become subsequently vested in the plaintiff by reason of the channel not originally fordable afterwards becoming fordable, and so establishing communication between the chur and the plaintiff's estate. But the plaintiff, respondent in this appeal, is supported by authority in his contention. He refers, in the first instance, to a passage in the judgment delivered by the late Chief Justice in a case where I was one of the Judges, to be found in 9 Weekly Reporter, page 312, Mohinee Mohun Dass *versus* Juggobundhoo Bose and others; and, secondly, to two cases in 2 Weekly Reporter, one at page 34 and the other at page 127, both decided by Mr. Justice Bayley and Mr. Justice Campbell, in which that view of the case appears to have been taken.

The late Chief Justice observes at page 315 of the case first mentioned: "If, when the island first formed, the river Bawar was not fordable between the plaintiff's estate, which formed that part of the share which was nearest the island, the island might, according to Clause 3, have been disposed of

by the Government. If, before the Government disposed of it, the river between the plaintiff's estate, Kootubpore, and the island became fordable, then, according to Clause 3, it would belong to the plaintiff as the owner of Kootubpore." That, according to the view of the Chief Justice, is the effect of Clause 3.

Then, in the cases in the second volume Weekly Reporter, the matter appears to have been chiefly considered by the light of various Sections of Act IX. of 1847, and there also the learned Judges held that, not the state of things at the original formation of such an island was to be looked to, but the state of things subsequently discovered at the period of re-survey, or possibly when the land was first taken possession of.

As to the remark of the Chief Justice, I am somewhat embarrassed by the circumstance that I assented to the judgment given on that occasion. At the same time, I certainly did not intend to bind myself to every portion of the argument on which that judgment (which was not a considered judgment) was based; and I am not prepared at this moment to give my assent to the proposition there laid down.

As to the cases in the second volume Weekly Reporter, they appear to have been argued exclusively with reference to the provisions of Act IX. of 1847. Now, it appears to me that those provisions, whatever bearing they may have had upon the cases then under consideration, really have no connection with the case before us. The first Section of that Act is in these words :—

"It is hereby enacted, that such parts of the Regulations of the Bengal Code as establish tribunals and prescribe rules of procedure for investigations regarding the liability to assessment of lands gained from the sea or from rivers by diluvion or dereliction, or regarding the right of Government to the ownership thereof—shall, from the date of the passing of this Act, cease to have effect in the provinces of Bengal, Behar, and Orissa; and that all such investigations pending before the Collectors and Deputy Collectors in the said provinces at the said date shall forthwith be discontinued; and that no measures shall hereafter be taken for the assessment of such land, or for the assertion of the right of Government to the ownership thereof, except under the provisions of this Act."

It seems to me quite clear that that was an Act of procedure and an Act to regulate the conditions under which, and the mode in which the rights of Government to such lands were to be asserted. This is not a case in which the rights of Government to these lands are at all under consideration, at least so far as we have gone in hearing this case. We have to do at present with the alleged rights of the plaintiffs, and it seems to me that, in order to ascertain what those rights are, we must look to the declaratory law of 1825; and, if the plaintiff fails to make out his title to these lands under Regulation XI. of that year, his case is at an end.

I cannot at present bring myself to consider that, when lands are formed by the throwing up of a chur or island in a large navigable river, the channel on either side thereof not being fordable, and, therefore become, according to established usage, as stated in the Regulation, at the disposal of Government, which I understand to be another form of saying that they are the property of Government; subsequently, by reason of the Government having omitted to assert its right by taking actual possession, and, by reason of a subsequent change in the position of things, by which a channel once unfordable becomes fordable—the right which had been vested in Government is to become divested, and the land is to become the property of a private individual. It seems to me that the two states of things described in the third Clause of Section 4, Act XI. of 1825, are not conditions one succeeding another, but opposite conditions. It is not that, if the channel be unfordable, the land is to be at the disposal of Government, and, on the channel afterwards becoming fordable, it shall be the property of the zemindar to whose estate it is contiguous; but that the decision of the question whether the land is to belong to Government or to belong to the adjoining zemindar, depends on the question whether, at the time of the formation of such island, the channel on both sides of it be fordable or unfordable. I understand that the state of things existing at the time of the formation of the island determines the right, and that that right, once vested, is like any other vested right, not liable to be changed by the subsequent change of circumstances.

With these views, it seems to me I am bound to refer to the Full Bench a point on which I find myself in conflict with the decisions of other Judges of this Court, and that, therefore, the case must go before the Full

Bench for a decision of this question, namely, whether in a suit regarding the right to a chur or island thrown up in a large navigable river originally surrounded by deep, unfordable water, but between which and the estate of the zemindar a fordable channel has since been created, the state of things existing at the time of the formation of such chur or island is to be the criterion, or the state of things at some later period, whether on re-survey, or at the time when the land was taken possession of, or when the dispute arose.

If the opinion of the Full Bench should be the same as that which I have expressed, the plaintiff's case, I think, will be at an end; but, if not, the case will have to come before the Division Bench again in order to the determination of the other questions which arise.

Glover, J.—I am of the same opinion.

The following are the judgments of the Full Bench:—

Couch, C. J.—The question which has been referred to us in this case is this—whether in a suit regarding the right to a chur or island thrown up in a large navigable river originally surrounded by deep, unfordable water, but between which and the estate of the zemindar a fordable channel has since been created, the state of things existing at the time of the formation of such chur or island is to be the criterion, or the state of things at some later period, whether on re-survey, or at the time when the land was taken possession of, or when the dispute arose.

Now, the third Clause of Section 4, Regulation XI. of 1825 is: "When a chur or island may be thrown up in a large navigable river (the bed of which is not the property of an individual), or in the sea, and the channel of the river, or sea, between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government. But if the channel between such island and the shore be fordable at any season of the year, it shall be considered an accession to the land, tenure or tenures of the person or persons whose estate or estates may be most contiguous to it."

I cannot see in the words of this Regulation that any other period for determining whether the land is to be treated as a chur or island which is to be at the disposal of Government or an accession to the land of the person whose estate may be most contiguous to it is indicated, than when it is thrown up or at the time of its formation. The first part of the Clause clearly points to that, and I do not think that the latter part, where it is said, "if the channel between such island and the shore be fordable at any season of the year," can alter that interpretation and render it right to hold the period to be one which may fluctuate; and that although at the time when the land is thrown up or formed it may be an island which should be at the disposal of Government, yet at a subsequent period that state of things may change and the land belong to the person to whose estate it is most contiguous. If the time at which the island is thrown up or formed is not taken, I do not see in this Regulation any other time which can be. It certainly could not be intended that the right to this, whether in the Government or in the person to whose estate it was most contiguous, was to remain in suspense until some person took possession of it. The natural construction, therefore, seems to me to be that the time when the chur is thrown up or formed, was intended to be the criterion. It would always be a question of fact in each case what is that precise time when the chur could be properly said to be thrown up or formed; but in answering the question referred to us, and in putting a construction on the Regulation we have only to lay down what is the general rule, and I think the Regulation means that the time of the formation of the chur or island is the time when the right, either of the Government or of the owner of the contiguous land, is to be determined.

Then, does Act IX. of 1847 make any alteration as to what was the state of the law under that Regulation? That is stated to be an Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction; and the first Section enacts that such parts of the Regulations of the Bengal Code as establish tribunals and prescribe rules of procedure for investigations, regarding the liability to assessment of lands gained from the sea or from rivers by alluvion or dereliction, or regarding the right of Government to the ownership thereof, shall, from the date of the passing of the Act, cease to have effect; and that such investigations as are then pending

shall be discontinued, and measures that are afterwards to be taken for the assessment of the lands, or for the assertion of the right of Government, shall only be under the provisions of that Act.

Now, looking at the first Section, the Act does not appear to have been intended to do more than make different provisions for the investigations regarding the liability of the lands to assessment or the rights of the Government, and it was not intended to alter in any way the right which existed in the land before that Act was passed. Then it provides by Section 3 for the making of a new survey of the lands at certain times, that is, whenever 10 years shall have elapsed from the approval of any prior survey by the Government, and for the preparation of new maps according to the new survey; and then Section 7 states that whenever, on inspection of any such new map, it appears to the local revenue authorities that an island has been thrown up, which, under Regulation XI. of 1825, is liable to be taken possession of by Government, "the said local revenue "authorities shall take immediate possession of the same for Government, and "shall assess and settle the land." These words do not appear to me to show that the right of Government does not take effect until they take possession, and that the period when the different rights are to be determined is after the re-survey or map is made. There is nothing to my mind in the provision which prevents the Government, when it appears on the survey that an island had been thrown up which the Government would be entitled to under Regulation XI. of 1825, from taking possession of it, although before possession is actually taken there may have been a silting up, so that there is no channel between the chur and the adjoining estate. In order to alter the law under the Regulation, I think there ought to be a clear manifestation of the intention of the Legislature, but there is no such intention manifested in this enactment. What the Act seems to me to have intended to do was to prevent the great inconvenience which might arise from surveys being made at different times, probably of small portions of land, at a great expense, perhaps much greater than the property would be worth, and adopt a system of having the surveys at stated periods, so that whatever rights might be found to have accrued to the Government with regard to lands of this description, those rights might be enforced. It did not, I think, alter the period which had been fixed by Regulation XI. of 1825 for determining whether the right existed or not, *viz.*, the period of the formation of the chur or island, and lay down the time of the survey or the preparation of the map as the period when those rights actually accrued. That being so, I do not think that the plaintiff has in this case got a title which he can enforce against the defendant. We are not now to determine any question as to the facts or what the rights of the parties on a full investigation of the circumstances of the case may appear to be. All that we have now to do is to answer the question which has been referred to us, and I think that the time of the formation of the chur, that is, the time when the chur or island is thrown up, is the period we have to look to in determining whether the Government has the right to dispose of it, or whether the owner of the land to which it is most contiguous has that right.

I would answer the question in those terms.

Bayley, J.—I am also of opinion that the time when a chur forms is the period which should be taken as the criterion for determining the rights of the parties. I think Regulation XI. of 1825 generally, and Clause 3, Section 4, specially, supports this view. The whole Regulation purports to lay down certain rules for determining the different rights that accrued to Government and the land-owners respectively, under various state of circumstances, *viz.*, in cases of disruption; in cases of accretion; in cases of re-formation on the original site; and in cases of dereliction of the river; and further, as here, in cases where land is thrown up as an island in the midst of a large navigable river. It is laid down that an island so formed shall be the property of Government if the channel between such island and the shore be not fordable at any season of the year, but that if the intermediate water be fordable at any season of the year, it shall be considered an accession to the land of the person to whose estate it is most contiguous. In short, the Regulation defines in its terms and by its context the rights of parties according to the *character* of the particular chur land at the time when the land formed out of water, with reference to the means by which it may have formed as those means are set forth in the various Clauses of the Regulation, especially of Section 4. It is in this

view the law enacts that if the land formed be an island surrounded by unfordable water, the island so formed should, on its appearance as land, be the property of the Government. The character of the formation at forming should be the criterion for determining the rights of the parties, whether by accretion, disruption, re-formation, &c.

I would not have considered it necessary to say anything more than express a concurrence with the learned Chief Justice, had it not been for the two cases decided by myself and Mr. Justice Campbell, cited in support of a contrary view. Mr. Justice L. S. Jackson, in referring to those cases, states in his judgment that those cases were exclusively with reference to the provisions of Act IX. of 1847. This is right. The arguments there were almost exclusively confined to the construction of Act IX. of 1847, though in connection with Regulation XI. of 1825.

In regard to the other precedents quoted, I think it necessary merely to refer to one decided by Sir Barnes Peacock and Mr. Justice L. S. Jackson. In that case, although the opinion of the Chief Justice has been given in a way that seems to contradict the view that I am now expressing, still I think it quite clear that that case did not turn, as this does, on the question whether the state of the chur at the time of its formation or at any subsequent period is the criterion for determining the rights of the parties to it.

Kemp, J.—I concur with the learned Chief Justice.

Jackson, J.—I also concur in the opinion stated by the Chief Justice; and in expressing that concurrence I have very little to add to what I have already stated in referring this case for the consideration of the Full Bench. I was not at that time aware of the case which has been cited from the 13th Volume of the Weekly Reporter, which had been then no doubt decided, but had not been reported. If I had been aware of that case, I should have been considerably strengthened in my opinion.

The vakeel for the respondent in this case admitted in the outset of his argument that he did not contend that rights once vested could afterwards become divested by the occurrence of certain natural phenomena. That being so, one would have supposed that the whole case was conceded; but it appears from the sequel of his argument that he could not have meant to make that admission, because he afterwards stated (I took the words from his mouth) that he had only to show title against the defendant, but not against the world; and the title which he showed was that the channel which separated this chur or island from the mainland had silted up. Therefore, if the channel had not silted up, the land would have continued to be the property of some one else, and consequently the right to that chur or island, previously vested in some one else, must be supposed to have afterwards become divested by the occurrence of the phenomenon in question, that is to say, the silting up of this channel.

As to the observation that the plaintiff had only to show a title as against the defendant and not as against third parties, I have only to observe that if that were so, a man might sue for possession of an estate on the ground that he was the heir in preference to the person in possession of it; but it might turn out that there were other persons who were still nearer in point of heirship than the plaintiff, but because the plaintiff was preferable heir to the person in possession he would get a decree and recover possession, and then the next person who had a better right might bring a suit against the successful party in the previous suit, and so on, until at last we got to the nearest heir of all. It seems to me it would be an absurd state of things.

I entirely concur in the view taken of Section 4, Regulation XI. of 1825. The construction of that Section appears to me to be extremely simple. When a chur or island is thrown up in a large navigable river and the channel between such chur or island and the shore is not fordable, it shall be at the disposal of Government; but if the channel between such chur and the shore is fordable at any season of the year, which I take to be the year in which the chur formed, it shall be considered as an accession to the land of the person whose estate is most contiguous to it. We may easily suppose that the Legislature had a measure at first in contemplation by which the right of Government was declared, if the channel should be unfordable at the time of formation, but that on it being objected that that would be giving Government a larger right than it would be equitable to give, then, in order to cut down as it were that right which Government was to have on the occurrence of such cases, the words "at any season of the year" may have been in-

troduced. It seems to me also clear that the words "any season of the year" refer to the year in which the formation of the island took place, and not to any future year.

Phear, J.—I concur entirely in the judgment which has been given by the Chief Justice.

It seems to me quite clear that the word "fordable" in the 3rd Clause of Section 4, Regulation XI. of 1825, refers to the point of time at which the chur or island is thrown up in a large navigable river or sea, as there described. The Clause commences thus: "If "the island be thrown up in a large navi-"gable river or in the sea, and the channel of "the river or sea between such island and "the shore be not fordable, it shall, accord-"ing to established usage, be at the dis-"posal of Government." If the Clause had stopped there, I do not suppose any one would have had a doubt that the character of fordability was to be possessed by the channel at the time when such chur or island is thrown up. Then comes the following passage: "If the channel between such island "and the shore is fordable at any season of "the year, it shall be considered as an acces-"sion to the land, tenure, or tenures of the "person whose estate is most contiguous to "it." I do not understand this to be anything other than a somewhat clumsy way of defining what the Legislature intended to be understood by the term "fordable," and for conciseness' sake this definition was tacked on to the opposite alternative of the first part of the Section. I think the Legislature really meant to say that the channel, for the purposes of this enactment, should be considered fordable at the time when the island is thrown up, if it were then such as to be in fact fordable at the low water period of the year.

I have made these remarks solely because a judgment which was delivered by my mouth and is reported in 9, Weekly Reporter, page 402, has been treated in the argument of this case as an authority in support of the view which is opposed to that now expressed by me. In that case the Division Bench was made acquainted with the decision which I think had at that time been only very recently passed by an Appellate Bench of this Court, namely, the decision reported in the same Volume of the Weekly Reporter, page 312, and felt itself bound by it. Indeed, if my memory serves me correctly, there was no contest in the case reported at page 402 upon this point. Both parties assumed that it was settled, so far as a Division Bench was concerned, by the decision of the Appeal Bench. The real subject of decision in that case was the question which is dealt with in the latter part of the judgment, namely, whether or not the fact of silting up of the channel taking place after the whole chur had undoubtedly become the property of one of the riparian proprietors could have the effect of transferring the ownership of a portion of the chur to another adjoining riparian proprietor.

I think that the answer to the question which has been proposed to us should be given as the Chief Justice suggests.

Final Order.

The result of this decision is that the judgment of the Lower Appellate Court must be reversed, and the decision of the Moonsiff dismissing the plaintiff's suit with costs restored.

The plaintiffs will also pay the costs of the defendants in this Court as well as in the Lower Appellate Court, including the costs of this reference.

The 18th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, F. B. Kemp, L. S. Jackson, and J. B. Phear, *Judges.*

Special Appeal—Small Cause Court—Section 287, Act VIII. of 1859—Section 27, Act XXIII. of 1861.

Case No. 82 of 1870.

Miscellaneous Appeal from an order passed by the Officiating Judge of Mymensingh, dated the 9th December 1869, affirming an order of the Moonsiff of Shereport, dated the 25th August 1868.

Soorjo Coomar Surmah Roy (Decree-holder), *Appellant,*

versus

Kristo Coomar Chowdhry (Judgment-debtor), *Respondent.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Anund Chunder Ghossal for Respondent.

HELD that, notwithstanding Section 387 of Act VIII. of 1859, Section 27, Act XXIII. of 1861, bars a special appeal in a suit of the nature cognizable by a Court of Smal lCauses instituted before Act XXIII. of 1861 came into operation.

This case was referred to the Full Bench by E. Jackson and Dwarkanath Mitter, JJ., with the following remarks:—

Jackson, J.—THIS is a special appeal from an order passed in regular appeal by the Judge of Mymensingh in execution of decree in a suit which, it is admitted by both parties, would be cognizable by a Court of Small Causes. The respondent takes a preliminary objection to the hearing of the special appeal on this ground, with reference to Section 27, Act XXIII. of 1861; but the special appellant's pleader argues that, as the suit was instituted before Act XXIII. of 1861 came into operation, and as Act XXIII. of 1861 has been declared shall be read as a part of Act VIII. of 1859, and as Section 387, Act VIII. of 1859, lays down that if in any suit pending at the time this Act shall come into operation, the application of any provision of it would deprive any party to the suit of any right of appeal, which, but for the passing of the Act, would have belonged to him, the Court shall proceed according to the law in force before the Act takes effect—it follows that his right of special appeal is not taken away by Act XXIII. of 1861.

We are of opinion that the contention of the special appellant's pleader is correct; that the terms of Section 287, Act VIII. of 1859, must be read with the different Clauses of Act XXIII. of 1861 as if Act XXIII. of 1861 was a part of Act VIII. of 1859; that the words "pending at the time this Act shall come into operation" would, in connection with the Sections of Act XXIII. of 1861, be the date at which Act XXIII. of 1861 came into operation; that, as this suit was instituted prior to that date, the special appellant is not deprived of the right to institute a special appeal, which he would have had according to the law in force before Act XXIII. of 1861 came into force; and that consequently we should admit this special appeal.

We find, however, that a Division Bench of this Court, Louis S. Jackson and Sir C. P. Hobhouse, *JJ.*, have held to a contrary effect. There being, therefore, a difference of opinion, we refer the point for the decision of a Full Bench of this Court.

At the same time we proceed to record our opinion upon the point on which the special appeal is preferred, as we have heard the arguments upon it, in order that we may pass final orders on the case as soon as the above reference is determined by the Full Bench.

The suit in question was brought against certain defendants as heirs and representatives of Opoorba Chowdhranee upon a bond due by her. The defendants admitted that they were her heirs, but denied that they had inherited any property from her. The Court decreed the claim as due from Opoorba Chowdhranee, and declared that her estate was liable for it, but held that the plaintiff had been unable to prove that the defendants inherited any estate from Opoorba Chowdhranee, and accordingly dismissed the claim as against them, giving the defendants their costs.

In execution, the decree-holder now applies to execute the decree against the same defendants on the ground that he can now prove that they held property which belonged to Opoorba Chowdhranee. The Judge of Mymensingh, concurring with the first Court, has held that the decree-holder cannot, under the terms of the decree, execute it against the defendants. This is objected to on special appeal as erroneous in law. We find that, in a similar case, Loch and Seton-Karr, *JJ.*, held that the decree-holder could bring the defendants upon the record, and, on proof that they have inherited property from Opoorba Chowdhranee, proceed to execute the decree against the defendants as against that property. We are inclined to take the same view. We think that the debt was decreed against the defendants as representatives of the deceased debtor, and that the claim was only dismissed against them at the time on the ground that the plaintiff had then been unable to prove that any property belonging to the late debtor had come into the defendant's hand. The decree as against the estate of the debtor was passed in their presence; and, if the decree-holder can now show that they held any such estate, the execution should be allowed to proceed against them.

If, then, the decision of the Full Bench is that we are right on the point on which

the reference has been made, we shall decree the special appeal, and, reversing the decision of the Judge of Mymensingh, we shall remand the case to the first Court to take evidence and decide whether the execution shall proceed or not. If the Full Bench is of opinion we are not right in our view of the law, and that the special appeal must be rejected, we shall dismiss this appeal with all costs.

Mitter, J.—I concur in the order proposed by my learned colleague.

It is admitted on all sides that the suit out of which this special appeal has arisen was actually pending in the Lower Court at the time when Act XXIII. of 1861 came into operation. It is, therefore, clear that the special appellant would have been fully entitled to maintain this special appeal if that Act had not been passed. But the question is, has this right been taken away from him by the provisions of Section 27, Act XXIII. of 1861? I am of opinion that this question ought to be answered in the negative. Act XXIII. of 1861 is called "an Act to amend Act VIII. of 1859," and the 44th Section of that Act expressly provides that it should be "*read* and *taken*" as part of Act VIII. of 1859. If, then, we "read and take" Act XXIII. of 1861 as part of Act VIII. of 1859, the *proviso* contained in Section 387 of the latter Act would stand just as much in the way of our applying the provisions of Act XXIII. of 1861 as in that of our applying the provisions of Act VIII. of 1859 as it was originally framed. It is true that the words "in any suit pending at the time when *this Act* shall come into operation" were originally intended to apply to suits pending on the 1st of July 1859, when Act VIII. of 1859 came into operation; but a wider signification must be given to those words now that we are obliged to "read and take" Act XXIII. of 1861 as part of Act VIII. of 1859. In fact, the new Act thus constituted must be considered as consisting of two parts, one of which came into operation on the 1st of July 1859, the other on the 28th of August 1861 when Act XXIII. of 1861 was passed. Such being the case, the provisions of Section 27, Act XXIII. of 1861, cannot be permitted to deprive the special appellant of his right to appeal specially to this Court —a right which he could have undoubtedly exercised but for the passing of that Section. This view of Section 387 of Act VIII. of 1859 is fully borne out by the general rule of construction which forbids the Court to give a retrospective operation to a legislative enactment, when the Legislature itself has not clearly expressed its intention that such operation should be given to it.

As to the merits of this appeal, I have nothing to add to what has been already said by my learned colleague.

The judgment of the Full Bench was delivered as follows by—

Couch, C. J.—We think it quite clear that no special appeal lies in this case. Section 27, Act XXIII. of 1861, expressly says that in a suit of this nature no special appeal shall lie from a decision which shall be passed on regular appeal after the passing of that Act. This is not only a law of procedure which would govern existing suits, but by its terms it applies to decisions or orders which are made after the passing of the Act, and unless this Section is controlled by Section 387 of Act VIII. of 1859, there is no right of special appeal. Section 387, which we may read as forming a part of Act XXIII. of 1861, as Section 44 says that that Act shall be read and taken as part of Act VIII. of 1859, is that no application of any provision of that Act is to deprive a party of any right, whether of appeal or otherwise, which but for the passing of the Act would have belonged to him. Now, was there a right of special appeal belonging to the applicant in this case, which he would have had but for the passing of Act XXIII. of 1861? There certainly was not. By Act XLIII. of 1860, he had no right of special appeal, and instead of there being a right of special appeal, which belonged to him but for the passing of Act XXIII. of 1861, it was the passing of that Act which is said to have given him the right of special appeal. If Act XXIII. of 1861 had not been passed, and Act XLIII. of 1860 had not been repealed, he would have had no right, and could not claim the benefit of Section 387. He had no right of special appeal during the existence of Act XLIII. of 1860; and as at the very moment that that Act was repealed the other Act also took away the right of special appeal, there was no intermediate period of time during which he had a right of special appeal to which Section 387 could be applicable. He was not deprived of anything which belonged or would have belonged to him but for the passing of Act XXIII. of 1861. The authority quoted from Dwarris on

Statutes has no application to a question of this kind, which depends on the construction of the several Sections of the Acts, and has to be decided by a reference to them, and not by any general rule. If a statute which creates an offence and makes it punishable in a certain way is repealed, and a new statute passed with a new penalty for the same offence, the offence committed during the existence of the old statute cannot be punished under it, as it is no longer the law, nor, unless it is specially provided for, can it be punished under the new statute. That is a quite different question from the one now before us. We think it is clear that, if Act XLIII. of 1860 had been brought to the notice of the learned Judges who referred the question, they would not have referred it, because their judgments show that the foundation of the reference was an opinion on their part that, at the time when Act XXIII. came into force, the petitioner had a right of special appeal. Mr. Justice E. Jackson says: "As this suit was instituted prior to that date," that is, when Act XXIII. came into operation, "the special "appellant was not deprived of the right to "institute a special appeal, which he would "have had according to the law in force "before Act XXIII. of 1861 came into force." Mr. Justice Mitter in the same way says: "It is, therefore, clear that the special ap-"pellant would have been fully entitled to "maintain this special appeal if that Act," *viz.*, XXIII. of 1861, "had not been passed." This was certainly an oversight of the learned Judges. It is clear to us that, if the state of the law as regards the special appeal had been present to their minds, they would have come to the same conclusion at which we now arrive.

The special appeal must be rejected with costs.

The 13th September 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, F. B. Kemp, and L. S. Jackson, *Judges*.

Judgment-debtor — Attachment — Execution — Official Assignee—Vesting order.

Case No. 193 of 1869.

Regular Appeal from a decision passed by the Second Subordinate Judge of the 24-Pergunnahs, dated the 27th May 1869.

Anund Chunder Pal (Defendant), *Appellant*,

versus

Punchoo Lall Soobalah (Plaintiff), *Respondent*.

Mr. G. C. Paul for Appellant.

Mr. W. Bourke for Respondent.

In execution of a decree obtained in September 1867, a piece of land with a house standing on it was attached in January 1868, and sold on the 17th of April idem.

In the meantime, the judgment-debtors had filed their petition in the Insolvent Court, and a vesting order was made on the 6th of March 1868.

The Official Assignee afterwards sold the premises by order of the Insolvent Court, and the plaintiff in this case, who was the purchaser, sued to recover the property from the purchaser at the sale in execution of the Zillah Court's decree.

HELD that the vesting order did not prevail over the previous attachment made after decree, and the purchaser from the Official Assignee could not interfere with the rights acquired under the attachment.

This case was referred to the Full Bench by L. S. Jackson and Glover, JJ., with the following remarks:—

Jackson, J.—I THINK this case must go to a Full Bench.

The question is a simple one.

The defendant Indur Chund Doogur had got a decree in September 1867 against Tara Chand and others, and in the month of Magh 1274, or 12th January 1868, caused a piece of land with a house standing on it to be attached, with a view to sale in execution of his decree; and it was sold accordingly on 17th April by order of the Zillah Judge, and bought by the other defendant Anund Chunder Pal. In the meantime, the judgment-debtors had filed their petition in the Insolvent Court, and a vesting order was made on the 6th March 1868.

The Official Assignee afterwards sold the premises by order of the Insolvent Court on the 24th July of the same year. The present plaintiff was the purchaser, and sues to recover the property from the purchaser at the Zillah Court's sale.

Does the vesting order prevail over the previous attachment made after decree, so as to give the plaintiff a better title than the defendant?

The Court below, on the authority of cases noted in the margin, has held that it does, and has given judgment for the plaintiff.

Indur Chunder Doogur *versus* Umur Chand Doogur, II. Ben.L.Reports, page 61, App. Civ.; Ram Pershad *versus* Kala Chand Doss, I. Indian Jurist, N. S., pp. 325 and 373.

But the same point (or nearly so) was very carefully considered by four Judges of the High Court at Bombay, in Gamble *versus* Bholagir and others, II. Bombay High Court Reports, page 146; and it was there unanimously held that the attaching creditors, who had obtained warrants in execution, were entitled to preference over the Official Assignee whose vesting order was of date subsequent to such warrants, though before sale.

In those cases, there had been attachment previous to judgment, and it seems to have been argued that, as there was no re-seizure by the Nazir, the property was merely detained under the first attachment, and it seems hardly to have been contended that the Official Assignee could have any case if the attachment had been after decree and previous to the vesting order.

The Court, however, held that re-seizure was unnecessary, and that the sale under the decree prevailed.

I incline to think that those cases in Bombay were rightly decided, and that the judgment in this suit ought to be reversed, and therefore I propose to send the case before a Full Bench.

Glover, J.—I adhere to the opinion I expressed in the case of Indur Chunder Doogur *versus* Cochrane, reported in 10. Weekly Reporter, page 353—a case which is exactly similar to the present one.

I have, however, no objection to the matter being referred to a Full Bench; and I, therefore, concur in the reference proposed by Mr. Justice Louis Jackson.

The judgment of the Full Bench was delivered as follows by—

Couch, C. J.—The facts of this case, which are stated in the reference to the Full Bench, are these: The defendant Indur Chunder Doogur had got a decree in September 1867 against Tara Chand and others, and in the month of Magh 1274, or 17th January 1868, caused a piece of land with a house standing on it to be attached with a view to sale in execution of his decree, and it was sold accordingly on the 17th of April by order of the Zillah Judge, and bought by the other defendant Anund Chunder Pal. In the meantime, the judgment-debtors had filed their petition in the Insolvent Court, and a vesting order was made on the 6th of March 1868.

The Official Assignee afterwards sold the premises by order of the Insolvent Court on the 24th of July in the same year. The present plaintiff was the purchaser, and sues to recover the property from the purchaser at the Zillah Court's sale.

And the question put is—Does the vesting order prevail over the previous attachment made after decree, so as to give the plaintiff a better title than the defendant?

The provision in the Indian Insolvent Acts 11 and 12 Victoria, Cap. 71, as to the vesting of the estate and effects of the insolvent in the assignee is similar to the provision in the English Insolvent Acts 1 and 2 Victoria, Cap. 110, and there is nothing in the Indian Act which can give to the assignee under it a greater right than the assignee in England has. The vesting order of the Insolvent Debtor's Court, under Section 37 of the English Act, has the same legal operation as the assignment to the provisional assignee had for which it was substituted. Now, Lord Saint Leonards, in the case of *in re* Atkinson, II. De Gex Macnaghten and Gordon, page 140, says in his judgment as Lord Chancellor: "Two questions arise on this appeal; the first, whether the title of the assignee in insolvency is so absolute that it cannot be disturbed; and, secondly, what, under the circumstances, as they here appear, are the rights of the assignee for value?

"It may be considered as decided that the assignee in insolvency represents the insolvent; he stands in his place, and takes only such interest as he can give, and subject to all equities by which the insolvent is bound. It has, however, been contended that the effect of the Act is so to vest the property that the insolvent cannot afterwards divest it; but this is not so, for there are no words in the Act giving to the assignee any higher interest than the insolvent himself has; the assignee does not therefore take, so as not to be subject to equities as administered in this Court."

And Lord Westbury, in moving the judgment of the House of Lords in Fleming *versus* Howden, Law Reports, 1 Scotch Appeals, p. 382, says: "The right of a trustee "under a sequestration is very different "from the right of a singular successor; "for it is a rule common to both English "and Scotch bankrupt law that the trustee "or assignee takes the property of the "bankrupt subject to all the rights and "equities that affected it at the time of the "bankruptcy. But the singular successor "is not bound by a trust or duty of which "he had no notice. The trustee under a "sequestration *is in the same position as* "*a gratuitous alienee.* He takes such "estate or interest only as the bankrupt can "lawfully convey. So in England, the as-"signee takes such interest only as the bank-"rupt can lawfully depart withal. The "force of the two expressions is the same, "and the implied conveyance to the trustee "or assignee ranks no higher than *a gra-*"*tuitous alienation.*" No higher authorities could be quoted for the rule which is to be applied in any case where it is necessary to determine what is the right of an Official Assignee. No doubt, as it was argued, he represents the creditors and is a trustee for them, but that cannot give him a greater interest in the property than the insolvent had.

It appears to me that in the decisions in the Indian Courts this rule has been lost sight of, and the question has been treated as if it were whether the property passed to the Official Assignee, and whether any charge or lien upon it was created by the attachment. I except the case of Gamble *versus* Bholagir, where the point was not raised, and it was assumed that, if the attachment after decree was complete without re-seizure by the Nazir, the execution-creditor was entitled to preference as regarded the attached goods over the Official Assignee. I think the question before us must be decided by considering the rule laid down by Lord Saint Leonards and Lord Westbury in connection with the provisions of the Code of Civil Procedure. At the most, the English cases upon a different form of procedure in execution can only assist us as being analogous. It is a little remarkable that, although the English Law has been so much referred to in considering this question, the case in the English Courts which is most applicable to it appears to have been the least noticed. It is not mentioned in the elaborate judgment of the High Court of the North-West Provinces. I mean the case of Woodland *versus* Fuller, 11 Adolphus and Ellis, page 859. There a writ of *fi. fa.* against a person was lodged with the Deputy of the Sheriff, who immediately issued a warrant to an officer. Afterwards, on the same day, a vesting order was made by the Insolvent Debtor's Court transferring the person's estate, and the assignee took possession of his property under it. The Sheriff's officer afterwards seized it, and it was held by the Court of Queen's Bench that the seizure was proper; that the vesting order only vested the property in the assignee subject to the right of the execution-creditor. The Court entertained no doubt, and the case is an instance of the application of the rule that the assignee takes the property subject to the rights and equities which affected it at the time of the bankruptcy or insolvency. But, as I have said, the question must be answered by a reference to the Code of Civil Procedure.

By Section 15 of Act XXIII. of 1861, substituted for Section 215 of Act VIII. of 1859, it is enacted that if the application for execution of a decree be admitted, the Court shall order execution of the decree according to the nature of the application. Section 221 of Act VIII. of 1859 says: "When all necessary preliminary measures "have been taken, where any such are requir-"ed, the Court, unless it see cause to the "contrary, shall issue the proper warrants "for the execution of the decree." Section 232 is: "If the decree be for money, "and the amount thereof is to be levied "from the property of the person against "whom the same may have been pronounced, "the Court shall cause the property to be "attached in the manner following." And then, after the different modes of attachment are given, Section 242 says: "In all "cases of attachment under the preceding "Sections, it shall be competent to the "Court, at any time during the attachment, "to direct that any part of the property "so attached as shall consist of money "or bank-notes, or sufficient part thereof, "shall be paid over to the party applying "for execution of the decree; or that any "part of the property so attached as may "not consist of money or bank-notes, so far "as may be necessary for the satisfaction "of the decree, shall be sold; and that the "money which may be realized by such "sale, or a sufficient part thereof, shall be "paid to such party."

Now, it is a rule that, when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application.

This has been often decided, and it is sufficient to quote the cases of Macdougall *versus* Paterson, 11 C. B., page 755; Crake *versus* Powell, 2 E. and B., page 210; Bowes *versus* Hope Life Insurance Company, 11 H. L., Cases, 389. In those cases, the word used in the statute was *may*. According to this rule, the words "it "shall be competent to the Court," in Section 242, must not be construed as giving to the Court a power which it may exercise or not as it thinks fit, but as obligatory and conferring on the attaching creditor a right to have the attached property sold and the money realized by the sale paid to him.

Section 116, which provides for the non-appearance of one or more of several plaintiffs, is an instance of the same words—"it "shall be competent to the Court" being obligatory; and so is Section 97, where, if the plaintiff satisfies the Court that there are sufficient grounds for permitting him to withdraw from the suit with liberty to bring a fresh suit for the same matter, the Court is bound to grant the permission.

In several Sections the word "may" is clearly obligatory. For instance, 84, 90, 101, 143, and the first part of 102. In the latter part of this Section, the words "if it "think proper" are introduced after "may," apparently to show that it is not obligatory. Section 351 is another instance of this, the words there being—"if it think right."

In Section 92 as to injunctions, the words "it shall be lawful for the Court" are clearly obligatory when a proper case arises. It would be contrary to the whole scope of the Act to hold that, by an attachment after decree, the creditor does not acquire a right to have the property sold, and that the Court may arbitrarily refuse to issue the order for sale.

Section 240 appears to me to furnish a strong argument against the Official Assignee. By that Section, the right or equity created by the attachment is such that it cannot be affected by even a *bonâ-fide* alienation for value without notice of it. The vesting order "ranks no higher than a gratuitous alienation" (Lord Westbury in the judgment before quoted), and it cannot be consistently held that it is to defeat the attachment when an alienation for value is not allowed to do so. It was argued that, after the vesting order, the property cannot be sold as that of the judgment-debtor, as it has passed to the Official Assignee; but the answer to that is that it has so passed subject to being divested by a sale in execution of the decree, and it may still be sold as the property of the judgment-debtor.

In this case, I think, the sale on the 17th of April by order of the Zillah Judge was legal, notwithstanding the vesting order, and the defendant Anund Chunder Pal acquired a good title to the property under it, and that the plaintiff has no right to recover it from him.

APPEALS FROM ORIGINAL JURISDICTION.

The 15th May 1865.

Present;

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble J. P. Norman, *Judge.*

Hidden plaintiffs—Costs—High Court—Equitable jurisdiction—Abuse of process of Court—Act VIII. of 1859.

Appeal from the judgment of the Hon'ble J. B. Phear, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Jointee Chunder Sein, *Appellant,*

versus

Anundo Lall Doss and others (Defendants), *Respondents.*

Messrs. J. D. Bell and *J. Coryton* for Appellant.

Messrs. J. T. Woodroffe and *L. P. Evans* for Respondents.

A suit for possession of land having been dismissed with costs, a motion was made on the part of the defendants asking the Court to make *A* and *B*, strangers to the record, pay the costs on the ground that they were the real, though hidden, plaintiffs, and had executed a false lease in favor of the nominal plaintiff who had brought the suit on the strength of such false lease.

HELD *by Phear, J.*, that the Court could not make the order applied for under Act VIII. of 1859, as that Act does not authorize a Court to deal by its judgment in any suit directly with persons not before it in that suit; but that the High Court has the same equitable jurisdiction which the Supreme Court had to entertain an application of this kind, and that, as the facts showed that *A* and *B* were the real plaintiffs in the suit, and that the conveyance to the nominal plaintiff was fictitious, the order directing them to pay the costs of the suit should go.

HELD *by Peacock, C. J., and Norman, J.* (confirming the order of *Phear, J.*), that *A* and *B* were guilty of a contempt and abuse of a process of the Court when they put forward a sham plaintiff and a deed which they knew was fictitious, with a view to impose upon the Court; and that the Court had power to compel them, as the real plaintiffs, to pay the costs of the suit, although they were not named as parties in the original proceedings.

THIS was an appeal against an order of the Hon'ble J. B. Phear, passed on the 10th of March 1865, in the suit of Bamasoondery Dossee *versus* Anundo Lall Doss and others, in which suit judgment was delivered on the 13th February preceding, by which the suit of the plaintiff was dismissed with costs. On a motion made before that learned Judge, it was sought to throw the costs of the suit on Juggut Chunder Sein and Jointee Chunder Sein, on the ground that, although they were not parties to the suit, they were the real, though hidden, plaintiffs. Phear, J., held that the case against Juggut Chunder Sein and Jointee Chunder Sein was made out, and he directed that they should pay to the defendants in the suit the costs incurred by them therein and in the motion.

The judgment of Phear, J., on this point was as follows:—

This was a suit brought to recover possession of certain land and premises in Calcutta. It came on for hearing in this Court on the 13th day of February last, and after a trial of several days it was dismissed with costs. The present application is by way of motion calling upon Juggut Chunder Sein and Jointee Chunder Sein, strangers to the record, to show cause why they should not pay the several defendants their costs of the suit. Mr. Bell, in showing cause against the motion, made the preliminary objection that the Court had no jurisdiction to entertain the application.

It is obvious that the question thus raised is a most important one, considering how great are the facilities for vicarious litigation of a vexatious and harassing nature which exists in this country, and therefore how desirable it is that this Court should have in its hands all reasonable means of visiting the real party, and not the ostensible party only, to the suit with the consequence of failure. It is true that the Court probably has in all cases the power to stay proceedings at the instance of a defendant, until the third person other than the plaintiffs gives security for payment of the defendant's costs; but this does not avail to give a relief to the plaintiff or to the defendant when, in the course of the trial itself, it for the first time turns out that the other party is a man of straw and merely the representative of a third person who is actually pulling the strings of the litigation.

It is said in opposition to the rule that the power of the High Court to deal with the matter must be sought in the provisions in this behalf of Act VIII. of 1859, and that these do not enable it after judgment to saddle any one with the burden of the costs who is not a party in the cause. Section 187 of that Act appears to be the only one which bears directly on the point. By this it is enacted that the judgment shall in all cases direct by whom the costs of each party are to be paid, whether by himself or by another party, and whether in whole or in what part or proportion; and the Court shall have full power to award and apportion costs in any manner it may deem proper. It seemed at first doubtful whether the Legislature used the words "another party" as equivalent to "another person," in which case the power contended for by Mr. Evans would undoubtedly be given to the Court by the express words of the Section, or whether it intended they should be read as if identical with "another party" to the suit. I think, however, that I must attach the latter signification to the words, otherwise I should be attributing two meanings to "party" in the same sentence; for it is clear that "costs of each party" must have reference to the technical sense only of the word. The last sentence in the Section does not, in my judgment, say anything to extend the area of the Court's action as regards the persons to be affected. The first portion of the Section directs that the judgment shall always contain an order for the payment of the costs of each party to the suit, either by himself or by some other party or parties to the suit, and that either wholly or in part. The latter portion of the Section only adds that the Court, in coming to that judgment, shall have the fullest discretion in regard to which it may treat the subject of these costs, and in determining the amounts to be borne by the respective parties. It never could have been the intention of the Legislature to empower the Court to deal by its judgment in any given suit directly with persons not before it in that suit.

On the whole, then, I conclude that Act VIII. of 1859 does not confer on this Court the power which is invoked in this application. Am I obliged, therefore, to say that this Court does not possess the power? I think not. The proceedings between party and party are, no doubt, regulated solely by Act VIII., but the remedy here sought is neither a stop in the proceedings of any particular suit, nor one which can be made the subject of a separate plaint: it is rather of the nature of a substantive proceeding *in personam*, and it may well be that our equitable jurisdiction is sufficiently large to afford it. Now, by Section 9 of the High Court Act, this Court has and can exercise all jurisdiction and every power and authority whatsoever which was vested in the Supreme Court, unless Her Majesty's Letters Patent constituting the Court otherwise direct; and certainly if the jurisdiction to entertain an application of this kind was vested in the Supreme Court, there is nothing in the Letters Patent, as far as I can discover, to prevent its devolving upon us. As to this, I should probably be bound, even was there an absence of authority, to assume from the general words of the original Charter that the jurisdiction of the Supreme Court was co-extensive with that of Her Majesty's Superior Courts at Westminster; but an unreported case, Doe, &c., *versus* Surroop Chunder Ghose, was cited in argument before me, which clearly showed that the Supreme Court did, in fact, exercise the peculiar jurisdiction of the English Superior Courts in regard to dealing with the subject of costs in ejectment-suits. It is true that the ejectment-suit no longer exists in its old form, but is in all respects assimilated to any other civil suit; and it might be argued that, as the jurisdiction in question originated in the specialties of the old form of proceeding, it must be considered as in some sense identical to it, and not self-existent; but on this point, I think, I must follow the example of the Superior Courts in England, who have decided (see Thornton *versus* Wilkinson, 9 Jurist N. S., 606, and Mobbs *versus* Vanderbrande, Volume III., Weekly Reporter, 464) that, notwithstanding the alteration of the nature of the action of ejectment there effected by the Common Law Procedure Act, the jurisdiction remained to them on the ground that that Act reserved all power which the Courts previously enjoyed. Similarly here, all previously existing powers of the Supreme Court are given to us; and I am, therefore, of opinion that this Court has the same power of directing that the costs of any party to a suit for the recovery of land shall be paid by a person who is not on the record, as the late Supreme Court had, and as the Courts at Westminster still possess and exercise. In coming to this decision, I do not disregard or infringe upon the precedents afforded by Evans *versus* Rees* and the cases there cited.

* 12 A. and E., p. 167.

Then do the facts of the case justify the making the rule absolute? I think I am bound on the authorities to do so, if I arrive at the conclusion that Juggut Chunder Sein and his son are the real plaintiffs in this suit; and on this point I feel no hesitation. I look upon the conveyance-transaction as entirely fictitious. I do not go the length of saying that there is no such person as Bamasoondery Dossee; but I am convinced that, if there is, she took no real part in the making of the conveyance. I should in all cases look with grave suspicion upon the circumstance of a suit in ejectment being immediately preceded by a conveyance to a purdah woman for the purpose of her being made the plaintiff, it being remembered how great is the difficulty of identification, and how impossible to enforce process against her personally if such a course becomes necessary. But here, in addition, there has been long antecedent litigation followed by a sleeping on his rights, supposing he had any, on the part of Juggut Chunder, until the end of this suit when he once more stirs himself to assert his title. Then suddenly comes the conveyance to this purdah woman, of whom all the description vouchsafed us is that she is an inmate of Juggut Chunder's house. He can't say why or when she came to his house, what her means are, or from whence she got the alleged consideration-money for the purchase. The making such a purchase at all with her eyes wide open, as Juggut Chunder is careful to say, to all the facts of the case, is so extraordinary an act for a woman, that I could not help remarking to her Counsel on his opening that his client must possess a very adventurous and speculative turn of mind. I could understand an attorney of a certain class or some species of reversionary societies buying up or making bargains with regard to the prosecution of rights like those involved in this suit; and I dare say transactions of this kind take place in Calcutta as well as in England. But it is simply unintelligible to me that an ignorant and purdah woman should voluntarily, and even against advice as Juggut Chunder says, insist upon purchasing a Chancery suit, she herself having previously been entirely uninterested in the matter; and the only motive which can be suggested for this pertinacity being the circumstance that a small portion of the premises sought to be recovered would aptly serve for carrying out a religious purpose said to be entertained by her. I will add that the identification of Bamasoondery Dossee, which forms a link in the chain of evidence offered to the Court, was most unsatisfactory to me. In short, I feel no doubt but that Bamasoondery Dossee, if such a person is connected with the suit at all, is entirely a sham plaintiff—a mere puppet in the hands of others. As far as I can judge, Juggut Chunder and Jointee Chunder are both directly interested in this suit, and are active promoters of it—certainly the latter is so. It may be that the vexation is brought about by some one not disclosed to the Court; and if so, I regret that I cannot reach him to make him in some degree responsible for this vexatious and harassing litigation which he has contributed to set on foot. However, as to Juggut Chunder and Jointee Chunder, I am clear that they ought, within the spirit of the decisions to which I have referred, to be made liable for the defendant's costs, and therefore this rule will be made absolute with costs.

Jointee Chunder Sein appealed from the above judgment, on the grounds substantially that, as he was not a party to the suit, the Court had no power to make him liable for the costs; that if the Court had such power, the order should have been passed at the time judgment in the suit was declared; and that, after the decree had once passed, it could not be afterwards altered.

The following are the judgments of the Appellate Bench:—

Peacock, C. J.—We do not think it necessary to call upon the respondent in this case. We think that the order of the learned Judge was a very proper one, and is fully borne out by the evidence.

If it were necessary to consider whether the late Supreme Court was bound by the decision in Hayward *versus* Gifford, 4 Meeson and Welsby, page 194, we might take further time to consider or look more minutely into the Charter of the Supreme Court. But whether the Supreme Court would have been bound by that decision or not, we think that the present case is very different from the case which has been cited. In that case the judgment of the Court was delivered by Lord Abinger as follows:—

"If we were at liberty to consult equity "and justice, we should probably make this "rule absolute. But the authority of the "Courts at Westminster is derived from the "Queen's writ, directing them to take cog-

"nizance of the suits mentioned in the writs "respectively, and thus bring the parties "before them. This being so, they had "no power to order any particular individual "to come before them at their pleasure. In "the present case, if it could have been "shown that Spencer had committed any "contempt of Court, or been guilty in "respect of this suit of anything in the "nature of barratry or maintenance, it would "have been another matter; but we cannot "make any order against an individual who "is not party to any suit before us, nor has "been guilty of any contempt, but merely "because he has an interest in the event of "the suit."

That case, therefore, was determined on the ground that Spencer had an interest in the event of that suit. In 2 Adolphus and Ellis, page 334, it was ruled that the Court would not order a person not a party to the record to pay costs in any action but ejectment; and there, I think, they followed the rule laid down by Lord Abinger in the case referred to above.

The learned Judge in that case having stated that the case would be different if the party had been guilty of any contempt of Court, let us see whether the parties who have been ordered to pay costs in this case have not been guilty of a contempt of Court, or at any rate guilty of an abuse of the process of the Court. This suit, although not an action of ejectment, is a suit to recover possession of land; and I say it is a gross abuse of the process of a Court of justice for a man to lease out land to another by a fictitious deed, for the purpose of imposing upon a Court of Justice, and making them believe that it was an actual conveyance whereon to commence a suit in his own name—more especially so if that conveyance is made to a woman from whom it is almost impossible to recover the costs of the suit if she should fail.

Let us see if the parties in this suit have not been guilty of abusing a process of the Court, by putting forward a deed which they knew to have no real foundation, in order to avoid paying costs of suit in case that suit failed. The learned Judge says that the deed was a wholly fictitious one; and from the affidavits before the Judge, there can be no doubt that the Judge came to a right conclusion upon that point.

It is said that the son (Jointee Chunder) ought not to have been made to pay the costs as well as the father (Juggut Chunder). But the question is whether both father and son were not colluding together, by endeavouring to recover property in the name of the plaintiff in such a manner as to avoid being liable in the costs of the suit in case the plaintiff failed.

[The Chief Justice here read from the depositions of the father and son, of Mr. Leslie, the attesting witness to the conveyance, and from the defendant Anundo Lall's affidavit.]

Now, here is a fictitious deed prepared which no one who reads the evidence can doubt; and both the father and son were present at the attorney's office where the deed was concocted, and where the son admits he gave full instructions to the attorney. He was, therefore, a party knowing full well that that deed was executed for the purpose of protecting a person (whoever he may be) from the payment of costs in the event of failure.

I say that that is a gross abuse of the process of a Court, and that the Court had the power to call the persons before it, and tell them that they had been guilty of a contempt of Court, and that the Court exercising a sound and wise discretion in compelling them to pay costs. I therefore think that this appeal must be dismissed with costs to be paid by both these parties.

Norman, J.—I am entirely of the same opinion, and I only wish to add one word with regard to Mr. Bell's observation in reference to the case of Hayward *versus* Gifford. In Marshall on Costs, page 445, it is said: "The rule in all other actions than "ejectment is not to call upon a person for "costs who is no party to the record." This is stated in Hayward *versus* Gifford to be the *general rule*. But the judgment in that case shows that there are several exceptions to it; and as regards ejectment, the Chief Baron points out that in ejectment the Courts take notice of the real parties litigant. There is no such limitation of the rule to the cases of defendants in ejectment as was suggested by Mr. Bell.

The case itself shows that, if a suit brought by a person having a real interest, however small, in the event of the suit, the Court cannot enforce payment of costs against a person who, being largely interested in the result, supplies the plaintiff with money, and otherwise assists him in carrying

on the suit. Evans *versus* Rees,* where the plaintiff was a tenant from year to year, was a similar case.

But in the case of the Queen *versus* Green (4 Queen's Bench Reports, page 652) the Court made an attorney pay all the costs of an information.

Sir William Follett in his argument put the case thus: "Where it is clear that a man "of straw is purposely put forward, the real "party ought to pay costs, and he cannot "shelter himself by alleging that he meant "only to act as attorney. Though he acted "in that capacity, the application is not the "less his own."

Lord Denman said: "The question is "whether a person who, on a motion for *quo* "*warranto* information, acts as an attorney, "is *on that account* to avoid payment of "costs when he has, in fact, been the relator, "but has put forward another person in that "capacity who is unable to pay costs. I "have no doubt that he is liable, where it "appears that he is actually and virtually "the relator." The Court, therefore, made the party in that case pay costs, not because he was attorney, but *although* he was attorney. I think that, where a person is put forward as plaintiff—who has no interest of any sort—who is a mere name—whose very existence, as I may say, is more than doubtful—the party using the name as plaintiff is guilty of a contempt and abuse of the process of the Court. The Court can and will compel the party who is really the plaintiff to pay costs, although he was not named as party in the original proceedings.

The 26th May 1865.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble A. G. Macpherson, *Judge.*

Limitation—Bill of Exchange—Cause of action.

Appeal from the judgment of the Hon'ble J. P. Norman, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Mohendro Lall Bose (Plaintiff), *Appellant,*

versus

Jadhub Kissen Singh (Defendant), *Respondent.*

Mr. J. T. Woodroffe for the Appellant.

Mr. L. P. Evans for the Respondent.

M, on the 12th October 1855, drew a Bill of Exchange, payable 3 months after date, in favor of *B*, which was accepted by *J*. Before the bill became due, *B* endorsed it to *P*, who again endorsed it for full value to *M B & Co.*, of which firm *M L* was a partner. *M B & Co.* discounted the bill with *G*, who presented it at maturity to *J*, who dishonored it. *G* thereupon sued *M L*, and recovered a decree which *M L* satisfied. *M L* thereupon brought the present suit, on the 13th February 1865, against *J* as the acceptor of the bill for the amount he paid under *G's* decree.

HELD (*confirming the decision of Norman, J*) that the suit was barred by limitation, more than 6 years having elapsed since the due date of the Bill of Exchange—the plaintiff's cause of action having accrued when the bill became payable, and the acceptor refused to pay.

THE plaintiff in this suit stated that, on the 12th day of October 1855, the defendant accepted a Bill of Exchange for Rupees 3,000 drawn upon him by one Mohendro Nath Tagore, in favor of one Brojendro Nath Tagore. Before the bill became due, Brojendro Nath Tagore endorsed it to one Prankristo Bose, who again endorsed it for full value to the firm of Mullick, Bose, & Brothers, of which the plaintiff was a partner. Before the bill became due, the plaintiff and his partner Jogendronauth Bose discounted it with one Gobind Chunder Sein, who presented the bill at maturity to the defendant who dishonored it. Gobind Chunder Sein sued the plaintiff on the 17th April 1861 on the bill, and obtained a decree against him on the 13th November 1862. The plaintiff paid the amount of the judgment on the 15th July 1864, which was Rupees 5,549-5-8. The plaintiff in this suit sought to recover from the defendant, as acceptor of the said bill, the said sum of Rupees 5,549-5-8. The plaintiff submitted that his cause of action arose on the 15th July 1864, the date on which he paid the amount decreed against him; and if not on that date, at all events on the 13th November 1862, the date of the decree in the suit against him. The present suit was brought on the 13th February 1865.

The Bill of Exchange was in the following terms:—

Calcutta, 12th Oct. 1855.

No. 1 of 22, due 9th May.

Company's Rs. 3,000.

* A. and E., p. 167.

Three months after date, please to pay to Brojendro Nath Tagore, or order, the sum of Company's Rs. three thousand for value received.

Baboo Jadub Kissen Singh. Nogendro Nath Tagore.
(Across the bill.)
Accepted 12th October 1855,
Jadub Kissen Singh.
Due 12-13th January 1856.
P. B.
No. 2480.
Co.'s Rs. 3,000 1856.
due 15th January. 12th October.
(On back.)
Brojendro Nath Tagore. Nogendro Nath Tagore,
Prawn Kisto Bose. *Drawer.*
Mohendro Lall Bose. Jadub Kissen Singh,
Jogendro Lall Bose. *Acceptor.*
Paid the Bank of Bengal, Brojendro Nath Tagore,
Gobind Chunder Sein. Prawn Kisto Bose,
Mohendro Lall Bose,
Jogendro Lall Bose, } *Endorsees.*

The defendant, among other pleas, contended that the suit was barred under Act XIV. of 1859, more than six years having elapsed since the due date of the Bill of Exchange.

Norman, J., without trying the other issues raised in the case, at once dismissed the suit with costs on the ground that it was barred by limitation.

The plaintiff appealed on the following grounds :—

1st.—That the Court ought to have settled the issues proposed by the plaintiff in this suit, and set the cause down for trial thereon;

2nd.—That the Court was in error in holding that the plaintiff's claim was barred by the law of limitation;

3rd.—That the Court ought to have held that the time for limitation began to run from the time of the plaintiff's satisfying the decree in the pleadings mentioned; and

4th.—That the Court should not have dismissed the plaintiff's suit with costs.

The following is the judgment of the Appellate Court as delivered by—

Peacock, C. J.—I must confess that, when this case first came before us, I thought that the judgment of the learned Judge was wrong, and that the plaintiff's suit was not barred by the statute of limitation. But, on further considering the case, I think that the judgment at which the learned Judge has arrived is correct. The question really is what was the cause of action upon which the plaintiff had the right to sue? Now, it appears that a bill was drawn by Mohendro Nath Tagore upon the defendant, who accepted the bill. The bill was endorsed to the firm of Messrs. Mullick, Bose, & Brothers, of which the plaintiff was a partner. Messrs. Mullick, Bose, & Brothers gave full value for the bill, and afterwards discounted it to Gobind Chunder Sein. The bill was dishonored when it became due, and the plaintiff was obliged to take it up.

The question is what right has the plaintiff to sue the acceptor? The plaintiff was one of the endorsees for value, and there never was any privity between him and the defendant. There was no separate contract on the part of the acceptor with the plaintiff, that he should indemnify the plaintiff in case of non-payment of the bill. But the plaintiff claims the right to sue the acceptor upon the bill. The promise was to pay the bill according to the tenor and effect of the bill; and the liability of the defendant to the endorsee is in consequence of the breach of that contract, namely—his not having paid the bill according to the tenor and effect thereof. When did that cause of action arise under these circumstances? It arose clearly when the bill became payable, and the acceptor refused to pay. According to the Law Merchant, a bill of exchange is transferable, and the assignee or endorsee of the bill may sue in his own name. Therefore, when the plaintiff and his partner transferred the bill to Gobind Chunder Sein, they transferred their interest in that bill to Gobind Chunder Sein; and by endorsing the bill, by the Law Merchant they also came under an obligation to Gobind Chunder Sein, namely, that they would take up the bill provided the necessary notice was given as provided by the Law Merchant. That is clearly laid down to be the obligation under which the endorsee comes. (See Chitty on Bills of Exchange, page 266.)

It is there stated—"It has been contended "that an endorsement is equivalent to a war-"ranty; that the prior endorsements were "made by persons having competent author-"ity—but the Court seemed to deny that "doctrine; and though an endorsement "admit all prior endorsements to have

"been in fact duly made, yet an endors-"er by his endorsement merely engages "that the drawee will pay, or that he, the "endorser, will, on his default and due "notice thereof, pay the same, and which is "the extent and limit of his implied con-"tract."

Now, Gobind Chunder Sein could not have sued the plaintiff to recover the money legally unless he had given due notice of dishonor to the plaintiff. The plaintiff might have waived notice of dishonor. Now, it has been held that, if a party to a bill gives time to the acceptor, he discharges all prior parties to the bill, because the endorsee, so long as he has a right to the bill, has the right, if he pleases, to give time to the acceptor. They are, therefore, discharged by reason of the time given. But the object of the notice of dishonor is that each party may, if he pleases, take up the bill and seek his remedy against all the other parties. When Gobind Chunder Sein gave notice of dishonor to the plaintiff, the plaintiff had a right if he pleased to seek his remedy against the acceptor. But the plaintiff chose to leave the bill in the hands of Gobind Chunder Sein up to such a period that Gobind Chunder Sein would be barred from recovering against the acceptor if he called upon him for payment; and the fault is his own for letting the bill remain so long in the hands of Gobind Chunder Sein. If the statute of limitations were not a bar in this case, an acceptor would scarcely get free from this liability under the bill, for an endorser might call upon him 6 years afterwards, and one endorser after another might call upon the acceptor, who might not be free from liability for 20 or 30 years.

It appears to me, looking accurately at the case, that the plaintiff and his partner are not sureties for the acceptor. There was no privity between the plaintiff and the acceptor, and the plaintiff's only cause of action against the acceptor was for non-payment of the bill at the time when it became due.

There was another point raised, *viz.*, that the learned Judge ought to have settled the issues. But the Judge was clearly right in not having raised issues on the merits when the case was barred by the statute of limitation. Had he raised issues, there was no matter of fact pleaded which would destroy the defendant's right to take advantage of the statute of limitation: The Judge having raised one issue in law, namely, whether limitation barred the suit as set out in the written statements, and having decided that issue against the plaintiff, it was unnecessary for him, under the Code of Civil Procedure, to fix and try any other issue. But even if he was bound, as a matter of form, to fix all the issues at the same time, it would be no good reason for upsetting his judgment that he decided upon that one issue which went to bar the claim on the ground of limitation. An Appellate Court ought not to upset a decision on a merely technical ground, but only on a ground which goes to the merits of a case. I see no force in this second objection, and under the circumstances think that the judgment of the learned Judge was perfectly correct, and must be affirmed with costs to be taxed according to scale No. 2.

Macpherson, J.—I am of the same opinion.

The 9th January 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble W. Morgan, *Judge*.

Limitation—Aurrutdary account—Commission—Cause of action—Clause 9, Section 1, Act XIV. of 1859.

Appeal from a judgment of the Hon'ble J. P. Norman, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Meher Chand Sahoo (Defendant), *Appellant*,

versus

Moroolyram and others (Plaintiffs), *Respondents*.

Mr. J. D. Bell for the Appellant.

Mr. J. T. Woodroffe for the Respondents.

The period of 3 years' limitation prescribed by Clause 9, Section 1, Act XIV. of 1859, is applicable to a suit for balance of aurrutdary account and for commission and interest—the cause of action in such a suit accruing from the close of the year in which the last item was admitted or proved, indicating the continuance of mutual dealings.

THE plaintiffs in this suit stated that, in the Sumbut year 1913, corresponding with parts of the Christian years 1855 and 1856, they commenced to have various dealings and transactions with the defendants, which

continued between them up to the Sumbut years 1916 and 1917, corresponding with the Christian years 1859 and 1860; that there was a settlement of accounts between the plaintiffs' and the defendants' firm through their gomashta Kalluram, and on such settlement of accounts there was due to the plaintiffs a sum of Rupees 18,717-4-9, of which Rupees 16,248-11-6 was principal, and Rupees 2,019-4-0 was interest at 9 per cent. per annum; that on the retirement of the said Kalluram, the defendants continued the said business with the plaintiffs through another gomashta, named Bhoyro Sing, and the said last-mentioned amount of Rupees 18,717-4-9 was brought over in this new account since the said retirement of the said Kalluram; that the defendants had some further dealings and transactions with the plaintiffs, which continued up to the 2nd day of Assin Soodee of the Sumbut year 1917, corresponding with the 16th of October 1860, on which date there appeared in the said account a balance of Rupees 15,049-11-3 in favor of the plaintiffs, of which Rupees 13,030-7-3 was principal and Rupees 2,019-4-0 was interest; that in the said account with the defendants' firm the plaintiffs are entitled to a sum of Rupees 84-11-6 as commission at 1 rupee per cent., and Rupees 2-10-3 as mundleka for the worship of the Hindoo deities at 6 pie per cent., and to Rupees 6,875-2-3 as further interest from the 17th day of Assar Soodee of the Sumbut year 1916, corresponding with the 2nd of July 1859 to the 19th of January 1865, the day on which the plaint in this cause was filed; the plaintiff accordingly sued the defendants for these sums, which together amount to the sum of Rupees 22,012-3-3.*

The defendants in their answer said that formerly they had pecuniary transactions with the plaintiffs, who occasionally lent the defendants moneys; that the defendants

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* The account annexed to the plaintiff's written statement was as follows :—

374½	0	0.	—Calculation of the auspicious interest of (the amount of) Bhoyro Sing, the gomashta of Soleenauth (and) Khosa Chund.

(*One side of the account.*)

2,189	6	0.	—Date the 14th day of the light side of the moon, and calculation figures, in Sawun of the Sumbut year 1916.
359	2	15.	—12th day of the light side of the moon in Assar of the Sumbut year 1916.
456	2	15.	—15th day of the dark side of the moon in Bhadro of the Sumbut year 1916.
826	10	5.	—3rd day of the dark side of the moon in Assin of the Sumbut year 1916.
552	7	0.	—12th day of the dark side of the moon in Assin of the Sumbut year 1916.
16	14	0.	—15th day of the dark side of the moon in Assin of the Sumbut year 1916.
2,340	15	5.	—12th day of the light side of the moon in Assin of the Sumbut year 1916.
805	10	5.	—1st day of the light side of the moon in Kartick of the Sumbut year 1916.
500	0	0.	—Date the 2nd day of the light side of the moon in Jeit of the Sumbut year 1917.
400	0	0.	—2nd day of the light side of the moon in Assin the second of the Sumbut year 1917.
25	0	0.	—10th day of the light side of the moon in Assin of the Sumbut year 1917.

(*The other side of the account.*)

5,65,243 4 0.	—16,248 11 10			Up to the 1st day of the light side of the moon in Assar of the Sumbut year 1916.
	18,167 15 10			Balance brought over from the account of Khuttur Ram, inclusive of interest up to the 1st day of the light side of the moon in Assar of the Sumbut year 1916.
				REAL FIGURES.
			16,148 11 10	Balance of principal as per khatta.
			2,019 4 0	Debited on account of interest.
			18,167 15 10	
	2,019 4 0			Deduct on account of interest, therefore no (further) interest, &c., is calculated in this sum.
			16,148 11 10.	
	100 0 0			Date the 1st day of the light side of the moon in Assar. First item debited to the account of Bhoyro Singh.
			16,248 11 10	

			Rs.	As.	P.	Months.	Days.	
3,138	0	0	2,189	6	0	1	13	
131	0	0	359	2	15	0	11	
897	0	0	456	2	15	1	29	
2,121	8	0	826	10	5	2	17	
1,546	12	0	552	7	0	2	24	
50	4	0	16	14	0	2	29	
7,881	4	0	2,340	15	5	3	11	
3,222	8	0	805	10	5	4	0	
5,516	12	0	500	0	0	11	1	
6,413	4	0	400	0	0	16	1	
82	8	0	25	0	0	3	9	
			5, 34,242	8	0	776	7 3.	Balance up to the 7th day of the dark side of the moon in Magh of Sumbut year 1921, being part of 13,030—7 63-21.
1,716	0.		25.					—Date the 2nd day of the light side of the moon in Assar of the Sumbut year 1916 63-20
27,213	4.		400.					—6th day of the dark side of the moon in Sawun of the Sumbut year 1916 ... 63—1
40,620	0.		600.					—1st day of the light side of the moon in Sawun of the Sumbut year 1916 ... ... 67—21

could not state the actual amount of the sums lent, but it was not so much as the plaintiffs alleged in their plaint—no part of which the defendants admitted. Defendants further said that, whatever claims the plaintiffs may have had against them, the same are barred by the Law of Limitation, Act XIV. of 1859; and that, if the Court directed, an account of all sums appearing within the term of three or six years, as the Court might, on the evidence, consider the proper time in calculating the time for limitation, ought not to be charged against the defendants.

33,783	8.	500.	—5th day of the light side of the moon in Sawun of the Sumbut year 1916 ...	67-17
33,700	0.	500.	—10th day of the light side of the moon in Sawun of the Sumbut year 1916 ...	67-12
6,730	0.	100.	—13th day of the light side of the moon in Sawun of the Sumbut year 1916 ...	67—9
26,996	0.	400.	—14th day of the light side of the moon in Sawun of the Sumbut year 1916 ...	67—8
6,666	12.	100.	—2nd day of the light side of the moon in Bhadro of the Sumbut year 1916 ...	66-20
16,575	0.	250.	—13th day of the light side of the moon in Bhadro of the Sumbut year 1916 ...	66—9
6,623	4.	100.	—15th day of the light side of the moon in Bhadro of the Sumbut year 1916 ...	66—7
7,609	4.	115.	—2nd day of the dark side of the moon in Assin of the Sumbut year 19 6 ...	66—5
13,206	4.	200.	—5th day of the dark side of the moon in Assin of the Sumbut year 1916 ...	66—1
3,293	4.	50.	—11th day of the dark side of the moon in Assin of the Sumbut year 1916 ...	65-26
39,460	0.	600.	—14th day of the dark side of the moon in Assin of the Sumbut year 1916 ...	65-23
34,473	0.	510.	—3rd day of the light side of the moon in Assin of the Sumbut year 1916 ...	65-19
13,120	0.	200.	—14th day of the light side of the moon in Assin of the Sumbut year 1916 ...	65-18
13,326	12.	200.	—3rd day of the light side of the moon in Bhadro of the Sumbut year 1916	66-19
26,160	0.	400.	—10th day of the light side of the moon in Assin of the Sumbut year 1916 ...	65-12
254	4.	4.	—5th day of the light side of the moon in Ughun of the Sumbut year 1916 ...	63-17
		13,030	7 5.—Balance up to the 7th day of the dark side of the moon in Magh of Sumbut year 1921.	
9,16,680	8	0—Due in calculation figures.		
		6,875	2 5—Interest due at 12 annas per cent.	
		13,030	7 5—Balance of Principal.	
		19,905	9 10—Clear balance due up to the day of the dark side of the moon in Magh of the Sumbut year 1921.	

The following judgment was delivered by Norman, J., in the Original Court:—

I am of opinion that no express limitation is provided for this suit, which is an action for money lent and commission on an aurrutdary account and one entire transaction. Therefore, though, with considerable hesitation, I must say the period of limitation is six years, I am sorry for it, but I must hold the case is not barred by the statute of limitation. I regard it as an interest and commission-account.

The defendant appealed against this judgment on the following grounds:—

1.—For that the Court was wrong in ruling that no express period of limitation was provided for the case under Act XIV. of 1859.

2.—For that the Court was wrong in ruling that the action was for money lent and commission on an aurrutdary account, and that these matters formed one entire transaction.

2,019	4	0—On account of former interest, which is deducted above from Rs. 18,167-15-6; no interest is charged on Rs. 2,019-4.	
87	5	9—Commission (on) aurrut and mundiljee (Temple) 84-11-6	2-10-3.
		22,012 3 3.—Up to the 7th day of the dark side of the moon in Magh or date 19th January 1865. The plaint has been filed for this amount.	

3.—For that the Court was wrong in ruling that the accounts between the plaintiffs and the defendants were an interest and commission-account.

4.—For that the Court was wrong in ruling that the period of limitation to be applied to this action was six years.

The following are the judgments of the Appellate Court:—

Peacock, C. J.—THIS is an action said to be brought for the balance of an account. The plaint recites that "the plaintiffs had various dealings and transactions with the defendants as aurrutdars, "and as the result of such transactions "there is now due by the defendants to the "plaintiffs, on balance of account between "the plaintiffs and the defendants," a certain sum of money for the balance of principal advanced by the plaintiffs to the defendants, and for commission at 1 per cent. and for interest at 9 per cent. per annum. The questions are: What is the period of limitation applicable to such a suit as this, and from what time does the period of limitation commence?

It appears to me that the period of limitation applicable to this suit is clearly prescribed in Clause 9, Section 1, Act XIV. of 1859. The suit was for a balance of account, and also for commission and interest. As to both those causes of action (neither of them accruing under a written contract), the period of limitation is 3 years from the time the cause of action accrued.

Then when does the cause of action accrue? Section 8 enacts that, "in suits for balances "of accounts current between merchants and "traders who have had mutual dealings, "the cause of action shall be deemed to "have arisen at, and the period of limitation shall be computed from, the close of "the year in the accounts of which there "is the last item admitted or proved indicating the continuance of mutual dealings; "such year to be reckoned as the same is "reckoned in the accounts." Therefore, looking to the year from which the period of 3 years is to be computed, we find it is to be computed from the close of the year in which the last item was "admitted or proved indicating the continuance of mutual dealings;" and as the period of limitation is 3 years, and the account was closed 4 years ago, it follows that the cause of action is barred by limitation.

The learned Judge in the Court below does not appear to have expressed a very strong opinion upon the matter. He simply said: "I am of opinion that no express "limitation is provided. This is an action "for money lent and commission on an aurrutdary account and one entire transaction. "Therefore, though with considerable hesitation, I must say the period of limitation "is 6 years. I am sorry for it, but I must "hold that the suit is not barred by the statute of limitation. It is an interest and commission-account." It appears to me that the suit being for money lent and interest, the period of limitation applicable to it is prescribed by Clause 9.

The decree of the Lower Court will be reversed, with costs of the Lower Court and costs of appeal.

Morgan, J.—I am of the same opinion, and desire only to add that our decision in this case does not touch those cases where there is some relation of trust or agency, which has never been distinctly ended, whatever may be the law applicable to them. This is a case in which clearly the relationship between the parties was closed more than 4 years before the suit was commenced, during all which period the plaintiff shows nothing but entries in his own books of charges for interest.

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The 10th September 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge.*

Plaint (Amendment of)—Amending issues—East India Railway Company — Section 11, Act XVIII. of 1854.

Appeal from the judgment of the Hon'ble J. P. Norman, exercising the Ordinary Original Civil Jurisdiction of the High Court, dated the 16th August 1867.

The East Indian Railway Company (Defendants), *Appellants,*

versus

F. J. Jordan and others (Plaintiffs), *Respondents.*

The Advocate-General (*Cowie*) and *Mr. J. T. Woodroffe* for Appellants.

Messrs. J. P. Kennedy and *E. S. Hyde* for Respondents.

In a suit in which plaintiffs sued as partners for damages for non-delivery of certain goods, and in which it was found on the evidence that two of the plaintiffs were not partners at the time the cause of action accrued or when the goods were delivered, the Lower Court ordered that the names of the two plaintiffs who were not parties should be struck out of the plaint, and gave a decree to the rest of the plaintiffs. HELD that the Judge was right in amending the issue, and that that was the correct mode of amending errors in a plaint.

The liability of the East India Railway Company as common carriers with respect to ordinary goods, is not restrained by Section 11, Act XVIII. of 1854. That Section means that notwithstanding any contract or notice, the East India Railway Company are liable for loss when caused by gross negligence or misconduct, leaving other cases when there is not gross negligence or gross misconduct to be dealt with according to ordinary law.

THE plaintiffs, who were carrying on the business of the "Indian Bullock Train Company," alleged that they received from one Elahi Bux of Cawnpore 52 bales of cotton for carriage from Cawnpore to Calcutta. The plaintiffs delivered these bales to the defendants on 25th January 1865 to convey to Howrah, where they were to be delivered to plaintiffs or to their order. The defendants gave the plaintiffs a bill of lading, which was sent to the plaintiff Richard Rose at Howrah. Mr. Rose presented the same, and according to practice signed a receipt for the goods in the goods office, and got an order on the godown officer for them. All the bales were delivered, except 12 which were not received by the plaintiffs. Defendants offered 12 other bales in lieu of those which had been lost, but this offer plaintiffs refused on the representation of Elahi Bux's agent, that they were not of the same quality as the bales which were short delivered. Elahi Bux sued the plaintiffs, and obtained a decree against them with costs for Rs. 1,759-12-9, which plaintiffs were compelled to pay. Hence this suit against the Railway Company. The plaintiffs were unable to produce the bill of lading, which they said was stolen from Mr. Rose on 29th June 1865 along with other papers and properties at Howrah.

The defendants acknowledged that they received the whole of the 42 bales, but said that they invariably require the production of the document given by them to the consignor as the receipt. On its production a memorandum of the quantity delivered is usually made on it, and the document is returned to the consignee. The plaintiffs were frequently asked, both before and after the suit was brought, to produce the receipt given for the goods, but no direct answer was received from them; and it was not until after the institution of the suit, that the defendants were for the first time informed that the receipt was stolen.

The judgment of Norman, J., appealed against was as follows:—

On the 25th of January 1865, certain persons calling themselves the East Indian Bullock Train Company delivered to the defendants at Cawnpore 52 bales of cotton to be carried to Howrah, and delivered to the East Indian Bullock Train Company or their order. Between the 14th and the 20th of March 40 bales were delivered to the Bullock Train Company. The remaining 12 bales have never been delivered at all.

The present action was brought on the 22nd May 1867. But there is no imputation on the Indian Bullock Train Company on account of the delay, as they made repeated claims on the Railway Company, and did not sue until they themselves had been sued and the price of the cotton recovered against them in the Cawnpore Court by Elahi Bux, the owner of the same.

The Advocate-General for the Company objected that the Railway Company is not liable for the loss of any goods while being carried on by the Railway unless the loss is caused by gross negligence.

He referred to the 11th Section of Act XVIII. of 1854 which is as follows:—

"The liability of such Railway Company "for loss or injury to any articles or goods "to be carried by them, other than those "specially provided for by this Act, shall "not be deemed or construed to be limited, "or in any wise affected by any public notice "given, or any private contract made by "them, but such Railway Company shall be "answerable for such loss or injury when it "shall have been caused by gross negligence "or misconduct on the part of their agents "or servants."

The construction contended for is a very startling one because, if the Advocate-General's argument is well founded, it amounts to this that Indian Railway Companies will not be bound by their own special contracts as to the carriage of goods. The Advocate-General admitted that he had raised the point on several occasions, but that in none of the very numerous cases of actions against the Railway Company as carriers decided in this Court has his view ever been acted upon. He suggested that in this case I must assume that the goods were lost in the transit, and that it is distinguishable from some of the other cases in that respect.

I think the defendant's liability is not affected by the Section in question.

There are three Sections of Act XVIII. of 1854 which deal with the liability of Railway Companies.

By the 9th no Railway Company is answerable for loss or injuries to passengers' luggage unless booked and separately paid for.

By the 10th no Railway Company is to be liable for the loss of gold, &c., unless the value is declared and an insurance rate paid.

Now, it will be observed that these two clauses are restrictive and negative in form.

In the first case the Company are not to be liable unless the luggage is booked. But suppose the goods are booked, what is the Company's liability? Is it provided for by the Act? No. Then it follows that the Act recognizes a liability of Railway Companies as carriers, which is not created or provided for or regulated by the Act.

In the second case Railway Companies are not to be liable unless the value of goods of the description mentioned in the Section is declared and an insurance rate paid.

But there is no restriction as to the extent of the obligation under which Railway Companies may come if an insurance rate is paid.

There is no direction as to the form of the contract into which Railway Companies are to be at liberty to enter. They are left perfectly free to enter into any engagements, in any form, which the necessities of trade, the pressure of competition or due care for their own security, might from time to time render it desirable or convenient to adopt.

The 11th Section is expressed in affirmative and not in negative language. Mr. Kennedy referred to the rule of construction, that an affirmative statute does not take away the common law. If the intention had been to restrict the liability of Railway Companies, one would have expected to find the form of the prior Sections continued, something to this effect: "*No Railway Company* shall be liable for loss unless caused by gross negligence or misconduct on the part of their agents or servants;" or if the form of the Clause was changed, some such phrase as this: "Such Railway Company shall be answerable for such loss or injury only when it shall have been caused by gross negligence or misconduct, &c." The absence of such terms of restriction shows that the Legislature did not contemplate the limitation of the liability of Railway Companies in cases falling within the 11th Section in the same way as their liability is limited by the 9th and 10th Sections. It would be an absurdity that Railway Companies, which are left to their ordinary liabilities as common carriers for passengers' luggage booked and paid for as goods to be carried, should be exempted from such liability and subjected to a much more restricted liability for goods carried on the railway entirely under their own control. It would be still more absurd that they should be allowed to make any contract binding themselves to any extent of liability as insurers of valuable goods lying in small compass, such as gold, jewellery, Government securities, and the like, and yet that they should not be at liberty, to enter into any special contracts as to the carriage of ordinary merchandize.

The object of the 11th Section in restraining Railway Companies from limiting

their liability by private contract is, no doubt, the same as that of the English Railway and Canal Traffic Acts 17 and 18 Victoria, Chapter 31. Railway Companies have virtually a monopoly. A merchant wishing to send his goods from one place to another with which it is connected by a line of Railway has practically no alternative. For the carriage of articles where prompt despatch is important he must employ the Railway as his carrier or fall behind his competitors in trade.

The Legislature both here and in England, as I think most rightly, has interfered for the protection of persons forwarding goods by Railway, treating them as persons not in a position to deal upon equal terms with the Company. The Indian enactment is even more stringent than the English Act in restraining Railway Companies from limiting their liability, because in India there is no competition amongst rival Railway Companies, and the monopoly is, therefore, more complete.

There is no analogous reason for the enactment of any law limiting the liability of Railway Companies, or their power to bind themselves by any contracts they think fit to enter into.

Another point arose during the course of the case. Four persons, Francis J. Jordan, Edward Jordan, one Mothoorapershad, and Richard Rose, joined in bringing this suit as constituting the Indian Bullock Train Company, Limited. It appeared in evidence that Mr. Rose did not become a partner until the month after the goods had been delivered by the Railway Company to be carried, and there was no proof that Mothoorapershad was a partner. It was objected that Mr. Rose and Mothoorapershad had been improperly joined as parties, and that the suit was wrongly brought. On the application of the plaintiffs' Counsel, I allowed the names of Richard Rose and Mothoorapershad to be struck out, notwithstanding the objection taken by the defendants that I had no power to do so. I thought it clear that I could do so; and I find that in a reported case Mr. Justice Levinge exercised a similar power.

The Railway Ticket given by the defendants to the plaintiffs stipulates that "the production of this ticket will be required at the station to which the goods are sent before they can be delivered."

It appears that the ticket of the plaintiffs had been lost. But nothing turns on this, because it is clear that the ticket had been repeatedly produced at the station, and been registered before the loss of it, which took place in June, full three months after the goods ought to have been delivered to the plaintiffs by the Railway Company.

The value of the 12 bales at the time of the loss is shown to have been 1,204 rupees. There will, therefore, be a decree for the plaintiffs for this sum, with costs on scale 2.

The defendants appealed against this judgment on the following grounds:—

First.—That the suit ought to have been dismissed with costs, the defendants being sued as common carriers and there being no evidence to prove that they were, and they not in fact being, common carriers.

Second.—That the suit ought to have been dismissed with costs, it being brought by four persons as plaintiffs upon an alleged joint bailment, and it being proved that two of them, *viz.*, Richard Rose and Mothoorapershad, had no interest whatever in the subject-matter of and did not join in the bailment.

Third.—That the said Judge ought not to have allowed the plaintiffs to amend the plaint, by striking out the names of the plaintiffs Richard Rose and Mothoorapershad.

Fourth.—That the suit ought to have been dismissed with costs, there being no evidence that the loss of the goods in question was caused by gross negligence or misconduct on the part of the defendants' agents or servants.

Fifth.—That the learned Judge decided the case on an erroneous construction of Section 11 of the Railway Act, XVIII. of 1854.

The judgment of the Appellate Bench was delivered as follows by

Peacock, C. J.—It appears to me that the judgment appealed against is correct and ought to be affirmed. The suit was brought by several persons who alleged that they carried on business in co-partnership under the style of the Indian Bullock Train Company, and that, at the time of the delivery of the goods to the East Indian Railway Company, they were partners. It appeared on the evidence that all the plaintiffs were not co-partners at the time the cause of action accrued, or when the goods were delivered. The Court under the provisions of Act VIII.

of 1859 amended the issue, and raised the question whether the plaintiffs were or were not partners. It appears to me that the Judge had power to amend the issue, and that that is the correct mode of amending errors in a plaint. You don't amend the plaint, but you may amend the issue at any time so as to raise the real questions in difference between the parties. Section 141 says: "At any time "before the decision of the case, the Court "may amend the issues or frame additional "issues on such terms as to it shall seem fit; "and all such amendments as may be neces- "sary for the purpose of determining the real "question or controversy between the parties "shall be so made." This was necessary for the purpose of determining the real question in controversy, as to whether the plaintiffs or any of them were entitled to recover. In England when several plaintiffs are improperly joined in an action of tort, not of contract, the misjoinder can only be taken advantage of by a plea in abatement. There is nothing of the kind here, and therefore there must be some mode of proceeding. The more correct course would have been for the Judge merely to have amended the issue, and to have allowed all the plaintiffs to remain as parties to the suit.

If upon the amended issue it had been found that only two of the plaintiffs were partners at the time of the delivery or when the cause of action accrued, the Court would have found that only two were partners at that time, and would have decreed that they should recover the value of the goods, and that decision would have been binding and conclusive on all the parties. If there was an error, it has only been in striking the names of two of the plaintiffs out of the record instead of leaving them in the plaint and giving a decree in favor of the other plaintiffs who were found to have been partners. It may make a difference if you strike out the names of some of the plaintiffs, because if the suit fails the defendants would have to look to the remaining plaintiffs for their costs and they might be thereby injured. In this case the defendants have failed and have, therefore, not been injured by having the names of some of the plaintiffs struck out of the record. There has been no substantial injury done to the defendants by striking the names of the plaintiffs who were not partners. If that was an error, Section 350 applies which says: "The "judgment may be for confirming or revers- "ing or modifying the decree of the Lower "Court. But no decree shall be reversed "or modified, nor shall any case be remand- "ed to the Lower Court on account of any "error, defect, or irregularity either in the "decision or in any interlocutory order "passed in the suit not affecting the merits "of the case or the jurisdiction of the Court." The order was an interlocutory order, but the error, if any, was not one which has caused injury to the defendants, and consequently it is not a ground for reversing the decree on appeal.

The only remaining question is what is the effect of Section 11 of Act XVIII. of 1854 which has been cited. By the Act of Incorporation the East Indian Railway Company was incorporated for the purpose of making, constructing, and working the Railway, &c., and they were authorized and required to carry on the business of carriers. They are to work the line in such a manner as may be agreed upon. Possibly the agreement between the Plaintiff Company and the East Indian Railway Company cannot be looked at by us, as it is not in evidence; and shutting it out of view we do not find whether the Railway Company agreed to act as common carriers; but we find, in point of fact, that the defendants acted as common carriers and took the goods as such; and therefore we must assume, as against the Company, that they were only carrying on that business which they would have been authorized to do if they had entered into an agreement; but we cannot assume that they have carried on business as carriers without authority.

Under these circumstances, it appears to me that there is sufficient evidence that the East Indian Railway Company were carrying on business as carriers and received those goods as such.

Now have they limited their responsibility, or are they liable as common carriers, the goods having been received by them and not delivered?

The only limitation is by Section 11 which says: "If at the time when the right to bring an action first accrues the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time after the disability shall have ceased, as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if at that time when the cause of action accrues

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to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him." It appears to me that that Clause is merely a saving Clause, restraining them from limiting their liability with regard to ordinary goods beyond gross negligence and misconduct. They possibly may, with the consent of the Government, limit their liability for loss arising not by gross neglect, but they have not obtained the consent of Government, and have not entered into a contract or given notice limiting their liability.

Section 11 means that notwithstanding any contract or notice they shall be liable for loss when caused by gross negligence or misconduct, leaving other cases, when there is not gross negligence or gross misconduct, to be dealt with according to ordinary law.

The judgment of the learned Judge will be affirmed with No. 2 costs.

Macpherson, J., concurred.

The 21st September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble J. B. Phear, *Judge.*

Suit for specific performance—High Court—Contract.

Appeal from an order passed by the Hon'ble J. P. Norman, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Ununtoram Doss and another (Plaintiffs), *Appellants,*

versus

Ramlochun Aitch and another (Defendants), *Respondents.*

Mr. J. T. Woodroffe for the Appellants.

The Respondents were not represented.

The High Court can, under the Charter and Act VIII. of 1859, grant specific performance of part of a contract, and give damages for the breach of the remainder.

In a suit for specific performance of a contract, the cause of action is sufficiently shown by a statement of the terms of the contract followed by the averment of the refusal of the defendant to perform it, with a readiness and willingness of the plaintiff to do his part in it.

THIS was an appeal from the order of Norman, J., rejecting the plaint in this suit.

The plaint set forth that the plaintiffs were entitled to six parcels of land, the details of which were given, and were possessed of the stock-in-trade and business of a spice trade carried on under the style of Bullodeb Dass. On 2nd April 1869 the plaintiffs agreed with defendants to sell the said six parcels of land and the spice business for Rupees 3,329-8-0. The defendants agreed to accept a conveyance from the plaintiffs, and paid them Rupees 600, whereupon plaintiffs made over to the defendants the key of the shop which the defendants still retain. The plaintiffs stated that they were ready to perform their contract, and on 21st June 1867 they tendered to the defendants a conveyance and a bill of sale, but the defendants refused to accept them or to pay the balance of the purchase money. Plaintiffs therefore prayed for specific performance for recovery of the balance of purchase-money and of all expenses incurred by them. There was also a prayer for general relief.

Norman, J., rejected the plaint, being of opinion that it did not show any right to the relief sought by way of specific performance of the contract. He added that the plaintiffs may have an adequate remedy of another description.

The plaintiffs appealed and contended that the plaint did disclose a right to the relief sought; that the learned Judge was in error in rejecting the plaint on the ground that there was an adequate remedy of another description—there being no such other remedy; and if there were, that does not afford any reason for rejecting the plaint in which with other relief the one form of remedy stated therein is sought; and lastly, that even if the plaint did not show that the plaintiffs had a right to specific performance, it was shown that the plaintiffs were entitled to sue for the balance of the purchase-money and other sums therein claimed.

The following are the judgments of the Appellate Court:—

Peacock, C. J.—In this case the learned Judge rejected the plaint upon the ground that it did not show any right to the relief sought by way of specific performance of the contract, and that the plaintiffs might have an adequate remedy of some other description. The contract, as set out in the plaint, was a contract for the sale of land at Baraset, and also for the sale of the stock-in-trade, goods,

effects, and chattels of the spice trade. The stock-in-trade was wholly unconnected with the lands; and the sum agreed to be paid for it was distinct from that at which the lands were to be sold. The lands were stated to be at Baraset, and the stock-in-trade to be the stock-in-trade of a spice business carried on at Burra Bazar. The price agreed to be paid for the lands was 1,700 rupees, that for the stock-in-trade Rupees 1,629-8-0, making a total of Rupees 3,329-8-0. The plaint avers that the defendants paid the sum of Rupees 600 to the plaintiffs, who thereupon delivered over the key of the said shop to the defendants who are still in possession of the same. "The said shop" probably refers to No. 10 Burra Bazar; but the plaint does not state that it was the shop, or that the goods were in it; and consequently the averment that he had delivered over the key of the shop was not necessarily an averment that the goods had been delivered. There was no allegation in the plaint that the plaintiffs had made out a good title to the land; it merely alleges that the plaintiffs were seized and possessed of or otherwise well entitled to the same; but the plaintiffs aver that they were at all times and still are ready and willing to complete the contract on their part; that they had tendered a conveyance of the lands and the bill of sale of the stock-in-trade, but the defendants refused to accept the same or to pay the balance of the purchase-money. The plaintiffs therefore prayed that the defendants might be compelled specifically to perform their contract and to pay the balance of the purchase-money, and that the plaintiffs might have such further or other relief as to the Court might seem fit.

It is clear that a suit for specific performance would lie in respect of the land; and it is clear that if the plaintiffs had delivered the goods to the defendants, the latter would be bound to pay the remainder of the purchase-money, which, as regards the goods, would be a specific performance of the contract. Courts of Equity in England may grant specific performance of part of a contract, and give damages for the breach of the remainder; and although the Act of Parliament under which that is done has not been expressly extended to this country, still I have no doubt that the Courts in this country have a similar power under the provisions of the Charter and Act VIII. of 1859. Without reference, then, to any technical objections which might in England be aken in a Common Law Court by way of general demurrer, the plaint shows that there was a contract between the parties; that the plaintiffs were at all times ready and willing to perform it; that the defendants had refused to perform their part of it; and there was a prayer for specific performance or such other relief as the Court might think fit to grant. It appears to us that for the purposes of a plaint there was a sufficient cause of action shown, and that the plaint ought to have been admitted, leaving other particulars to a written statement if the Courts thought necessary to order it, or to issues which might be raised by the Court at the proper stage of the cause for the purpose of determining whether the defendants had or had not a defence to the plaintiffs' demand. I think that the plaint ought therefore to have been admitted, and that the order of the Court rejecting it ought to be reversed with costs of this appeal, to be taxed according to scale No. 2 and to be costs in the cause if the plaintiffs succeed.

Phear, J.—I concur entirely in the judgment of the Chief Justice. I would add that in my opinion in a suit for specific performance of a contract, the cause of action is sufficiently shown by a statement of the terms of the contract followed by the averment of the refusal of the defendant to perform it, with a readiness and willingness of the plaintiff to do his part in it. If the contract is one of which the Court will not enforce specific performance, of course a cause of action does not appear; but if a part of the contract is such as will be enforced, I think that that objection does not apply. In England at the present time a Court of Equity will entertain a suit for specific performance of a contract, and grant specific performance of part only with an award of damages, if necessary, for the remainder. That appears from the case of Kay *versus* Johnson, 2 Hemming and Miller. It was only lately that the Courts of Chancery obtained this power of dealing with a suit for specific performance; but I agree with the Chief Justice that we have that power under our Letters Patent and Act VIII. Consequently we are at any rate now in the same position in relation to this matter as the Courts of Equity in England. I therefore think that it is no objection to a plaint for specific performance of a contract tendered to this Court, that a portion of the contract is such that it is possible the Court will eventually on hearing the case award damages, instead of specific performance, in respect of that point. For this reason, in addition to those stated by the Chief Justice, I entirely concur in his judgment.

The 6th May 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble J. P. Norman, *Judge.*

Commission—Evidence—High Court—Withdrawal of suit on appeal—Section 37, Act XXIII. of 1861.

Appeal from the judgment of the Hon'ble W. Markby, exercising the Ordinary Original Civil Jurisdiction of the High Court, dated the 17th December 1867.

Gregory and others (Defendants), *Appellants*,

versus

Dooley Chand Kandary Mull (Plaintiff), *Respondent.*

Woodroffe for the Appellants.

The Advocate-General and *Marinden* for the Respondent.

A party who has not joined in a commission is entitled to cross-examine the witnesses who are examined under the Commission.

Where a Commissioner took the evidence of witnesses when the last return day of the Commission had expired, it was held that the depositions of the witnesses were not admissible in evidence in the cause.

Under Section 37, Act XXIII. of 1861, the High Court upon appeal from a Judge sitting in the exercise of the Ordinary Original Jurisdiction of the Court, has power, before pronouncing final judgment in appeal, to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit.

THE plaintiffs in this suit alleged that on the 19th January 1866, they shipped certain goods on board the "Gertrude," bound for Bombay, and obtained from the defendants a Policy of Insurance in respect of those goods. The plaintiffs paid the premium on the said policy, and did all that was necessary to entitle them to payment, in the event of the goods being lost by a risk insured against. On the 10th day of February 1866, the "Gertrude" with the said goods on board was stranded, and the goods were totally lost with the exception of a small portion thereof, which was landed in a damaged state, and realized the net sum of Rupees 2,249—the loss being much more than 5 per cent. A protest of the loss was lodged at Colombo on the 23rd of March 1866. The defendants had notice of the loss, and were requested to pay the amount, but have neglected to do so.

The plaintiffs, therefore, prayed that the defendants may be ordered to pay to them the sum of Rupees 17,616 insured to the plaintiffs by the said policy, or such other sum as, under the circumstances, the Court shall think right, the plaintiffs offering, in the event of the whole amount secured by the said policy being paid to them, to make over to the defendants any rights which the plaintiffs may have to the net proceeds of the goods sold in a damaged state as aforesaid.

The defendants acknowledged that the plaintiffs effected the insurance on the goods as mentioned in the plaint; but they averred that they did not know whether the goods were on board the ship at the time the vessel was stranded, or whether the said goods or any portion of them had been lost. They also denied that they ever received proper notice of such loss, and said, therefore, that they were not liable to the plaintiffs.

The plaintiffs obtained a Commission addressed to the District Judge of Batticalloa in the island of Ceylon and to the Government Agent of the Eastern Province of that Island, to examine witnesses on their behalf. The Commission issued on the 22nd of May 1867, and was made returnable in six weeks from that date. The Commissioners did not receive the Commission till the 3rd of September. They took the evidence of witnesses on the 6th of that month, and made their return to the Commissioner on the following day. The defendants had permission to join, but did not join in the Commission. An application to enlarge the time of the Commission till the trial of the suit was refused on the 14th September. The return of the Commission was received by the High Court and filed on the 23rd September. The case was decided by the High Court on the 17th December.

Markby, J., relying on the evidence given under the Commission, gave a decree to the plaintiffs for the full amount claimed, with costs on scale No. 2. The defendants appealed against this judgment.

When the appeal came for hearing on the 5th of May, Mr. Woodroffe for the appellant first urged that the depositions of the witnesses examined under the Commission could not be received in evidence, inasmuch as they were taken after the time for the return of the Commission had elapsed.

The Advocate-General *contra* contended that there was no good ground for rejecting the evidence. The defendants had an opportunity afforded them of joining in the Commission but did not avail themselves of it, and could

not on that account have examined the witnesses.

Mr. Woodroffe in reply contended that a party has a right to examine witnesses, though he may not have joined in a Commission. (Steinkeller and Newton, 1 Scott N. S., 148; Taylor on Evidence, page 477.)

The Court delivered judgment as follows on this point:—

Peacock, C. J.—The second ground of appeal in this case is that depositions purporting to have been taken under a Commission from this Court were wrongly admitted in evidence, the time limited for the return of the said Commission having expired before any such return was made, and before the said depositions were taken.

It appears that on the 4th of May 1867, an order for a Commission was issued at the instance of the plaintiff, to be returnable within six weeks from that date. The defendants were to be at liberty to join in the Commission within four days. The Commission issued on the 22nd of May, and was returnable according to the order within six weeks from that date. It was, therefore, returnable on the 3rd of July. The defendants did not join in the Commission. After the day on which the Commission was returnable, *viz.*, on the 8th of July, an order was made that the return should be enlarged till the 15th of July. After that day, *viz.*, on the 22nd of July, the return was again enlarged for three weeks which ended on the 12th of August. On that day an application was made to Mr. Justice Markby for a further enlargement of the Commission. The summons was to show cause why the date of the return of the Commission should not be further extended for a fortnight. Mr. Justice Markby, being satisfied by affidavit that that summons had been served, ordered that the hearing of the suit be adjourned to the 16th of September next, and that it should be heard peremptorily on that day. Nothing is said in the order as to the enlargement or non-enlargement of the return day of the Commission. But we are informed that Mr. Justice Markby considered it unnecessary to enlarge the return. The order is drawn up upon hearing the Advocates of both sides, but it is said that the defendants did not appear on that occasion. It would not be usual to state that an order was drawn up upon an affidavit of the due service of the summons if both parties appeared. I do not think that it is material whether the defendants did or did not appear, inasmuch as the order mentions nothing of the enlargement of the return of the Commission; and we must take it that Mr. Justice Markby refused to enlarge the time. Nothing was done till the 3rd of September, when the Commission was delivered to the Commissioner, as appears by his return. No witness was examined before the 6th of September, and the return was signed by the Commissioner either on the 7th or 9th. There is nothing to show that the defendants had notice of the delivery of the Commission to the Commissioner or of the days on which it was to be executed, and none of the witnesses were cross-examined on the part of the defendants, nor does it appear that they or any one on their behalf appeared before the Commissioner on the days of execution of the Commission.

It is not very clear whether if a party refuses to join in a Commission obtained by his opponent, he is entitled to notice of the execution of the Commission; but I should think that notice ought to be given. If a Mandamus were sent to England to examine witnesses, and a local agent in England were not appointed, one can scarcely see how notice could be given to any person not joining in the Commission of the day on which the Commissioner would call the witnesses before him and examine them. The attorney for the party at whose instance the Commission or Mandamus was issued, would probably be quite as ignorant of the day actually appointed for the examination of the witnesses in England as his opponent.

When a party joined in a Commission it was the practice to appoint separate Commissioners on his behalf, and the Commissioners appointed on behalf of the person at whose instance the Commission was issued were required to give notice to the Commissioners appointed for the opposite party of the day appointed for the execution of the Commission.

In the case of Steinkeller and Newton, Scott's New Reports, page 148, it was contended that, according to the practice of the Courts, the opposite party was entitled to notice of every proceeding under a Commission, so as to enable him to cross-examine, whether he had joined in the Commission or not.

Tyndall, C. J., said that he always understood the practice to be that if one party obtains a Commission and the other joins in it, the latter is entitled to examine his own witnesses, but that he may cross-examine his opponent's witnesses without joining; and he referred to the case of Brydges *versus* Fisher, 1 Scott, page 485, "where the plaintiff seems to

have cross-examined the witnesses, though he did not join in the Commission; if the practice be otherwise, I must say I think it very unreasonable. In equity, the party certainly has notice of every step."

In delivering judgment in Steinkeller and Newton, the Chief Justice said: "It appears to me that the Commission under which these examinations have been taken issued without any proper authority from the Court. It is impossible, I think, to read my order without seeing that it was intended that the cause should be tried at the sittings after Hilary Term, 1838; and that being the only order authorizing the issuing of a Commission, it is an implied condition that it should be returned before that time; whereas this Commission was not returned until November following. The practice upon the subject seems to be involved in some obscurity; but as far as we can learn it is usual to insert in the rule or order, a power for the opposite party to cross-examine. The Commission in this case having issued without due authority, we are bound to set it aside and grant a new trial, but I think justice will be attained by ordering that the plaintiff shall have the costs of the first trial if he succeeds on the second."

The Court accordingly passed an order that the verdict should be set aside which had been influenced by the evidence so obtained.

There has appeared that the Commission had issued after the day fixed for the trial. Here the Commission was issued, but the Commissioners were ordered to return it within six weeks from the 22nd of May, and the time for the return of the Commission had not been enlarged beyond the 12th of August.

In the case of writs of process, it is clear, that they could not be executed after the day of return. If the Sheriff executed them before the return day, he was liable to be attached for contempt of Court if he did not return the writ within a certain limited time after the return day. But the Court would frequently enlarge the time for making the return, and thereby the Sheriff was saved from contempt, but the enlargement of the time for the Sheriff to make the return did not give the Sheriff power to execute the writ after the original return day if it had not been executed. I do not mean to say that a writ might not be amended by altering the date in the writ, but a rule enlarging the time of the return did not enlarge the time for executing it. The rules in the present case were not to amend the commission, but merely to enlarge the time for returning it. It may be that the meaning of the rules in the present case was that the time for executing the Commission should be enlarged. Be that as it may, the time for executing the Commission was not enlarged beyond the 12th of August.

Now, if in the case of Steinkeller and Newton it was essential that the Commission should have issued before the day fixed for the trial of the cause, it was surely essential in the present case that the witnesses should be examined before the last day to which the time for executing the Commission had been enlarged. If a party who does not join in a Commission is not to have notice of the day on which the Commission is to be executed, it is surely necessary that he should not be misled by allowing the Commission to be executed and the witnesses examined in his absence, after the day on which the Commissioner was ordered to send the evidence of the witnesses to the Court.

It is one of the fundamental principles in the administration of justice that every man should have an opportunity of cross-examining witnesses whose evidence is to be used against him. If a Commission were left open, without any day fixed for the Commissioners sending the evidence to the Court, the party not joining in the Commission might have to watch for an interminable length of time; and therefore, in this case, a day was originally fixed in the Commission, within which it was to be executed, though that period was subsequently enlarged from time to time up to the 12th of August. I say limited for the execution of the Commission, because I understand it to have been contended that the day fixed for returning the examination of the witnesses was merely conditional upon the fact that the witnesses should have been examined before that day.

The Commission runs thus: "We empower and command you that you or either of you do administer the oath or solemn affirmation first specified in the schedule hereunto annexed to the said witnesses, and we do also empower and command you that you do cause the said witnesses to come before you, and that you do then and there administer such solemn affirmation as aforesaid to the said witnesses if other than Hindoos or Mahomedans, and examine such witness on behalf of the said plaintiff, and that you do take such their examinations and reduce the same into writing on paper or parchment, and when you shall have so taken and reduced the same into writing as aforesaid, you are to send the

same within six weeks from this date, together with this Commission."

Now, I apprehend that that order for return of the Commission is not an order conditional upon the fact that the witnesses should have been examined before the day named, but an order that the witnesses should be examined, if at all, before that day, and their evidence submitted.

Many of the old writs ran in this form. After commanding the Sheriff to do what was required, they concluded with the words: "How you should have executed this our writ make known to us on a certain day." That form of writ did not command the Sheriff to do the act before a certain day in express terms; but the day named in the writ was the return day of the writ, and the Sheriff could not execute it after that day.

This is made still clearer by the 179th Section of Act VIII. of 1859, which shows that a Commission may be left open without a return day, or that it may have a day fixed for the return of the Commission. The Section says: "After the Commission has been duly executed, it shall be returned, together with the deposition of the witness who may have been examined thereunder, to the Court out of which the Commission issued." That is, it need not be returned until the witnesses have been examined, and after it has been executed then it is to be returned. But the Section proceeds—"unless otherwise directed by the order for issuing the Commission, in which case it shall be returned in terms of such order, and the Commission and the return thereto, and the deposition of the witness who may have been examined under such Commission, shall in all cases form part of the record of the suit," so that, if there is an express order as to the mode in which the Commission is to be returned, it must be in accordance with that order.

Here it was expressly ordered to be returned within six weeks from the date of it; and admitting that the subsequent orders for enlargement of the time, coupled with this Section of the Act, authorized, as I think they did authorize, the execution of the Commission within the enlarged time, such enlargement did not extend beyond the 12th of August. After that day, it appears to me that the Commissioner had no power to examine the witnesses; and to hold that they were so empowered would be to hold that the examination of these witnesses could be used against the defendant, though he had never cross-examined them or had an opportunity of cross-examining them, and although he might have been misled by the insertion of a return day in the Commission and by the several orders made for the enlargement of the time.

This case is much stronger than the case of Steinkeller and Newton. That rested merely on an implied condition that the Commission should be executed before the day fixed for the trial. Here, as it appears to me, the Commissioner had no power to examine the witnesses after the day fixed for the return of it or the day to which the trial was ultimately extended. It is the only construction which I can put upon the Commission.

It is said that Mr. Justice Markby on the 12th of August stated that there was no necessity to enlarge the return. It appears to me that the parties, even if they were present, were bound only by the order which that learned Judge made, and not by anything which may casually have fallen from him at the time he made the order.

It appears to me that the evidence taken under the Commission ought to be rejected and the case determined upon the remainder of the evidence. It occurred to me at one time whether the case ought not to be remanded, but it appears to me clearly that it ought not. There appears to have been very great delay on the part of the plaintiff in getting the Commission executed, and there would be no use in remanding this case unless it were with a view of making the plaintiff to issue a fresh Commission. On the 14th of September 1867, Mr. Justice Norman refused to enlarge the time for executing the Commission already issued, and we ought not to send the case back to enable the plaintiff to issue a fresh Commission.

Norman, J.—I regret exceedingly the result of this case. At the same time I cannot say I feel surprised at what has happened. It has been before me repeatedly during its progress. Mr. Woodroffe mentioned that the Court made an order for the return of the Commission within 6 weeks, and I have no doubt that even then plaintiff had been guilty of delay. The Commission issued on the 22nd May and expired on the 3rd July. No application for citation was made till 8th July. There were some circumstances which induced me to look favorably upon it; and looking at the case of Parberry *versus* Newnham, 7 Meeson and Welsby, page 378, in which it was held that the time for an arbitrator's making his award might be extended, and acting also upon the practice which I find prevalent that the time for the returning of a writ is enlarged

after the time has expired, I thought I had power to enlarge the time in this case. I enlarged the time to the 15th July to allow the steamer to arrive. The parties waited to the 22nd July, when they applied to me for further enlargement. The application was opposed, and I was persuaded again to act under the power which I conceived I possessed, and I enlarged the time to August. No explanation whatever was made to me for the great delay. I know nothing of the application which was made to my brother Markby, but on 14th September 1867 application was made upon affidavits setting out a telegram from the Judge of Batticallao, dated in July, stating that he had for the first time received the Commission, and there was nothing to show why it was not returned, as in due course of post it must have reached in 10 days. I, therefore, refused the application with costs.

If people are so negligent as to allow this delay to take place without giving the Court any explanation whatever of it, it is manifest that they must take the consequences.

I entirely agree with the Chief Justice that, after the time to which the return had extended was expired, the Judge of Batticallao had no power to call the witnesses before him and examine them. I concur with him in thinking that the Judge had that power up to the 12th August.

The examination here took place at a time when the Judge had no power under the Commission, and at a time when the defendants had no opportunity of attending to cross-examine the witnesses. The case of Steinkeller and Newton clearly shows that the defendant possessed that power, notwithstanding the fact that he did not join in the Commission. It is a fundamental principle of the law of evidence that depositions so taken are inadmissible. That a failure of justice should result is a matter of great regret to me; but it is clear from the fundamental principles of the law of evidence that evidence taken under these circumstances is inadmissible, and we have no alternative but to reject it.

On the following day the Advocate-General for the plaintiff applied for leave to withdraw the case under Section 97, Act VIII. of 1859 as the evidence which had been taken under the Commission had been rejected by the Appellate Court. (The Bombay City Bank *versus* Moujee Hurry Doss, referred in Broughton's Civil Procedure, Section 37.)

Mr. Woodroffe opposed the application, on the ground that the Court had no power to allow the withdrawal under Section 97, Act VIII. of 1859, and that if the Court had the power this was not a case in which it would exercise it. (Haseebooddeen *versus* Naseerooddeen, S. D. A., N.-W. P., 1864, p. 389.)

The following judgments were then delivered by the Court:—

Peacock, C. J.—It appears to me that this application ought to be granted.

It has been objected that this Court has not the power to allow the plaintiff to withdraw from the suit with liberty to bring a fresh suit. It has been decided that under Section 97, Act VIII. of 1859, as it stands, a Court of appeal has no power to grant such permission. It is unnecessary to consider whether that decision was correct or not, because Act XXIII. of 1861, Section 37, enacts that unless when otherwise provided, the Appellate Court shall have the same powers in cases of appeal which are vested in the Courts of Original Jurisdiction in respect of original suits.

It seems to have been decided in the Sudder Court of the North-West Provinces as late as 1864, that the withdrawal could not be made when the case is gone up in appeal. If that had been a decision of the High Court, we might have been bound to have referred this case to a Full Bench for decision; but that case applied, not to an appeal from the High Court in the exercise of Original Jurisdiction to the High Court on appeal, but to a case tried originally in the Mofussil and appealed to the Sudder Court.

It appears to me to be clear that under the 37th Section of Act XXIII. of 1861, this Court upon appeal from a Judge sitting in the exercise of Original Jurisdiction has the power, before pronouncing final judgment in appeal, to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit.

The question, then, is whether the circumstances of this case are such as to induce the Court to grant that permission.

The suit was brought by the plaintiff against certain gentlemen carrying on the business of an Insurance Company under the name of the Indian Insurance Company. The plaintiff obtained judgment in the Court of first instance for a large amount, *viz.*, Rupees 17,616, with costs. We cannot say that that judgment was right, or that the plaintiff clearly was entitled to recover that money; because that decision was pronounced after relying upon evidence which had been given under a Commission—which evidence has been rejected by us upon the ground that it was taken after the return day of the Commission. We were bound to determine that question upon general principles, the question being one purely of law; and one of the grounds upon which we held that the evidence was not admissible was that the defendants had

the right of cross-examining the witnesses, which in consequence of the time at which the evidence was taken, they might have been prevented from exercising. But no suggestion has been made that the defendants really intended to cross-examine the witnesses, even if they had been examined before the Commission was returnable; and there is nothing to induce me to believe that they ever had any such intention, or that they were prepared to carry it into execution. Under these circumstances, they were not substantially injured by reason of the witnesses being examined after the return day of the Commission. It is highly important that merchants who insure their goods should have some confidence that when they seek an indemnity for their loss, they may not be deprived of that indemnity merely from some misapprehension, either of themselves, or of their legal advisers, or gentlemen who may be appointed by this Court to act as Commissioners for taking evidence. I do not mean to suggest that the defence which has been taken by these defendants is not a very just and proper defence to be taken by an Insurance Company. I could not make such a suggestion without knowing what are the real merits of the case; and upon that point I am not in a position to form a judgment. But it appears to me that plaintiffs having failed by reason of the rejection of the evidence which was taken under the Commission, they ought to be at liberty to withdraw from the suit with liberty to bring a fresh suit, in which the case may be tried upon its substantial merits. This can be done only upon condition of their paying the costs both in the Original Court and in this Court. I had at once a doubt as to whether it ought not to be upon payment of the defendants' costs to be taxed as between attorney and client; but considering that the case has been argued in this Court, and that the defendants have had the chance of preventing the plaintiff from withdrawing with permission to bring a new suit, that they ought to bear the difference between the costs taxed as between party and party, and the costs taxed as between attorney and client.

Plaintiffs, therefore, will have liberty to withdraw from this suit with liberty to bring a fresh suit upon payment of the defendants' costs in the Original Court and in this appeal, to be taxed upon scale No. 2; but it must be stipulated that unless those costs are paid within one month after taxation, this appeal will be decreed with costs in both Courts according to scale No. 2, for it is substantially admitted by the plaintiff that without the evidence which has been rejected, there is not sufficient evidence to support the decree of the Lower Court.

The Master will tax the costs on the principle of the suit being withdrawn this day.

Norman, J.—This is an action on a Marine Policy of Assurance on certain goods lost in the Red Sea. Plaintiff obtained a verdict in the trial before Mr. Justice Markby for Rupees 17,616, with costs; and against that decree, defendant appeals, and he raises before this Court a technical objection, *viz*, that certain depositions taken by the Judge of Batticallao in Ceylon under a Commission from this Court are inadmissible in evidence.

The objection being well-founded the Court entertained it, and the result is that the parties are in such a position as to render it impossible for the Court, if the suit proceeds without reference being made to that portion of the evidence which was taken under the Commission, to acquire any knowledge of the merits of the case. The Advocate-General applied for leave to withdraw, and I think we ought to give leave if we have the power. The matter is regulated by Section 37 of Act XXIII. of 1861 which provides: "Unless when otherwise provided, "the Appellate Court shall have the same "powers in cases of appeal which are vested "in the Courts of Original Jurisdiction in "respect of original suits." Now, one of these powers is given by Section 97 of Act VIII. of 1859. It is plain that the Court in its Original Jurisdiction had that power; and that power is extended to the Appellate Court by Section 37 already cited. That is shown by the case of the Bombay City Bank *versus* Moujee Hurry Doss which has been referred to by Counsel, and which is mentioned in a note to Section 37 in Broughton's Civil Procedure Code.

The case of Haseebooddeen *versus* Naseerooddeen, S. D. A. (N.-W. P.), 1864, page 389, was cited in argument, but I think we are not bound by the decree of the late Sudder Court of the North-Western Provinces in the case which appears to have been decided upon Section 97. That Section was probably the only one which was brought to the notice of that Court, and it is not at all unlikely that the appeal was presented before Act XXIII. of 1861 was passed.

I think we are bound by our decision sitting as an Appellate branch of the High Court, and not by the decision of the late Sudder Court at Agra.

For these reasons, I concur with the Chief Justice.

d

The 10th March 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Hindoo widow—Unchastity—Inheritance—Act XXI. of 1850.

Appeal from the judgment of the Hon'ble W. Markby, exercising the ordinary Original Civil Jurisdiction of the High Court, dated the 14th May 1868.

Matunginee Dabee (Plaintiff), *Appellant*,

versus

Joykallee Dabee (Defendant), *Respondent*.

Woodroffe and *Marinden* for the Appellant.

The Advocate-General and *Graham* and *Evans* for the Respondent.

Judgment of *Markby, J.*, holding that a simple act of unchastity in a Hindoo widow, unless for loss of caste unexpiated by penance and unredeemed by atonement, does not divest from her the inheritance of her deceased husband which has once vested in her, confirmed by the Appellate Bench, which, however, abstained from expressing any opinion whether, if the widow were degraded or deprived of her caste, her estate would cease. Act XXI. of 1850 explained.

THIS was a suit in which the plaintiff sought a declaration of her rights, and for possession of the moveable and immoveable property of Ramgopaul Banerjee. She alleged that Ramgopaul Banerjee died in March 1860, intestate and without male issue, possessed of considerable moveable and immoveable property and effects, leaving him surviving the defendant his sole widow and heiress, and the plaintiff his then only daughter, his next reversionary heiress. Ramgopaul also left him surviving two grandsons by a deceased daughter, named respectively Preonauth Chatterjee (since deceased) and Nunny Mohun Chatterjee, who had since been adopted by one Sibkissen Banerjee—the brother of the said Ramgopaul Banerjee. The plaint went on to state that the Receiver of the High Court was, at the instance of the defendants (who instituted suit against one Sibnath Chatterjee, who claimed to be executor of a will of Ramgopaul Banerjee, which had been pronounced against), appointed Receiver of the estate of the said deceased, and as such was in possession thereof. The plaintiff charged that the defendant, after her husband's death, became unchaste, and that, on the 11th November 1867, she gave birth to a female child; and the plaintiff contended that, by reason of such unchastity, the defendant had, according to Hindoo Law, lost and forfeited all her right of inheritance to the estate of her deceased husband, and the plaintiff, as the only surviving daughter of Ramgopaul Banerjee, was entitled to inherit to the estate of her father.

The defendant denied the charge of unchastity which was brought against her by the plaintiff, and urged that the plaintiff was not at the time of death of her father Ramgopaul Banerjee, and is not now the wife; but she was at the time of such death and is the Hindoo childless widow of one Sosheebhoosun Chatterjee, who left this country upwards of 20 years ago, and who, as the defendant alleged, died a long time ago and previous to the death of Ramgopaul Banerjee. The plaintiff, therefore, the defendant contended, being a Hindoo childless widowed daughter at the time Ramgopaul died, is not entitled, according to Hindoo Law, to succeed to his estate; either during the lifetime of the defendant by any alleged forfeiture of her estate, or after her death, and that she has no right to maintain this suit.

The following is the judgment of Markby, J., which was the subject of the present appeal:—

Ramgopaul, the person to whose property this suit related, had 4 wives—three are dead, one is alive, and is the defendant in this suit. She was the person entitled at his death to take his estate for the interest of a Hindoo widow, and that interest she still holds unless she has forfeited it under the circumstances which I am about to state. Two of the other widows died without issue: the other had issue—two daughters, one of whom is the plaintiff in this suit. The other daughter is dead, having left two children—one a boy and the other a girl. The boy has been adopted into another branch of the family, so that Ramgopaul's family is now represented by females alone; his widow, the defendant, his daughter, the plaintiff, and his granddaughter, who is not a party to this suit.

The plaintiff was married to a Koolin Brahmin, who has not lived continuously with her, nor has she ever left the house of her father; she does not seem now to know exactly where her husband is, but I have no reason to suppose him to be dead.

Ramgopaul was the son of Radhamadhub, who had several sons; and I gather from the evidence that all or at least several of the members of Radhamadhub's family are living in the same house, which was the family-house of Radhamadhub. There was no evidence to show whether or no there was ever any separation in estate, food, or worship, either between the members of the family of Radhamadhub, or between the members of the family of Ramgopaul; nor in my opinion is this material.

It was proved that, after the death of Ramgopaul, a few weeks before the filing of the plaint in this suit, the defendant had a child by a person in her employ. No other act of unchastity was proved against her, and she has all along resided and still resides in the house of Radhamadhub.

The prayer of the plaintiff is that it may be declared that the defendant has forfeited her right as the widow of Ramgopaul to inherit his estate by reason of her unchastity; that it may be declared also that the plaintiff is entitled to this estate; that the defendant may be restrained from interfering therewith; and that the Receiver appointed by this Court, who is now in possession of that estate, may be directed to hand it over to the plaintiff.

The question is whether the defendant's right as widow to the estate of her deceased husband has ceased by reason of the act of unchastity. If it has, there is no doubt the plaintiff is entitled as the next taker; so that the question is reduced to this—does the simple act of unchastity in a widow cause her immediately to forfeit her estate? If it does, the plaintiff is entitled to the declaration which she asks for. If it is necessary, in order to establish the forfeiture, to prove anything more than a simple act of unchastity, then the plaintiff must fail, for here nothing but the simple act of unchastity has been established.

I wish entirely to adopt the duty of an European Judge (though I do not suppose it is confined to European), as laid down by the Privy Council in a judgment delivered on the 21st May last,* where they say that the duty is not so much to enquire whether a doctrine is fairly deducible from the earlier authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage; but I refer to the older texts which I am about to quote, not so much to gather from them what is the present law, as to trace (however improperly) its origin and foundation. And as my object is to see what the older writers have said on this subject, I quote indifferently from the authorities of all the schools.

Of the three collections of laws to which Menu's name is attached—the Vrehut Menu, Briddhu Menu, and Laghu Menu, we have an English collection and translation of the latter only. The author of this work, whoever he may be, did not at that time, at any rate, consider that widows had any right of succession whatever to the estates of their husbands; for as he himself wrote (Chapter IX., v. 185): "Not brothers nor parents but sons are heirs to the deceased: but of him who leaves no son the father shall take the inheritance." The words "nor a wife nor a daughter," which are inserted after "son" and printed by Sir William Jones in italics, are a gloss of the Commentators Colluca (See Preface, page xviii, ed. 1825, Sir William Jones's Translation); as are the similar words interpolated in Chapter IX., v. 217, of the same work. So far, therefore as this Menu or edition of Menu, whichever it ought to be called, is concerned, we cannot hope to find any rule of law applicable to the present enquiry; and as we should expect, he here holds out to a faithful wife as a reward for her fidelity, the satisfaction arising from a good reputation and the prospect of re-joining her husband in another world; whereas, if she be disloyal, she is to incur disgrace here and misery hereafter; but there is no allusion to the loss or gain of any temporary advantage. (Ch. IX., § 29, 30.)

Very early writers, however, appear to have recognized the widow's right of succession. Vrihaspoti, as quoted in the Dyabhaga, Chapter XI., Section 1, § 2, says: "In Scripture and in the Code of Laws as well as in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased, half the body survives. How should then another take his property, while half his person is alive? Let the wife of a deceased man who left no male issue take his share notwithstanding kinsmen—a father, a mother, or uterine bro-

* 10 W. R., P. C., p. 17.

ther—be present. Dying before her husband, a virtuous wife partakes of his consecrated fire, or if her husband die (before her) she shares his wealth; this is a primeval law. Having taken his moveable and immoveable property, the precious and the base metals, the grains, the liquids, and the clothes, let her duly offer his monthly, half-yearly, and other funeral repasts. With presents offered to his manes and by pious liberality, let her honor the paternal uncle of her husband, his spiritual parents and daughter's sons, the children of his sisters, his maternal uncles, and also ancient and unprotected persons, the guests and females of the family. Those near or distant kinsmen who become her adversaries or who injure the women's property, let the King chastise by inflicting on them the punishment of robbery."

These seven texts as they are called seem to be the fullest exposition, and are adopted by Jimuta Vahana in his treatise as the basis of the widow's right of succession. It will be observed that they contain no special reference whatever to the virtue of chastity, but only to virtue in general. The passage is, however, differently translated or quoted in Juggernath's Digest, Book V., S. 399, where the primeval law runs thus: "Since she was previously espoused in due form, she must support the consecrated fire, and after the death of her husband the widow faithful to her lord shall take his wealth; this is a primeval law." The words which in the one are translated "a virtuous wife" and in the other "faithful to her lord" are *pativrata sadhwi* (See Vyavasta Darpana, p. 27), and what that is, is fully explained in Juggernath's Digest, Vol. 3, p. 462, and in the Dyabhaga in passages cited below. It includes chastity and many other virtues besides the observance of certain religious practices and austerities. The other (so called) inspired writers who are quoted by Jimuta Vahana in favor of a widow's right of succession are Yajnyawalkya, Vishnu, Katyana, and Vrihut Menu. The two last are the only ones who make special mention of conjugal fidelity. The first says (Dyabhaga, Chapter XI., Section 1, verse 56): "Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it." The second says (Dyabhaga, Chapter XI., Section 1, verse 7): "The widow of a childless man, keeping unsullied her husband's bed and persevering in religious ordinances, shall present his funeral oblation and obtain his entire share."

Jimuta Vahana, after noticing certain authorities adverse to the widow's right, then goes on to show that her right of succession is in accordance with the true principles of Hindoo Law. He maintains the well-known proposition that the right of succession is grounded solely on benefits conferred (Chapter XI., Section 1, verse 33)—that is, conferred upon the person whose property devolves, and consequently (§ 43) the widow, because she performs acts spiritually beneficial from the date of her widowhood, and not as sons do from the date of their birth, succeeds to the estate in their default; and then he immediately goes on to describe what the widow's duties are, quoting from Vyasa: "After the death of her husband let a virtuous woman observe strictly the duty of continence, and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband; let her day by day perform with devotion the worship of the gods and specially the adoration of Vishnu; practising constant abstemiousness, she should give alms to the chief of the venerable for increase of holiness and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duties conveys her husband, though in another world, and herself, to a region of bliss;" and then he sums up thus (§ 44): "Since by these and other passages it is declared that the wife rescues her husband from hell, and since a woman doing improper acts through indigence causes her husband to fall to a region of horror, for they share the fruit of virtue and vice, therefore the wealth devolving on her is for the benefit of the former owner, and the wife's succession is consequently proper." Then in § 59: "Therefore those persons who are exhibited in a passage above-cited (§ 14) as the next heirs on failure of prior claimants shall in like manner, as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after her use of it upon the demise of the widow in whom the succession had vested. At such time (here Srikishen inserts "when the widow dies," and Chuddamoney inserts "or when her right ceases") the succession of daughters and the rest is proper."

The author of the Mitakshara who discusses the widow's right of succession in default of sons at very great length (Chap-

ter 2, Section 1) and, as is well-known, only partially admits it, starts the discussion with the passage of Yajnyawalkya, which is quoted by Jimuta Vahana. He also quotes under the names of Vriddha Menu and Vrihad Vishnu, the same passages which Jimuta Vahana quotes under the names of Vriddha Menu and Vishnu; but the passage of Katyayana quoted by Jimuta Vahana is in the Mitakshara quoted or translated somewhat differently (Section 6): "Let the widow succeed to her husband's wealth provided she be chaste, and in default of her the daughter inherits, if unmarried;" and he quotes also this passage from the same writer: "The widow being a woman of honest family, or the daughters, or on failure of them the father or the mother or the brother or his sons, are pronounced to be the heirs of one who leaves no male issue." From Vrihasputi he quotes one only of the seven texts quoted by Jimuta Vahana: "Let the wife of a deceased man who left no male issue take his share notwithstanding kinsmen—a father, a mother, or uterine brother be present."

Among the writers who have held opinions adverse to the widow's succession, the author of the Mitakshara quotes Nareda, Menu, Sancha, and Katyayana in another passage. The result he sums up in these words (Section 39): "Therefore it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not subsequently reunited with them, dies leaving no male issue."

It is remarkable that, in discussing and opposing the opinion of Dhareswara (Section 8), who, relying on a passage in Goutama, maintained the doctrine that a widow succeeded to the property of her husband only in case she were solicitous of permission to raise up offspring to him, the author of the Mitakshara treats the references to chastity in the passages above-quoted as bearing upon this disputed point. Thus (in Section 18) he says: "Besides it is fit that a chaste woman should succeed to the estate rather than one appointed to raise up issue, reprobated as this practice is in the law as well as in popular opinion." The succession of a chaste widow is expressly declared, and then he quotes the passage of Vriddha Menu or Vrihad Menu already mentioned, and the conclusion he comes to is, that the widow may either seek to obtain progeny or may remain chaste. This the Visweowara Bhatta, as quoted by Mr. Colebrooke, changes into, "either she *must* seek male issue by means of an appointment for that purpose, or she must remain chaste."

In the Vivada Chintamoni (Baboo Prosono Coomar Tagore's translation) Vrihat Menu is quoted; but either the translation or the original differs from that of the Dyabhaga. In the Vivada Chintamoni the passage runs thus: "A widow who has no male issue, who keeps the bed of her lord inviolate, and who strictly performs the duty of widowhood, shall alone offer the cake at his obsequies and succeed to his whole estate." The author of this work then quotes from Vrihasputi the greater portion of the seven texts above-mentioned, and the important passage runs thus: "If the wife dies before her husband, she shall receive his consecrated fire; if not, the widow faithful to her lord shall take his wealth: this is a primeval law," and "faithful to her lord" is declared to mean "chaste."

The passage on this subject in the Vyavahara Mayukha, at least as translated, is very confused. The author quotes under the name of Projaputi, the primeval law of Vrihasputty, in the same terms as Jimuta Vahana; and he quotes several passages from Katyayana, which I can hardly identify with those already mentioned. His own conclusion (Chapter IV., Section 8, Verse 2, p. 84 of Stokes's Ed.) is that "a wife faithful to her husband takes his wealth—not if she be unfaithful."

The Dayakrama Sangraha throws no additional light on this subject. A passage from Katyayana is quoted here (Chapter I., Section 2, Verse 3, p. 474, Stokes's Ed.) in the same terms as in the Dyabhaga, Chapter XI., Section 1, Verse 56.

Jaganatha (Digest, Vol. 3, p. 462) quotes the seven texts from Vrihasputi in the terms I have already stated, and says that Udayacara explains "faithful to her lord" in this passage to mean "firm in the rigid duties of a faithful widow." He then goes on to give the definition of such a woman, quoting it from Harita; but the author to whom he probably refers is Vrihasputi (See Book IV., verse 107, of his own work), who says: "The virtuous woman who is indisposed when her husband is sick, pleased when he is cheerful, squalid and pining when he is absent, dies when he deceases, must be considered as truly faithful to her lord."

In another part of Jaganatha's Digest (Book IV., Chapter 3, Section 2, p. 459)

are collected a variety of passages describing the duties of widows who choose to survive their husbands. What is chiefly enjoined is the general practice of austerities. Eating the leaf of the betel, feeding from vessels of zinc, eating more than one meal a day, sleeping on a bed, using perfumed substances, sexual pleasures generally, are all forbidden. No special mention is made of chastity; but "a widow, who, from a wish to bear children, slights her deceased husband by marrying again, brings disgrace on herself here below, and shall be excluded from the seat from her lord." This is quoted from Menu in Chapter L., Section 11.

Baboo Shama Churn Sircar in the Vyavasta Darpana, page 28, quotes the following passage from Katyayana: "The wife who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, or who is addicted to adultery, does not deserve property;" and I do not find this passage anywhere quoted by the authors I have above referred to except in the Vivada Chintamani (p. 265), where the last few words run thus—"is held unworthy of the property before described." This seems to be her own separate property and an allotment for maintenance; no reference is made to the passage when the author comes to discuss the succession of widows.

All the commentaries quoted above contain chapters on exclusion from inheritance. It seems to me, however, not a little remarkable that I do not find any of them mention unchastity as a ground of exclusion. Impotent persons, outcasts, persons born blind or deaf, madmen, idiots, the dumb, such as have lost the use of a limb, is the list given by Menu of persons who are excluded; and I do not find it has been much extended. Narada adds—"one who has been addicted to vice or expelled from society." Devata adds—"a leper and a person wearing the token of religious mendicity." Persons of neutral sex and the offspring of incestuous intercourse have also been added. Sancha and Likhita are quoted by Jaganatha (Digest, Book V., verse 318) as saying—"Of him who has been formally degraded, the right of inheritance, the funeral cake, and the libation of water, are extinct." The author of the Vyavasta Darpana is the first Hindoo Commentator that I have seen, who brings in the unchastity of the widows as a separate cause of exclusion from inheritance. It will be seen, however, presently, that he does not thereby introduce any new doctrine as to exclusion, because he only excludes when one would fall under one of the classes above-mentioned, namely, that of an outcast.

In Sir William Macnaghten's collection of cases, a case is mentioned (Volume 2, p. 19), in which the Pundits were asked what would be the effect of unchastity in the widow after the death of the husband: they answered—"It is the general doctrine that the virtuous widow of a man who dies leaving no heir down to the great-grandson succeeds; but that, if she, on the death of her lord, be faithless to his bed, she has no right of succession." For this they cite Vrihaspati, Katyayana, Vrihat Menu, and Narada. What the three first say I have already shown. The passage said to come from Narada is that already referred to, as quoted by Baboo Shamachurn and the author of the Vivada Chintamani from Katyayana, and which is omitted in the other commentaries.

In the next case, the question is asked whether a widow who had become a prostitute was entitled to succeed; and the Pundits answered that, "if it be proved that the widow, in fact, did not keep her husband's bed unsullied, she has no title to his property, and ought to be expelled from the house."

The opinion of Sir Thomas Strange is given at Volume I., p. 136, of his work, and it is that "an unchaste wife is excluded from the inheritance; but nothing short of actual infidelity in this respect disqualifies, nor the inheritance once vested in her is it liable to be divested unless for loss of caste unexpiated by penance and unredeemed by atonement." It appears, however, that this is really an opinion of Colebrooke's adopted by Sir Thomas Strange, the original opinion and Colebrooke being given in very nearly the same words at p. 275 of Vol. II., of Strange's work; and from the opinions of the Pundits there quoted, it would seem that the occasion of the opinion was a difficulty which had arisen in Madras as to how the incontinence of the widow ought to be established. We have here therefore a direct expression of opinion by the highest European authority on Hindoo Law, supported by another European authority of considerable eminence. At page 159, Strange quotes from Colebrooke a passage in which the causes of exclusion from inheritance are discussed. Although there is no mention of unchastity

in it, it is, I think, important to refer to it, because, taken with the opinion of Colebrooke already referred to, it shows completely what his views were on the subject. He says: "In regard to the causes of inheritance discussed in Chapter 5, Section 1, verse 6, corresponding with the 5th Chapter of Jimuta Vahana, and the 10th Section, Chapter 2 of the Mitakshara, I am not aware that any can be said to have been abrogated or to be obsolete. At the same time, I do not think any of our Courts would go into proof of one of the brethren being addicted to vice or profusion, or of being guilty of neglect of obsequies and duty towards ancestors. But expulsion from caste, leprosy, and similar diseases, natural deformity from birth, neutral sex, unlawful birth resulting from an uncanonical marriage, would doubtless now exclude; and I apprehend it would be so adjudged in our adawluts." Strange dilates at length upon this passage, and points out how the power of degradation or expulsion from caste can be exercised, and its consequences; and he again (at p. 163) puts the forfeitures of the widow for unchastity on the ground taken by Colebrooke, namely, loss of caste.

The decided cases in which this question has arisen are extremely few. In Morton's decisions there is a case of Radhamoney Raur *versus* Nilmoney Doss, where it was proved that the widow who was claiming her husband's share had, after her husband's death, been incontinent, and had long since quitted the house and protection of her husband's family. It is said to have been held by Chambers, C.J., Hyde, Jones and Dunkin, JJ., that she had, by her incontinence, forfeited her right to her husband's estate.

In the case of Maharanee Bussunt Coomaree *versus* Maharanee Komul Coomaree, 7 Sel. Rep. 144, what was held by the Court below was that a widow who voluntarily quitted the family-house by night in the same carriage with a Baboo was not entitled to have a separate house and maintenance provided for her, but the Judge awarded her 1,000 rupees per mensem conditionally upon her return.

The Court of appeal, however, considered that she had by her conduct forfeited all legal claim according to the Shasters to maintenance from her husband's family. There is not a word about chastity or unchastity in the report, though perhaps an elopement may be hinted at; but they seem to have considered the widow's right to consist in a claim to food, apparel, and residence only, and not to any sum of money in lieu thereof; and I gather that they deprived her of maintenance on the mere ground of her having absented herself from the family-house—a decision which could hardly now be supported. The report is very meagre; but I cannot help thinking that, if it had been considered necessary to come to a distinct finding upon the question of chastity, either this finding or the facts leading to it would have been explicitly stated.

In the case of Raj Coomaree Dossee *versus* Golabee Dossee, 14 S. D. A., 1891, the elder widow brought a suit to recover the deceased husband's property against the younger widow. The younger widow repudiated the plaintiff's claim on the ground that the plaintiff had, during her husband's lifetime, eloped with another man, against whom her husband had brought an action for the seduction and recovered damages, and that her husband had never afterwards admitted the plaintiff into his house or cohabited with her.

The Court in their judgment first discussed the evidence of incontinence which they consider conclusive. They do not, however, rest the case there; they proceed to consider a contention on behalf of the plaintiff that there was no express declaration or solemn act on the part of the husband from which the Court could infer that it was his intention to disinherit her, and they proceed to find that it was his deliberate and fixed intention that she should not, after his death, participate beneficially in his estate. It is clear, therefore, that this case is rather an authority to show that even adultery in the husband's lifetime is not in itself sufficient to disentitle the wife to inherit, but that the husband may for this cause by a clear expression of intention deprive her of her right to succeed him.

This is all that, with the very able assistance of the learned Counsel who argued this case, I have found in the way of authority or comment upon the question now before me. Leaving aside those passages in the Hindoo law-books which speak of the duties of a wife, I think it is clear that the observance of chastity is strongly enjoined on the widow; and looking to the reasoning by which Jimuta Vahana establishes her claim to the succession, namely, by the performance of acts beneficial to her husband,

there is no doubt some ground for the argument that she continues to hold the estate only so long as she performs the duties which are the foundation of her right; but such a principle has never been enunciated, nor do I find the least trace of its being acted upon in Hindoo Law. If it did exist, if the widow who ceased to perform acts beneficial to her husband lost her estate, she would lose it for other causes besides unchastity. The argument would be just as strong in favor of forfeiture in case of her failure in any of the other numerous qualifications of a pativrata sadhwi as in the case of unchastity; and it would apply not only to widows but sons whose right to inherit is put upon the same ground, and upon whom virtuous conduct is hardly less strictly enjoined. On the other hand, I think that this argument by way of inference may be met by one not less strong on the other side. I think if loss of chastity had *ipso facto* been a ground of exclusion from inheritance, it would have certainly been mentioned as such by some one of the commentators in the chapter on that subject, or at least, if not there mentioned, that in some of the above-quoted passages where chastity is enjoined, the punishment of it by forfeiture would have been declared.

The conclusion which I come to and which is based upon the opinion of Colebrooke, cited by Strange already referred to, is that neither for unchastity nor any other vicious act is a right forfeited under the Hindoo Law. There are acts of gross and continued immorality for which a Hindoo may be completely and irrevocably cut off from his family and caste. From that moment he is, to all intents and purposes, as one dead so far as the family is concerned to which he formerly belonged. Ceremonies are performed as if he were actually so (Strange, Volume I. page 160), and the fiction of Hindoo Law is that from that moment he dates a new existence, as will be clearly seen by the rules which regulate the rights to property which he afterwards acquires. Of course, therefore, the property held by such a person passes on to the next taker. How far this power of degradation would now be recognized by the law, and whether unchastity in a widow would be a just cause of degradation, are questions which it is in no way necessary for me now to consider. One of them at least is a question of no little difficulty. What I now hold is that it is not the immoral act alone which in any case destroys the right, but the loss of caste or degradation which may follow thereupon. This explains the silence of the Hindoo law-books as to forfeiture for particular acts of immorality, and accords entirely with the doctrine of expiation which would otherwise appear to be almost unmeaning.

This view of the law is supported, as I have said, by the authority of Colebrooke and Strange; it is not opposed, as far as I am aware, by any European writer on Hindoo Law; and I think it by no means unimportant to observe that it is also that which is adopted by an able living writer on the Hindoo Law of the Bengal School, who must be well-acquainted with the opinions current on this subject amongst the most learned of his countrymen. Baboo Shama Churn Sircar in his work already referred to, at page 1016, thus sums up the law on this subject: "It should, however, be observed that the woman who is adulterous at the time when the succession opened, or who previously committed adultery which remained unexpiated by penance, forfeits her right to inheritance and maintenance; and not she who was previously adulterous, but ceased to be so and cohabited with her husband, or expiated or was about to expiate the sin by penance before the time of succession; and not also she who became adulterous after inheriting property or obtaining maintenance, unless the crime were such as to cause complete degradation by loss of caste unredeemable by atonement."

Of the three decided cases, the first is, I think, too scantily stated for any very secure inference; it is certainly not sufficient to outweigh the combined authority of Colebrooke and Strange. The second did not, I think, turn at all upon the question of chastity. The third relates not to forfeiture by a widow, but to the right of a husband to exclude his unchaste wife from her rights as such. It is in my opinion a prefectly correct decision, and supports the law as laid down by Baboo Shama Churn Sircar on the subject in the passage I have just referred to, but it rests on a totally different principle from forfeiture. It might rather be termed the exercise of a summary power of divorce by the husband for adultery. It in no way conflicts, on the contrary, I think, it accords in principle, with the view I take of the law, because even there it would appear that the simple act of unchastity did not cause a loss of inheritance, but only such an act followed by an express exclusion.

The result is that I hold that the defendant has not by the simple act of unchastity proved

against her, she not having been degraded or expelled from caste, forfeited her right as widow of Ramgopaul to inherit his estate. The suit, therefore, fails altogether, and must be dismissed with costs on scale 2.

The plaintiff appealed against this judgment on the following grounds:—

First—That unchastity in a Hindoo widow works a forfeiture of or terminates the estate and interest in her husband's property.

Second—That incontinence in a Hindoo widow in itself involves loss of caste, and is an offence for which Hindoo Law has not provided any atonement or expiation, and that even if expiable or redeemable, there was no evidence that the defendant had ever effected redemption or expiation, or was about to do so.

Third—That the incontinence of the defendant was followed up by her leaving her husband's house, to which, as far as can be gathered from the evidence, she had no intention of returning, and would not have returned thither at all or at least for some time but for her arrest by the police on the suspicion that she was about to destroy the child with which she was then pregnant, or to conceal its birth.

Fourth—That chastity in a Hindoo widow is an essential condition to the continuance and enjoyment of the estate of her deceased husband by a Hindoo widow for whose benefit alone she takes the estate, and that as such, wholly apart from any outcasting or degradation, incontinence causes the estate to revert to the next heir of the deceased proprietor capable of conferring benefits on him as his representative.

Fifth—That the suit should not have been dismissed with costs.

The judgment of the Appellate Court was delivered as follows by

Peacock, C. J.—This case has been very ably argued on both sides. It appears to me that the judgment of the Court of Original Jurisdiction ought to be affirmed. There is no doubt that, according to the Hindoo Law of Inheritance, a wife who commits adultery during the lifetime of her husband loses her right to inherit her husband's estate, unless the act is condoned by her husband or expiated by penance. But the question involved in the present case is whether a widow who succeeds to her husband's estate by inheritance holds that estate merely so long as she remains chaste, or forfeits the estate which has become vested in her if she is guilty of an act of unchastity.

There are authorities both ways, but giving the case my best consideration, it appears to me that the learned Judge who tried the case arrived at a correct conclusion. He has so fully entered into the authorities and arguments that I do not propose to go into much length in the consideration of the question.

Mr. Colebrooke's opinion, as expressed in his remarks upon the Trichinopoly case in Strange's Hindoo Law, Vol. II., page 272, appears to me to be correct. He says: "An unchaste woman is excluded from the inheritance of her husband, but no misconduct other than incontinency operates disinherison, nor after the property has vested by inheritance does she forfeit it, unless for loss of caste, unexpiated by penance and unredeemed by atonement."

It was said in the course of the argument that the right of inheritance or succession according to the Hindoo Law is founded on benefits to be conferred upon the ancestor. "He who takes the estate of the deceased is to perform his obsequies." This is not true in every case, for it is laid down that "if one be heir to an estate and another be qualified to perform the shradh, he must give sufficient property, and cause the rites to be celebrated by him who is qualified to perform them." (See Vyavasta Darpana, 8vo Edn., p. 363) where reference is made to Colebrooke's Digest, Vol. III., pp. 545-546. But however that may be, there is no authority to show that the person who takes an estate by inheritance, holds that estate only so long as he performs those duties which are morally imposed upon him, or that he forfeits the estate which he has taken if he ceases to perform those duties. It is clear that, according to the Bengal School, a man who takes an estate by inheritance may sell or otherwise dispose of it.

As regards male heirs, an estate taken by descent is not forfeited by neglect of those moral duties which are imposed upon an heir; and I see no authority sufficient to induce me to think that the estate taken

by a Hindoo widow by inheritance is an estate so long as she continues chaste, or an estate liable to be forfeited by an act of unchastity. If the estate is to continue only so long as she continues chaste, it would cease immediately upon an act of unchastity; and in that respect, a widow would be in a worse position than a wife, inasmuch as a wife may inherit if her offence is expiated before the death of her husband, but if a widow's estate ceases expiation would not restore it.

So in the case of persons incapable of inheriting, such as a leper, leprosy at the time when the right of inheritance accrues would destroy the right of inheritance, but leprosy after an heir has succeeded is no ground of forfeiture, nor is the estate of an heir held only so long as he is free from a sinful disease which would prevent him from inheriting.

In Baboo Shama Churn's Vyavasta Darpana it is stated "that a woman who is adulterous at the time when succession opened, or who previously committed adultery which remained unexpiated by penance, forfeits her right to inheritance and maintenance, and not she who was adulterous but ceased to be so, and cohabited with her husband or expiated, or was about to expiate, the sin by penance before the time of succession; so a woman who becomes adulterous after inheriting property is not prevented from holding the estate, unless the crime were such as to cause complete degradation by loss of caste unredeemable by atonement." Vyavasta 663, page 1016.

Although Baboo Shama Churn Sircar is no authority on Hindoo Law, it appears to me that he has there given a correct view of the law on the subject.

In the Rajah of Shiva Gunga's case, 2 Weekly Reporter, Privy Council cases, page 31, it was held that a decree in a suit brought by a Hindoo widow binds the heirs who claim in succession to her, but that can only be in a suit brought by her so long as she holds a widow's estate. It would cause infinite confusion if a decree in a suit brought by a widow could be avoided by showing that she had committed an act of adultery before she commenced the suit. But if the rule contended for is correct, and the estate which a widow takes by inheritance is merely an estate so long as she continues chaste, all the acts which a Hindoo widow could do with reference to the estate might be avoided by taking up some act of unchastity against her. Inconvenience would not be a ground for deciding a case like the present if the law were clear upon the subject; but it is an argument which may be fairly adduced when the authorities in favor of the opposite view are merely the expressions of opinion by Hindoo law-officers or by European or modern text-writers, however eminent, or even decisions of a Court of Justice when they are in conflict with decisions of other Courts of equal weight.

The case which was cited from Chambers's notes in Mr. Montriou's Edition of Morton's decisions, page 314, is given very shortly. In that case it was held that the incontinence of a widow creates a forfeiture of her claim to the succession. That decision is counterbalanced by the case of San Money Dossee *versus* Neemy Churn Doss, which was later in date, and also decided by the Supreme Court, 2 Taylor and Bell, page 300, Sir Lawrence Peel in that case held that a widow did not forfeit her estate by living an immoral and unchaste life. He said: "Further in this case the widow had been for some time in rightful possession, and the Court would be disinclined to disturb her in the absence of any decision of a Court of law, showing that such a person for such reason as above stated might be expelled from possession."

Mr. Justice Markby has stated that adultery is not sufficient to deprive a widow of an estate which she has taken by inheritance from her deceased husband, in the absence of degradation or expulsion from caste. I wish to avoid being supposed to express any opinion that if she were degraded or deprived of her caste her estate would cease to exist.

Conflicting opinions have been expressed as to the construction of Act XXI. of 1850. With reference to that Act, Sir Lawrence Peel in the case to which I have referred in 2 Taylor and Bell, observed: "That it was provided by Act XXI. of 1850, that so much of any law or usage, now in force in India, as inflicted on any person forfeiture of rights of property or might be held in any way to impair or affect any right of inheritance, by reason of his or her being deprived of caste, should cease to be enforced as law." His opinion, therefore, appears to have been that the Hindoo Law so long as it inflicted forfeiture of rights of

property or impaired or affected right of inheritance by reason of deprivation of loss of caste, was intended to be abolished by the Act to which he refers.

The late Sudder Court took a different view of that Act. They read it with the light thrown upon it by the preamble, for referring to the case which had been decided by Sir Lawrence Peel, they say, "with every respect for that opinion and without the means of ascertaining whether the particulars of the present case are the same as those upon which it was given, we must determine the point irrespectively and with reference solely to the intent and meaning of the Act as they may be fairly and reasonably gathered from the latter portion of it taken in connection with the preamble"—page 1895 of the Sudder decisions for 1858.

Mr. Sconce says: "The title of Act XXI. of 1850, declares its purpose to be the extension of the principle of Section 9 of Regulation VII. of 1832, and in the preamble this principle is embodied, being to the effect that if one party to a suit should not be of the Hindoo (or Mahomedan) persuasion, the laws of the Hindoo religion should not be suffered to deprive him of any property to which, but for the operation of such laws, he would have been entitled. Accordingly in the body of the Act it is declared that any law which may impose a forfeiture of rights as a consequence of the renunciation of or exclusion from the communion of any religion or of being deprived of caste shall cease to be enforced as law." He holds that being deprived of caste (reading it in connection with Regulation VI. of 1832), meant loss of caste by reason of excommunication from religion.

Looking very carefully at the Act XXI. of 1850, it appears to me that the preamble is wholly irrelevant to the enacting part of that Act. The Act is called: "An Act for extending the principle of Section 9, Regulation VII., 1832, of he Bengal Code throughout the territories subject to the Government of the East India Company."

It recites that it was enacted "by Section 9, Regulation VII. of 1832, of the Bengal Code, that whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindoo and the other of the Mahomedan persuasion, or where one or more of the parties to the suit shall not be either of the Mahomedan or Hindoo persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled: and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company: It is enacted as follows:—

"1. So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights of property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter."

The principle of Section 9, Regulation VII. of 1832, was that a party to a suit of one religion was not to avail himself of the laws of the religion of the other party which deprived him of any property. If a Hindoo had sued a Hindoo, the Hindoo defendant might possibly have set up against the Hindoo plaintiff that he had no right to sue, in consequence of his having been degraded from his caste. The Regulation would have prevented a Mahomedan defendant from taking advantage of that rule of the Hindoo religion which would have deprived the Hindoo plaintiff of his right by reason of his degradation from caste. The enactment says that so much of any law as inflicts on any person forfeiture of rights of property by reason of his being deprived of caste shall cease to be enforced as law.

It was, therefore, an enactment that in suits between Hindoos the loss of property by deprivation of caste should not be enforced. The principle, if it can be so called, of that Regulation which prevented the laws of the Mahomedan or Hindoo religions which deprived a party of a right of property in suits between persons of different persuasions, was extended to persons of the same persuasion, and that which could not be taken advantage of by a Mahomedan in a suit by a Hindoo, so far as it related to deprivation of property by loss of caste, was not to be taken advantage of even by a person of the same persuasion. The enactment rather than the principle of the enactment was ex-

tended, and the rule which was laid down to be observed in suits between persons of different persuasions was intended to be extended to suits between persons of the same persuasion.

Under the Regulation of 1832, I think it is clear that in any place in which that Regulation had effect, a Mahomedan in a suit by a Hindoo, could not have availed himself of any part of the Hindoo Law which deprived a Hindoo of a right of property by reason of deprivation of caste. If so, it appears to me, that by an extension of that law by Act XXI. of 1850 to all parts of the territory of the East India Company, it was declared that all the rules which inflicted any forfeiture of rights on any person on account of his renouncing his religion or being deprived of caste, should cease to be enforced as law. It appears to me that the words "being deprived of loss of caste by reason of renouncing religion" were useless. If the renunciation of religion deprived a man of his right, his being deprived of caste by reason of that renunciation would not carry the case further. If a Hindoo lost his right to property by renouncing his religion, Regulation VII. of 1832 deprived a Mahomedan of his right of setting up that defence as against a Hindoo, and the Act of 1850 deprived a Hindoo from setting up against a Hindoo that which a Mahomedan could not set up against a Hindoo in that respect.

If a Hindoo widow without reference to loss of caste held her estate so long only as she remained chaste, Act XXI. of 1850 did not affect the case. If her estate was an estate to continue only so long as she remained chaste, Act XXI. of 1850 did not affect the case. But if the widow of a Brahmin lost her estate by reason of the loss of caste entailed upon her by having a child by a Sudra, Regulation VII. of 1832 prevented that law from taking effect in suits in which both parties were not Hindoos, and Act XXI. of 1850 prevented that law from taking effect in suits between Hindoos.

In Menu, Section 181, it is said that "he who associates himself for one year with a fallen sinner, falls like him. That man who holds an intercourse with any one of the degraded offenders must perform as an atonement for such intercourse the penance ordained for that sinner himself. They must thenceforth desist from speaking to him, from sitting in his company, from delivering to him any inherited or other property, and from every civil or usual attention, as inviting him on the first day of the year and the like." Chapter XI., slokas 181, 182, and 185.

Now, I apprehend that the object of Act XXI. of 1850 would get rid of such a defence as that. If a Brahmin brought a suit against a Mahomedan to recover his property, the Mahomedan, after Regulation VII. of 1832 was passed, could not have set up as a defence that the plaintiff had associated himself with a fallen sinner or that he had held intercourse with any of the degraded offenders referred to in the Chapter of Menu above cited. It is more reasonable to suppose that the Legislature intended to prevent a Brahmin or any Hindoo from setting up as against another Hindoo a defence of that nature, than to prevent a Hindoo from setting up against another Hindoo any defence which he might otherwise have had by reason of the plaintiff's having renounced the Hindoo religion. It appears to me that when the Legislature intended to prevent a Hindoo from taking advantage as against another Hindoo of any part of the Hindoo Law which deprived his opponent of a right of property by reason of his having renounced his religion, or of his having been excommunicated from his religion, they intended to deprive a Hindoo of his right to take advantage of any rule of the Hindoo religion which deprived his opponent of any part of the Hindoo religion by reason of his loss of caste. Looking at the case even as between Hindoos, it appears to me that the removal of loss of caste cannot be more objectionable than the removal of that part of the religion which deprived a man of his right by reason of renunciation of religion or excommunication therefrom.

I, therefore, notwithstanding the decision of the Sudder Court in the case decided in 1858, take the same view of Act XXI. of 1850 which was taken by Sir Lawrence Peel in the case to which I have referred, and I, therefore, am of opinion that the principle of this case is not affected by the fact that the respondent had a child by a Sudra. As far as chastity was concerned, it made no difference whether the father of the child was a Sudra or a Brahmin. It is only as regards caste, that that circumstance would make any difference.

Sir Collis Scotland in a case reported in Stokes's Reports, Volume I, page 482, seems

to have taken the same view as I do of Act XXI. of 1850. He says: "Further so to decide in this case would in effect be giving to illegitimacy as a disqualification an operation which it would be contrary to the spirit, if not the letter, of legislative enactment (see Act XXI. of 1850), to allow to degradation of caste," thus treating degradation from caste simply without reference to its being a degradation on account of the renunciation of religion or of excommunication.

The Hindoo Widows Marriage Act XV. of 1856 has also been referred to. By the 1st Section it was enacted that no marriage contracted between Hindoos shall be invalid, and the issue of no such marriage shall be illegitimate by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindoo Law to the contrary notwithstanding.

Section 2 enacted that all rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to her lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died.

It is said that we are to infer from this that the Legislature considered that a Hindoo widow forfeited her estate by reason of an act of unchastity. I draw no such inference from this enactment. The Legislature enacted that the marriage of a Hindoo widow should not be void; but at the same time they declared that the right which she had taken in her deceased husband's estate should cease on her marriage. Therefore it appears to me that the provisions of this Act have no bearing on this case.

The decision of Mr. Justice Markby is affirmed with costs.

Macpherson J., concurred.

The 11th January 1870.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge.*

Appeal to the Privy Council—Delay in prosecuting.

Appeal from an order of the Hon'ble J. H. Phear, dated the 9th September 1869.

Goberdhone Bermono (Plaintiff), Appellant to England, *Appellant,*

versus

Sreemul Munnee Bibee (Defendant), Respondent to England, *Respondent.*

Jackson for the Appellant.

Graham and *Banerjee* for the Respondent.

Section 30 of the Charter of the late Supreme Court is still directory in the High Court with regard to appeals to the Privy Council.

Until a petition of appeal to the Privy Council presented to the High Court is admitted and allowed, a party has no right to appeal to Her Majesty in Council. If the petition is allowed to remain on the files of this Court and is not prosecuted within a reasonable time, the Court has power to order its removal from the files.

THIS was an appeal from an order of the learned Judge, striking off an appeal which had been preferred by the plaintiff to the Privy Council, as the plaintiff had taken no steps to prosecute it. The appeal to England was filed in March 1868, and in September 1869 the defendant, after giving notice to plaintiff, moved to have the appeal struck off.

Phear, J., held that he had jurisdiction to hear the case. The judgment, holding that the Court had jurisdiction, was as follows:—

I think, Mr. Graham, I have power to make the order you asked, *viz.*, that the petition should be disallowed. I have had

some difficulty in satisfying myself as to how the practice stands, but it seems to me to be thus: The right of appeal is given by Section 39 of the Letters Patent, subject to any existing rules and orders and any future rules and orders to be made by the Privy Council. As far as I can make out, there are no rules of the Privy Council which have any bearing on the action of this Court, excepting one or two referring to giving security, &c., nor have we any practice laid down except that founded upon Clause 30 of the Charter of 1774. I think that Clause is still in force, and that the 9th Section of our High Court Act keeps alive all powers, authorities, and jurisdiction in the High Court, as were in any way vested in the late Supreme Court, except so far as they might be affected or modified by the Letters Patent to be granted to this Court. Now, the existing Letters Patent prescribe nothing: they simply give a right to appeal, and the 1st Clause of these Letters, while it revokes the previous Letters Patent with respect to appeals, makes this exception, "except so far as the Letters Patent of the 14th year of His Majesty King George the Third, dated the 26th of March 1774, establishing a Supreme Court of Judicature at Fort William in Bengal, were revoked or determined thereby." The first Letters Patent, in Section 44, only revoked so much of the Letters Patent of George III. as were inconsistent with the new Act and Letters Patent: every thing else remained in force. It seems to me, therefore, that Section 30 of the Charter of 1774 is still directory upon this Court with regard to appeals to the Privy Council. Now, that Section, I think, very clearly gives a certain judicial discretion to this Court, in regard to entertaining applications to appeal to the Privy Council. The right to appeal is conditional upon the appellant's praying for leave to appeal, and in praying for leave to appeal, before appeal shall be allowed, security for the acts of appeal and for the performance of any judgment or order of the Privy Council shall be given to the satisfaction of the Supreme Court. And that being done, the Supreme Court shall allow the appeal with this proviso imposed by Section 33, and there is the same proviso in the Letters Patent of 1774, that no appeal shall be allowed by the said Supreme Court, unless the petition for that purpose shall be preferred within six months from the day of pronouncing the judgment, decree, or decretal order. The result seems to be that the High Court, on an appeal being preferred, must satisfy itself that the petition was preferred within six months, or that proper security has been given, that the amount is such as entitles the petitioner to appeal, or that for some other good cause the petitioner is entitled to appeal; and impliedly in all this, as in every other application to have the benefit of the judicial decision of this Court, that the applicant must proceed with due diligence. The alternative to this would be that, so long as he filed his petition within six months, he would have any time whatever to suit his convenience for coming to this Court to ask to have the petition allowed. Practically this would be giving an unlimited time to appeal, because, if filing the petition within six months were that that were necessary to keep alive the right to appeal, it would be done, as a matter of course, in all cases, and would reduce the time of limitation to a nullity. If, therefore, the petitioner were coming before the Court to have his petition allowed, it would be perfectly competent to this Court to disallow it on the ground of delay in prosecuting the appeal, provided there is nothing to satisfy this Court that there was reasonable ground for such delay. The only question then is, whether the respondent, in the event of the plaintiff being guilty of this delay, can himself put the Court in action to disallow the petition of appeal.

I cannot find any decision on this point in any of our reports. The case of Woomesh Chunder Paul Chowdhry *versus* Issen Chunder Paul Chowdhry, Morton's Reports, page 59, is a remarkable case, which at first sight appears in point. There the petitioner, appellant, had got his petition of appeal allowed, and six months after the respondent obtained a rule calling upon the appellant to show cause why the petition of appeal should not be dismissed for want of prosecution. The Court concurred in thinking that the respondent was premature, and following, as they stated, the case of Gordon *versus* Lowther, they were of opinion that twelve months was the proper limit; and as six months had not elapsed, they discharged the rule. It appears to me very clear in that case the Court was bound to discharge the rule, but not for the reasons the Judges assigned. After the appeal had been allowed, the matter had passed out of the hands of the Supreme Court, and they had no jurisdiction; and it is singular enough that Gordon *versus* Lowther, upon which they base their opinion, if it shows anything, shows exactly the reverse of what they held, that if the respondent

had waited twelve months, he would have been entitled to have his application granted. Further, Gordon's appeal had been allowed in the Colonies, and Lowther, to get the appeal dismissed, was obliged to come before the Privy Council. He transmitted the records and all proceedings of the Colonial Court to the Privy Council, and there got the appeal dismissed for want of prosecution within twelve months. But I do think that the practice and rule of the Privy Council is of some value to us in guiding me to a conclusion in the present case. If the Privy Council think that the interest of justice required that a delay of a definite period of twelve months should be sufficient to put an end to the appellant's right to appeal after it is perfected, I think certainly it may be plainly inferred that the interests of justice required some limit to be put to the appellant's right to carry on his proceedings in the Lower Court. It would be a great hardship to a suitor who has had his right declared in the highest Court of the Colonies that he is still to be subject to have a petition of appeal hanging over his head, and the possibility of appeal kept alive for any indefinite time at the pleasure of the appellant. Such a state of things is, no doubt, calculated in a great degree to depreciate the value of the proprietary right he has successfully asserted; and if he *cannot* get rid of it by himself taking the initiative here, I think it follows he cannot get rid of it at all, for the Privy Council would not take notice of proceedings of this Court, which are only in an inchoate state. It is for this Court to take care of its own proceedings. I have thus come to the conclusion that the application made by Mr. Graham for the respondent is one which I can entertain and deal with, and I think there can be no doubt what my decision must be, if I act upon the materials now before the Court. But I think it fair to give Mr. Marinden's client an opportunity, if he wishes, to show better than he has done the cause of the delay. It is, I believe, the first application of this kind that has been before this Court, and perhaps Mr. Marinden's client may not have been so well prepared as he might have been. If no good reason is shown for the delay, the application must be disallowed with costs.

The plaintiff then filed affidavits, stating that he had been suffering with dysentery and fever from October 1868 to May 1869; that he was admitted in June 1869 into the Sealdah Native Hospital under an attack of elephantiasis, on account of which he was confined to his bed; that he is still an inmate of that Hospital. Plaintiff applied for one month's further time to enable him to go on with the appeal. It further appeared from the affidavit that in April 1868 the plaintiff's attorneys wrote to the Registrar, suggesting the names of two persons as his sureties for the costs of the appeal, but the Registrar stated that application should be made to the Court, after notice to the respondents, for leave to give security.

Phear, J., held that no sufficient cause for the delay had been made out, and disallowed the application with costs. The following is a substance of the judgment on this point:—

I don't think this affidavit sufficient. If it proves anything, it proves too much. In order to proceed with the petition of appeal, all that was necessary was to tender security and to serve a summons on the party before the Court, requiring him to be present on an application to the Registrar to accept security. Such an application is no more arduous for a sick man than to procure and make the affidavits which plaintiff has procured and made in opposition to Mr. Graham's application. The affidavit of Dabey Lall makes out that, from October 1868 to the present time, the plaintiff has been so ill as to be unable to attend to any business; first, for 9 months in consequence of fever and dysentery; and, secondly, for the remaining period in consequence of suffering from elephantiasis; and the native doctor supports his view of the incapacitating effects of this disease by a certificate of the European Doctor in charge of the Municipal Pauper Hospital. He is incapacitated from business, and therefore has been unable to prosecute this appeal; but it does not incapacitate him from doing, in opposition to Mr. Graham's application, what is as arduous and harassing as anything he would have to do in prosecuting this appeal. Then the affidavit of Dabey Lall, who makes no statement as to his qualifications, speaks to nothing before October 1868; but at that time his petition to appeal had been filed seven months. It appears to me he has made out no substantial reason why he should not have gone on with his appeal. That being so, on the ground I explained when this application was last before me, I think Mr. Graham's client is entitled to have plaintiff's petition dismissed. I shall make no order as to costs.

The plaintiff appealed from this order on the following grounds:—

1st.—That there is no law or rule of practice of this Honorable Court limiting the time within which petitions for leave to appeal to Her Majesty's Most Honorable Privy Council, which have been received, read, and filed by this Honorable Court, shall be prosecuted, and that the learned Judge had no power to make the order complained of.

2nd.—That such order ought only to have been made conditionally upon the plaintiff, appellant, not taking steps to prosecute such appeal within a time to be fixed by such order.

3rd.—That the affidavits filed on behalf of the plaintiff, appellant, sufficiently explain the cause of his delay in prosecuting such appeal.

4th.—That even if there was improper laches and delay on the part of the plaintiff, appellant, the Court in the exercise of its discretion ought to have given him further time to prosecute such appeal, considering that it has never before been established by any decision of this Court, that there is any limit to the further time to be allowed for prosecuting an appeal to Her Majesty in Council, after the petition for leave to appeal has been received, read, and filed by this Court.

Jackson, in support of the above grounds, urged that, when once an appeal to Her Majesty in Council is allowed by this Court, the jurisdiction of this Court ceases, and that the appellant did all he could be expectedt o do. (Woomesh Chunder Paul Chowdhry *versus* Issen Chunder Paul Chowdhry, Morton 59; Gordon and Lowther, 2 Lord Raymond's Reports 144.)

Graham *contra* contended that in this case all that was done was to file the appeal, and there has been no motion or order allowing the appeal. (Hurosoonduree Dossee *versus* Kistonath Roy, Fulton's Reports, 10; Raebutty Dossee *versus* Radhanath Sen, 6 Moore, p. 346.) Until an appeal has been allowed, it is in the power of the Court, if it thinks that there has been unreasonable delay, to remove the petition from the file. Though there is no rule directing such a procedure, there is nothing to prevent the Courts taking such a course. (St. Louis and St. Louis, 1 Moore 143; Gungadhur Seal *versus* Radhamonee Dossee, 9 Moore, p. 411.)

Jackson replied.

The judgment of the Appellate Court was delivered as follows by—

Peacock, C. J.—I think that the Judge had power to dismiss this petition. The petition is not an appeal to Her Majesty in Council, but it is a petition to this Court, directed to the Chief Justice and his companion Judges, stating that the petitioner, feeling himself aggrieved, is desirous of appealing to Her Majesty in Council. It is an application to this Court that all necessary orders may be made to enable the petitioner to appeal to Her Majesty in Council, and that seems quite in conformity with Section 30 of the Charter of the late Supreme Court, which says that, "in all cases in which any person shall find him, her, or themselves aggrieved by any judgment, decree, order, or rule of the said Supreme Court of Judicature at Fort William in Bengal, it may be lawful for him and them to appeal to us, our heirs, or successors in our or their Privy Council, in such manner and under such restrictions and qualifications as are hereinafter mentioned; that is to say, in all judgments, decrees, or decretal orders made by the said Supreme Court of Judicature at Fort William in Bengal in any civil case, the party and parties against whom or to whose immediate prejudice the said judgment, decree, or decretal order shall be or tend, may by his or their humble petition to be preferred for that purpose to the said Supreme Court of Judicature at Fort William in Bengal, pray leave to appeal to us, our heirs, or successors in our or their Privy Council, stating in such petition the cause or causes of appeal; and in case such leave to appeal be prayed by the party or parties who is or are directed to pay any sum of money or to perform any duty, the said Supreme Court of Judicature at Fort William in Bengal shall and is hereby empowered to award that such judgment, decree, or order shall be carried into execution; or that sufficient security shall be given for the performance of the said judgment, decree, rule, or order as shall be most expedient to real and substantial justice, provided always that, where the said Supreme Court of Judicature at Fort William in Bengal shall think fit to order the judgment, decree, rule, or order to be executed, security shall be taken from the other party or parties for the due performance of such order or decree, as we, our heirs, or successors, shall think fit to make therefrom, and in all cases we will

and require that security should also be given to the satisfaction of the said Supreme Court of Judicature at Fort William in Bengal, for the payment of all such costs as the said Supreme Court of Judicature at Fort William in Bengal may think likely to be incurred by the said appeal; and also for the performance of such judgment or order as we, our heirs, or successors shall think fit to give or make thereupon; and upon such order or orders of the said Supreme Court of Judicature at Fort William in Bengal thereupon made being performed to their satisfaction, the said Supreme Court of Judicature at Fort William in Bengal shall allow the appeal; and the party or parties so thinking him, her, or themselves aggrieved, shall be at liberty to prefer and prosecute his, her, or their appeal to us, our heirs, or successors, in our or their Privy Council in such manner, and from and under such rules as are observed in appeals made to us from our plantations or colonies or from our islands of Guernsey, Jersey, Sark, or Alderney."

Thus, it is not until a petition is presented to this Court upon proper security, that the party has a right to prefer his appeal to the Privy Council.

Section 31 applies to a case in which an appeal has been allowed. It says that in all such cases the Supreme Court shall certify and transmit under its seal to the Privy Council a true and exact copy of all the evidences, proceedings, judgments, decrees, and orders had or made in such causes appealed, so that it is not until a petition is allowed that the transcript of the record is to be sent to Her Majesty in Council.

By the orders of Her Majesty in Council of 1838, Section 6 (See Smoult's and Ryan's Rules and Orders, Appendix, page 103), it is said that, in default of the petition of appeal of the appellant being lodged in the Privy Council Office within three calendar months from the registration of the arrival of the transcripts, or in default of the appellant's case being carried on within one year from the time of such registration, the respondent shall be entitled in either case to move to dismiss the appeal for want of prosecution.

It appears to me, therefore, that, until the petition presented to this Court is admitted and allowed, a party has no right to appeal to Her Majesty in Council.

If the petition is allowed to remain on the files of the Court, and is not prosecuted within a reasonable time, the Court has the power to order its removal from the files.

In this case Mr. Justice Phear has given his reasons for thinking that the petitioner has not shown sufficient grounds for the delay in prosecuting his appeal, or for being allowed to proceed with it now; and I see no reason to differ from the learned Judge in that respect, and consequently I think that the present appeal from his judgment ought to be dismissed with costs.

I may also add that, by Section 39 of the recent Charter by which the power to appeal to Her Majesty in Council is allowed, it is to be subject to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Her Majesty in Council from the Courts in this Presidency.

Macpherson, J.—I am of the same opinion.

The 12th January 1870.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge.*

Stamp — Promissory note payable on demand—Collateral agreement.

Appeal from a judgment of the Honorable J. B. Phear, exercising the Ordinary Original Civil Jurisdiction of the High Court, dated the 23rd November 1869.

Chunder Kant Mookerjee (Plaintiff), *Appellant,*

versus

Kartick Chunder Chaile and another (Defendants), *Respondents.*

Graham and *Jackson* for the Appellant.

Kennedy and *Banerjee* for the Respondents.

In applying the Stamp Law, the stamp must be paid upon what is stated in the instrument, and cannot depend on collateral evidence.

Where a promissory note is payable on demand, it ought to be stamped as a note payable on demand, although there may be a collateral agreement between the parties that the holder will not present it for a given time, or, if paid on demand, that the maker of the note shall be entitled to a certain amount of discount to be deducted.

THE plaintiff in this suit was the banian of the firm of Watson, Green, and Hart, merchants. He alleged that, by an arrangement between him and that firm, he took

the responsibility of all deliveries of goods sold by the firm. He received promissory notes from the dealers in favor of the firm, who endorsed the notes to him, and he had no redress against the firm if he failed to recover the amounts of the notes. Goods were sold under this arrangement to the defendants who gave seven promissory notes which were endorsed by the firm to plaintiff, but the amounts of these notes the defendants have not discharged in full. The plaintiff therefore sued for the balance, Rs. 5,181-13-3, with interest thereon. He also maintained his right to recover that sum as due on accounts stated between him and the defendants.

There was very little substantial defence to the suit, and the plaintiff recovered a decree, but Phear, J., at the hearing excluded the balance, Rs. 3,513-4-1, due on a note of the 6th August 1868 for Rupees 4,310-13-3 on the ground that it could not be admitted in evidence, because it did not bear a sufficient stamp.

The plaintiff appealed, insisting that the note was sufficiently stamped; and, if not, that he was at all events entitled to recover the amount excluded from his decree as on an account stated.

The note which was excluded bore a stamp of the value of one anna, and was in the following terms—

Chit No. 3114.

Calcutta, 6th August 1868.

Contract No. 1087.

Rupees 4,310-13-3.

On demand, we, Kartick Chaile and Kedarnath Dey, promise to pay to Messrs. Watson, Green, and Hart, or order, the sum of Rupees 4,310-13-3 only, with interest at the rate of 12 per cent. per annum, from 30th August 1868, being the value of the goods delivered by them to us (*viz.*) ex "City of Benares," C. W. G. H. 210, 209, 200, 196, 207, 199, 208, 211, 220, 212, 215, 217, to 12 bales Mule Twist No. 40s, 12,000 morahs at 16 annas per morah.

No. 5154.

Date 30th August.
Chit No. 3114.
Sale No. 1087.
Date 6th August 1868.
Account of Kartick
Chunder Chaile and
Kedarnath Dey.

	Rs.	As.	P.
Through price of 12 bales of Mule Twist, No. 40s, consisting of 12,000 morahs at 6 annas	4,500	0	0
Allowance at 3 pie per morah...	187	8	0
	4,312	8	0
Less deduction ...	1	10	0
	4,310	14	0

Sri Kartick Chunder Chaile
Sri Kedarnath Dey
by
Sri Madhub Chunder Dutt.

The sum of four thousand three hundred and ten rupees, twelve annas, and six pie only—45 days from the 5th of August.

(*On the back.*)

Paid on the 9th September, through B. N. Mookerjee, Company's Rs. 1,000.

Graham, for the appellant, submitted that the stamp on the note was sufficient. The note was complete when the signature was affixed to it, and in such case it was a note payable on demand and the stamp-duty on it was therefore sufficient. The transaction was in substance one for the sale of goods, and the purchaser gave an acknowledgment in the form of a note. The last portion of the note ought not to be taken as part of the note.

Kennedy for respondent cited the Eastern Financial Association *versus* Pestonjee Cursetjee Shroff (3, Bombay Reports, 9.) Both parts of the contract may be taken together and incorporated. (Green and Davis, 4 B. and C., 235.)

Graham was not called on to reply.

The following are the judgments of the Appellate Court:—

Peacock, C. J.—It appears to me that the note in question ought to have been admitted in evidence and should not have been excluded on the ground of not being sufficiently stamped. It appears to me that in applying the stamp law, the stamp must be paid upon what is stated in the instrument and cannot depend on collateral evidence. If a man signs a promissory note payable on demand, it appears to me that the note ought to be stamped as a note payable on demand, although there may be

a collateral agreement between the parties that the holder of the note will not present it for a given time, or, if paid upon demand, that the maker of the note shall be entitled to a certain amount of discount to be deducted.

In the present case, according to the evidence, notes payable on demand were given in respect of all the other goods which were sold. The note in question expressly declares that the defendants on demand promise to pay to Messrs. Watson, Green, and Hart, or order, the sum of Rupees 4,310-13-3 with interest at 12 per cent. per annum from the 30th of October 1868. In the margin of the note, it is stated that something will be due on the 30th of August, according to Chittee No. 3114 and contract of sale No. 1087. It appears probable that the sum mentioned at foot of the signature was intended to correct that mistake, and to point out that, according to the real transaction between the parties, what may be called the price of the goods was not to be due on the 30th August, that is payable without any deduction for discount.

There may be a partial or a varying acceptance of a Bill of Exchange; but there is a great distinction between a Bill of Exchange and a promissory note. A Bill of Exchange is a request by one man to another to pay a certain amount, and the acceptor of the bill may, according to the custom of merchants, accept only for part of the amount which he is requested to pay, or he may accept payable at a different time from that at which he is requested to pay, and that seems consistent with reason. But when a man signs a promissory note, all that he promises to do is his own expression. He is not varying that which another man requests him to do. He cannot, therefore, with any reason state in the body of the note that he will do one thing, and by a memorandum annexed to his signature declare that he intends to do another thing. In this case the defendants expressly promise to pay on demand a certain sum of money, but to their signature they annex the following words: "The sum of Rupees 4,310-12-6 only" (which is a different sum from that stated in the body of the note), and "45 days from the 5th August" (which is also a different date from that stated in the body of the note).

They do not say that they intend that the note should be payable 45 days after date for the sum of Rupees 4,310-12-6, and they do not say "Although we have said one thing in the body of the note, we intend to say another thing in the body of the signature." The memorandum to the signature is therefore ambiguous, to say the least of it, and may relate to the memorandum in the margin of the note, which gives the memorandum of the contract on which the note was given.

In the case of Fanshawe and Peet, 2 Hurstone and Norman, page 4, to which I referred in the course of the argument, Mr. Baron Martin said: "At the trial, after consulting my brother Crompton, I thought that if a drawee intends to qualify his acceptance he must do so in unambiguous language." The present case is still stronger, being a promissory note. If the defendants by their signature intend to say that what they promised to do is to pay the amount annexed to their signature at the date mentioned in that memorandum, and are not bound by the terms in the body of the note, it follows that they are bound to do so in the most unambiguous language. In this case, I have shown that the memorandum at the end of the signature does not in unambiguous language state that the maker is not to be bound by what he has expressly declared in the body of the assignment.

In the case of Ferris and Bond, 4 Barnewall and Alderson, 679, it was held that a note beginning in the body of it, "I, A B, promise to pay," and signed "A B, or else C D," was a good note against A B. In other words, that the body of the note prevailed over the signature, and, consequently, that it was not a note (which, in fact, would be bad) that either A B or else C D was to be bound by it. It was held that the words "or else C D" was only evidence against C D of a conditional agreement to pay if A B should not.

In this case, I think we may fairly and reasonably hold that the words annexed to the signature were not sufficiently clear to show that the signer of the note intended to do that by his signature which was expressly at variance with what he was stated to have promised in the body of the instrument. I think that the Court is bound to put a reasonable construction in cases like this, and not to allow a man to use ambiguous language for the purpose of getting rid of a contract upon the ground that it was not sufficiently stamped. It would indeed be very hard

upon parties if a law which was made simply for the purpose of revenue should be so applied as to allow men to make contracts, and then to violate them.

It appears to me that the decree ought to be amended by adding to the amount of the decree the amount due upon this note, with interest thereon at 12 per cent. per annum from the 1st of October 1868. The appellant to have his costs on scale No. 2.

Macpherson, J.—I admit that if it had been clear from the words added by the person who signed the note, that his intention was that the note was not to be payable *on demand*, there would have been no promissory note at all. But I think it is extremely doubtful what was the real object in adding those words. Mr. Kennedy has contended that the way to read the note is by treating it as a note payable "at 45 days' sight, on demand," or "on demand after 45 days"—a reading absolutely inconsistent with the terms of the note as it originally stood. But it appears to me more probable that the intention was merely to show that interest was not to begin to run until after the lapse of 45 days, or that, if the money was paid before the lapse of 45 days, discount was to be allowed.

We have the evidence of the person who signed the note, and it appears that he himself did not know the meaning of the words which he added. Madhub Chunder Dutt says: "I was servant of K. C. Chaile "and Kedarnath Dey. I signed the promis- "sory notes. I was a servant of the firm from "its commencement. I was the gomashta. "I was gomashta to K. C. Chaile and Kedar- "nath Dey. I was gomashta of the business "of K. C. Chaile and K. N. Dey. Gudadhur "Dey used to work. The business of K. C. "Chaile and K. N. Dey used to be carried on "by Gudadhur Dey. Gudadhur carried it on. "This is signed by me. I was in the "habit of signing promissory notes. Guda- "dhur told me to do so. I signed the two "names to this by authority of Gudadhur "Dey." Then in answer to Mr. Kennedy he says: "*I wrote 45 days from 5th August. "I was told to do so. Gudadhur told me. "I don't know the meaning of it. Guda- "dhur told me and I wrote it. I know no- "thing about its meaning.*"

In further examination by Mr. Kennedy, he says: "I knew the goods used to be pur- "chased and delivery taken. The terms were, "money was to be paid 45 days after the "goods were brought: always 45 days after "delivery. The note was signed on the "goods being delivered. After the goods "were delivered the notes were brought to "me and I signed them. Money has been "paid within the term and discount allowed, "and money has been paid after the term. "*If money was paid within 45 days, dis- "count was allowed. That was what I "was told to write and I wrote it.* I wrote "according to my directions."

So that, in the first place, he says he does not know what he meant; and, in the second place, he says that he meant that which is entirely opposed to what Mr. Kennedy contends that he may have meant. In my opinion there is nothing to lead me to suppose that he intended to alter the note from being a note payable "on demand" to a note which was not payable on demand.

Therefore, I think the note is sufficiently stamped, and ought to have been admitted in evidence.

The 23rd June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble J. B. Phear, *Judge.*

Limitation—Merchant and trader—Balancing of accounts—Section 8, Act XIV. of 1859.

Appeal from the judgment of the Hon'ble J. P. Norman, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Sreenath Dass (Defendant), *Appellant,*

versus

Parke Pittar and another (Plaintiffs), *Respondents.*

Branson for the Appellant.

The Advocate-General (*Graham*) and *Evans* for the Respondents.

The period of three years allowed to a merchant by Section 8, Act XIV. of 1856, to sue another on a balance of accounts as on mutual dealings, was intended to be reckoned from the time when the balance of accounts is struck; and the Legislature contemplated that such balance would be struck yearly.

THE plaintiffs in this suit sued the defendant to recover from him the sum of

Rupees 3,772-13-6, money due and payable by the defendant to the plaintiffs on the balance of the account current between them in respect of mutual dealings with each other for the price of goods sold and delivered by the plaintiffs to the defendant at his request, and for money paid by the plaintiffs to the use of the defendant at his request, and for money lent to the defendant by the plaintiffs, and for interest on such money-payments and advances forborne at interest by the plaintiffs at the request of the defendant, and for money found to be due from the defendant to the plaintiffs on accounts stated between them, between the 22nd day of February 1866 and the 25th May 1867. They alleged that in the years 1865 and 1866 the defendant indented through them for the supply of large quantities of merchandize, and signed in respect of each of such indents a letter, of which the following, signed on the occasion of the first indent, was a copy:—

"*Calcutta, 20th December 1865.*

"MESSRS. CHARLES NEPHEW & CO.

"DEAR SIRS,

"We beg to hand you an indent for the following goods, which you will please order out from England on our account and risk. We hereby engage to take delivery of the goods on arrival direct from the ship, and to pay all duties and charges incidental thereon, together with your agent's usual commission of 5 per cent. on the transaction, and authorize your agent or agents to draw upon us for the total amount of invoice at 60 days' sight for such goods as are shipped in sailing vessels, and at 10 days' sight for such goods as are sent overland, at current rate of exchange for Bills against indents, and which Bill or Bills we hereby bind ourselves to accept on presentation and pay at maturity.

"In the event of the goods arriving before the said Bills become due, we agree to retire such Bills under discount at the rate of the Bank of Bengal at the time being; should we fail to accept or to pay at maturity such Bill or Bills, we hereby authorize you to dispose of the goods either by private sale or public auction on our account and risk, and we hereby bind ourselves to make good any loss or deficiency arising from such sales, waiving all claims of any advantages thereon." At the foot of such letters a description of the goods to which each indent referred was written.

Plaintiffs went on to say that the several goods so indented for were, from time to time, shipped by their London agents, Messrs. Parke Pittar and Co., who forwarded the shipping documents to them through a Bank to whom the goods were pledged, and Messrs. Parke Pittar and Co. drew on the defendant for the amount of such consignment, and such drafts were forwarded to the plaintiffs and presented by them to defendant for acceptance, and on the payment of his acceptances the shipping documents relating to the goods against which such drafts had been drawn were made over by plaintiffs to defendant, who obtained delivery of the goods. On the 22nd February 1866, the defendant, being unable to honor one of his acceptances for the indented goods, requested time for payment, which the plaintiffs consented to give on defendant's accepting plaintiffs' draft for Rupees 417-1-9, being the amount of his dishonored acceptance, with interest, which defendant did, and plaintiffs thereupon credited him in account with the amount of his renewed draft. The defendant subsequently dishonored various other acceptances so given by him, and the plaintiffs at his request renewed such acceptances, and defendant was credited in account with the amount of such renewed acceptances, and debited with the amount of his dishonored acceptances and interest, plaintiffs holding the shipping documents as security for the payment of such renewed acceptances. The defendant made payments on account to plaintiffs, and received from plaintiffs shipping documents for goods of an equivalent value, and such payments were credited to defendant in account current. He also from time to time purchased various goods from plaintiffs, and the plaintiffs also from time to time purchased goods from the defendant. Some of the defendant's acceptances were dishonored by him, and plaintiffs consented at defendant's request to their renewal on several occasions, plaintiffs retaining in their possession the shipping documents relating to the goods against which such acceptances were originally given, and which goods were sent by certain ships and were subsequently sold by plaintiffs towards payment of defendant's renewed acceptances, and in terms of the letters ordering the several indents signed by the defendant, who was

credited with the amount realized by such sales.

The plaintiffs alleged that their cause of action in respect of the said balance arose on the 30th day of June 1867, being the end of the commercial year in the accounts of which there occurred the last item in the said account current indicating the existence and continuance of mutual dealings and transactions between the plaintiffs and defendant as merchants and traders.

The substantial defence of the defendant was that the account in the plaint mentioned was not an account as between merchant and trader who had had mutual dealings with each other, and consequently the suit was barred by limitation.

The following judgment was passed by Norman, J, at the original hearing:—

The question in this case turns on the construction of Section 8 of Act XIV. of 1859. That Section enacts that in suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned as the same is reckoned in the accounts. The first and important question is—are the accounts between the plaintiffs and the defendants, accounts current between merchants and traders who have had mutual dealings? The words have been considered in an appeal from this Court in its Original Jurisdiction, and a liberal construction put on the words. The defendant is a general merchant dealing in brandy, precious stones, and other merchandize. He employs plaintiffs as his agents to get goods from London on indent, and he purchases also from them goods supplied in Calcutta in the ordinary course of business. The plaintiffs, Messrs. Charles Nephew and Co., render themselves responsible to the parties executing the indents. The plaintiffs have been in the habit of taking up the bills drawn against the goods shipped on the indent and drawing upon the defendant Sreenath Dass, and from time to time renewing the two bills as they fell due. The three bills put in are renewals dated August and September 1866. It appears that the plaintiffs have, in execution of orders received by them, required small quantities of the brandies consigned under the indents. They have as merchants, and not for mere private or domestic purposes, ordered three cases in one instance, and one case in another, of defendant who has supplied them as a merchant. The question is whether there is a mutual dealing between the parties. The plaintiffs having acted as defendants' agents, I find as a fact that the plaintiffs and the defendant are merchants and dealers who have had mutual dealings. The next question is—what was the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings? It appears to me the acceptance by the defendant of the bills renewed in August and September 1866, were acts which indicated the continuance of the mutual dealings, showing that the parties were dealing in the same way as they had previously done up to that time. The next question is—what is to be considered the close of the year of the dealings that then took place? The 8th Section provides that such year is to be reckoned as the same is reckoned in the accounts. I can only conclude that the year is not necessarily to be the English year or the Bengalee, Sumbut, Mahajunee, or Fuslee year, but may be something different. It is to be the year as reckoned in the accounts. If the accounts are made to the particular date on which the books are closed, I think the parties are allowed three years from the end of such conventional year. In the present case the plaintiffs' books are regularly made up year by year to the 30th June. The suit, therefore, having been brought within three years from 30th June 1867, appears to me to be within time.

The defendant appealed against this judgment on the following grounds:—

First.—For that the said learned Judge ought to have held that, under Clause 9, Section 1 of Act XIV. of 1859, the claim of the plaintiffs was barred, and ought therefore to have dismissed this case.

Second.—For that the said learned Judge was in error in holding the plaintiffs' claim was of the nature of mutual dealings between merchants and traders, when he ought to have held that there was no evidence of mutual dealings between the plaintiffs and the defendant within the meaning of Section 8 of Act XIV. of 1859.

Third—For that the said learned Judge was in error in allowing the plaintiffs to reckon their year from the 30th day of June of one year to the 30th day of June in the next year, inasmuch as, the plaintiffs being European merchants, their year ought to have been held to run from the 1st day of January to the 31st day of December.

The judgments of the Appellate Bench were delivered as follow :—

Couch, C. J.—I think that the judgment of Mr. Justice Norman must be confirmed. There is no question here that both parties are traders—that they had mutual dealings. Now, Section 8, Act XIV. of 1859, says nothing of the extent of the mutual dealings. In this case there were two dealings; one was a purchase by the plaintiff from defendant of two cases of brandy; and the other the purchase of one case. These constituted a case of mutual dealings. I don't see if we went into a consideration of the extent of mutual dealings, that there is anything at all to guide us in the case of mutual dealings. The only question is whether Mr. Justice Norman was right with regard to the mode in which he reckoned the year. Section 8 says that, "in suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned as the same is reckoned in the accounts."

The Legislature would seem to have contemplated that the accounts would be yearly accounts, and that the balance would be struck yearly; and I think, when we look at the reason of that provision, it must mean that the year was intended to reckon from the time when the balance was struck. The object seems to me to be this, that if there were accounts between the parties, in many cases there would be no right to sue at all until a balance is struck; and in other cases, even if there were a right to sue, the merchant would not sue without a balance being struck. It was intended that the year should reckon from the period when he might be expected to sue on the balance, and he is to have 3 years from that time as in ordinary cases. Mr. Branson has argued that this construction would enable parties to bring false actions by making up books. It may be that fraud would be practised in some cases, but we must not put a forced construction on an Act for the purpose of preventing fraud. Fraud is prevented in other ways and by the Criminal Law. This observation was made in a recent case before the House of Lords, where it was argued against the law with regard to the endorsement of one of a set of Bills of Lading passing property that it would open a door to fraud, and Lord Westbury replied that fraud was prevented by other means, and not by putting a construction on a law with the view to prevent fraud. That is an answer to Mr. Branson's argument that parties would fabricate books to avoid the operation of the Limitation Law. If a party is able to do that, he would possibly find some easier method than making up books for a long series of years.

The decree of the learned Judge will be affirmed with costs.

Phear, J.—I quite concur. There can, I think, be no doubt in this case that the parties are traders, and that there have been mutual dealings between them as traders. However, during the consideration of the case, I felt that there was some difficulty in arriving at a conclusion with regard to the year to which the Section refers. The words of the Act are: "In suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved."

I have no doubt that the Chief Justice is correct in the supposition that the framers of the Act when wording this Section, had present to their minds only the case of yearly accounts. But even if that be so, it does not necessarily follow that the year to which they refer in this Section is the period of 12 months at the lapse of which the accounts are made up. But probably the reason which actuated the Legislature in giving the special period of limitation is that which was pointed out by Mr. Evans, namely, that it is reasonable not to force a merchant to sue until the period has elapsed at which he usually makes up his accounts with his constituents; and if that be the proper guide for the construction of this

Section, then I think we must take it that the year which is here mentioned is the 12 months which the merchant takes customarily for the currency of his accounts before balancing them. It appeared to me at first that the last words of the Section which define, so far as the Legislature has defined, the year which was contemplated, namely, "such year to be reckoned as the same is reckoned in the accounts," meant the year of the style in which the accounts were kept. They seemed to me to bear that meaning more readily than any other; and that meaning would certainly make the Section more completely operative than the one which I have already said I believe that the Legislature did really intend them to carry. I say more completely operative, because there is a class of cases, more or less large, and which will certainly not be easily brought within the scope of this Section with the meaning of the word *year* which we have felt obliged to give it; that is, all those cases in which the merchant or trader balances his accounts at the lapse of periods which are less than 12 months. We have in this account examples of such cases, but it is rather difficult to foresee what would be the result of applying this Section to one of them.

The 15th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble J. P. Norman and W Markby, *Judges*.

Damages — Landlord and tenant — Negligence.

Appeal from the judgment of the Hon'ble A. G. Macpherson, exercising the ordinary original civil jurisdiction of the High Court.

C. Koegler & Co. (Plaintiffs), *Appellants*,

versus

A. Yule & Co. (Defendants), *Respondents*.

The Advocate-General (*Graham*) and *Woodroffe* for the Appellants.

Kennedy and *Evans* for the Respondents.

The plaintiffs, the landlords of certain premises, let the upper storey to the defendants for the purpose of using it as a godown for storing merchandize, and retained possession themselves of the lower storey where they stored their own goods The only condition put on the defendants by the terms of their lease was that no combustible or hazardous goods should be stored in the godown. The defendants stored the godown, among other things, with casks of white and red lead and cases of tins. The flooring of the upper godown fell in and damaged the goods belonging to the plaintiffs, which were in the lower storey The plaintiffs sued the defendants for damages in consequence of the loss occasioned thereby.

Held that, as the storage of the goods in the upper floor was a lawful user, and authorized by the terms of the tenancy, and the defendants did not, on the evidence, load an unreasonable and improper quantity of goods upon it, they were not liable.

In the case of landlord and tenant, the true rule is that the tenant is not liable unless the premises are used in an unreasonable and improper manner, or for a different purpose from that for which they were let.

Where the facts are equally consistent with the presence or absence of negligence, the plaintiff cannot recover; and the defendant is not bound to show that there was no negligence.

THE plaintiffs in this suit sought to recover the sum of Rupees 2,944-11-3, being the amount of damages sustained by them. The plaintiffs alleged that the defendants were tenants of the plaintiffs of the upper part of a godown in Clive Street, which the plaintiffs held on lease from the Oriental Bank Corporation, the owners thereof, which upper floor the defendants held of the plaintiffs upon the terms that the defendants should use the same in a tenant-like manner, yet the defendants used the said premises in an untenant-like and improper manner, and loaded on the upper-floor an unreasonable and improper weight of white lead and other merchandize, whereby the said upper floor broke and fell in, and the goods of the plaintiffs were damaged and injured, and thereby loss and damages were sustained to the said goods to the amount of Rupees 2,944-11-3, for recovery of which sum with interest the plaintiffs brought this suit.

The defendants in answer acknowledged that they hired from the plaintiffs the upper floor of the premises in the plaint mentioned, for the purpose of using the same as a godown or warehouse for the storing of goods and merchandize; but they denied that they used the said in an untenant-like or improper manner, or that they loaded on the said upper floor an unreasonable or improper weight of white lead and other merchandize, or that the breaking and fall of the said floor in the plaint mentioned was occasioned by any untenant-like or improper act of the defendants. They averred that, on entering into possession of the upper floor, they loaded thereon in a tenant-like and proper manner a reasonable and proper weight of merchandize, and such as the floor of a godown used for the storing of merchandize ought to have been capable of sustaining, being at the time of storing the said merchandize ignorant of the

facts hereinafter mentioned, which rendered the said premises incapable to support such weight, and part of the said upper floor broke and fell in. They then set forth a statement showing, as nearly as they could estimate the same (part of the merchandize so stored having been destroyed by the fall of the said floor), the total weight and the average weight per superficial foot of the merchandize so stored by the defendants upon the portion of the said floor which fell down, which they made out as follows:—

SPACE that came down measured 30 x 24 feet = 720 square feet, 2,051 packages weighing 974 cwt., or 1 cwt. and 1 qr. the square foot.

The part which did not fall down was stated to be 70 x 24 feet=1,680 square feet, and to have had on it 5,668 cases, weighing 2,126 cwt., or a little more than 1 cwt. and 1 qr. the square foot.

The part near the staircase was represented as measuring 17 x 24 feet=408 square feet, and containing 606 packages weighing 246 cwt., or a little more than 1½ cwt. to the square foot.

The defendants then stated that they had the premises inspected by Mr. Clark, Engineer to the Justices of Calcutta, who made the inspection in the presence of Mr. Osmond of the firm of Mackintosh Burn and Co. on behalf of the plaintiff; and Mr. Aitchison of the firm of Messrs. Burn and Company on behalf of the Oriental Bank Corporation; and from information supplied by the Surveyor they went into a calculation of the thickness and breaking strength of the girders, and stated that the girders were not calculated safely to support the brick arching and floor above; that it appeared from the said inspection that the said godown was originally constructed as a godown with only one floor, and the upper-floor upon which the said merchandize of the defendants was stored was originally the roof of the building, and was not constructed for the purpose of storing merchandize thereon, as the defendants, when they hired the said building, reasonably expected that it was; and that two of the said three girders were slightly defective.

The defendants, in conclusion, contended that, even if the Court should be of opinion that the weight of the merchandize loaded upon the floor by them was improper and unreasonable yet, inasmuch as the defective state of the building contributed to the falling of the floor, the defendants were not liable for any damage occasioned thereby, and they put the plaintiffs to proof of the amount of damage stated in the plaint to have been sustained by them by reason of the fall of the upper floor.

The plaintiffs made counter allegations and gave counter evidence with regard to the strength of the flooring and the breaking weight of the girders, &c.

The following is the judgment of Macpherson, J., which was the subject of this appeal:—

The plaintiffs in this case let to the defendants a godown on an upper storey, being the first floor of No. 2, Clive Street; and it appears from two letters which passed between the parties at the time of the letting that the only condition made by the plaintiffs was that "no combustible or hazardous goods" should be stored in the godown. The present suit is brought by the plaintiffs to recover damages from the defendants, in consequence of the floor which was let to them having given way and caused injury to the goods of the plaintiffs stored below. The plaint alleges that the defendants hired the premises of the plaintiffs upon the terms that the defendants should use the same in a tenant-like manner, yet the defendants used the said premises in an untenant-like and improper manner, and loaded on the said upper floor an unreasonable and improper weight of white lead and other merchandise, whereby, on or about the 19th day of May 1869, the said upper floor broke and fell in, and the goods of the plaintiffs and the defendants were damaged.

Upon this plaint the only issue is whether or not the defendants used the upper floor in an untenant-like and improper manner, and loaded an unreasonable and improper weight on it.

It seems to me that no question of implied warranty that the premises let should be suitable for the purpose for which they were hired arises necessarily in this action, because the suit is brought by the landlord who seeks to recover damages from his tenants for improper and untenant-like use of the premises. If the defendants were hereafter to sue the plaintiffs for damages (which I am very far from advising them to do). the question would then probably arise whether there was any such warranty.

The issue being whether the defendants used this godown improperly, and there being nothing in the appearance of the

godown to indicate to an unprofessional observer that it was especially weak, it seems to me that the question is not so much what precise weight the floor could carry safely, or what precise weight of goods was, in fact, stored upon it, as whether the defendants, acting as they did, acted in an improper and untenant-like manner. Upon the evidence it is clear that the general user of this godown by the defendants was not dissimilar to that of its former tenants—Messrs. Schoene Kilburn & Co. But there is this difference in the defendants' mode of using the room, that—in addition to wine and light goods, such as had always been stored there—at the time that the accident occurred, sixteen casks of white and red lead and certain cases containing tin plates were stored in the godown; and these latter articles are undoubtedly not light goods. In considering the question whether the defendants acted in an improper and untenant like manner, it really comes to this—that almost the only point I have to decide is whether they acted improperly and unreasonably in taking these casks of white and red lead and these tin plates into the godown.

There is not much material discrepancy in the evidence of the three professional gentlemen who have been examined, except perhaps that Mr. Clark put the bearing power of an ordinary warehouse floor higher than the other two. They were all agreed that the breaking weight of the girders which gave way was 35 tons, and that it required a distributed pressure of 183 cwts. per superficial foot to cause them to break. Mr. Aitchison, speaking probably chiefly from his English experience, said that an ordinary floor ought to carry 1 cwt., and a common warehouse floor 1½ cwt. per superficial foot. Mr. Osmond, speaking chiefly from Calcutta experience, said that 1 cwt was sufficient in either case, while Mr. Clark said that floors ought to carry from 1½ to 2 cwts. per foot.

On the whole, I am inclined to act upon Mr. Aitchison's evidence, and to hold that a warehouse-floor should be able to carry 1½ cwt. per foot. Taking that as the weight which an ordinary warehouse-floor ought to be able to bear, I think there was nothing improper or unreasonable in the weight the defendants placed in this godown. There is a certain amount of discrepancy, as pointed out by Mr. Graham, in the evidence as to what the upper floor contained at the time of the accident. But the defendant Mr. Brown and his sircars having stated to the best of their knowledge what goods were in the godown, and having said that all the goods in it were accounted for except 77 dozens of bottles which were supposed to have been broken and could not be traced, I think I may safely take the quantities to have been substantially such as they are stated by the defendants to have been. So I think I may also take the weights on the several parts of the floor to have been substantially such as they are said by the defendants to have been. Mr. Brown says that he himself weighed the cases and calculated the average weights; and without saying that his figures are strictly accurate, I have no doubt they are sufficiently so for the present purpose. He says that there was in the western portion of the room, which remained standing, only a distributed pressure of 2 qrs. and 21 lbs. per superficial foot; on the eastern portion a pressure of 1 cwt. 1 qr. and 2 lbs.; while the goods which had been stored on the portion which fell gave a pressure of only 1 cwt. 1 qr. and 6 lbs. Even making a liberal allowance in addition to these figures, the result would still not show that there was anything very unreasonable in the weight the floor was required to bear. Mr. Aitchison deposed that an ordinary warehouse-floor ought to be able to bear 1½ cwt., and that the weight of the floor itself ought not to be more than ½ of the whole weight which it can bear. This being so, it cannot, in my opinion, be said that the quantity of goods placed in the room by the defendants was unreasonable or improper or such as a tenant exercising ordinary caution might not have placed there even if ¼th be deducted as the weight of the floor itself from the ½ cwt. which such a floor ought to be able to bear.

It is true that the whole of the heavy goods were stored in the part of the floor that gave way, and it is possible, as suggested by Mr. Graham, that even if the whole weight in that part, if distributed, was only 1 cwt. 1qr. and 6 lbs., those heavy goods may have been improperly heaped together on one spot. But beyond the fact, admitted by the defendants, that the goods were stored on the portion of the floor which gave way, there is nothing in the evidence to show that they were improperly stored by being heaped together or piled one upon the other. It lay upon the plaintiffs to show that the premises were used in an improper manner. In my opinion, as the mere fact of placing these heavy goods in the godown at all

was not of itself an improper or unreasonable proceeding, the fact that they were stored over the part that gave way is not in itself sufficient to prove that there was any specially bad storage as regards those goods in particular, so as to justify me in holding that the defendants used the premises in an improper and untenant-like manner.

I do not consider it necessary to go very closely into all the details of the evidence. I base my opinion on a general view of the evidence as to the weights and quantities actually on and in the godown, and as to the bearing power of the floor in ordinary godowns. The case is one in which the plaintiffs ought to have protected themselves by express stipulation if they did not mean the godown to be used as it was. Suit dismissed with costs on scale No. 2.

The plaintiffs appealed against the above judgment on the following grounds:—

1.—That on the evidence there had been an unreasonable and improper use of the upper floor of the godown by the defendants in storing white paint and other heavy goods thereon, and that, by reason thereof, the said floor fell and caused the damage to the plaintiffs' goods beneath.

2.—That the learned Judge ought to have decided the case on the question whether the defendants loaded on the upper floor an unreasonable and improper weight of merchandize, and on that to have decreed in favor of the plaintiffs, whereas he decided the case (as the plaintiffs submit wrongly in fact) on the question whether the defendants used the godown in a tenant-like manner.

3.—That it was proved, in fact, that the upper floor gave way by reason of its having been overloaded by the defendants; and that the defendants ought, under such circumstances, irrespective of any question of landlord and tenant between them, to have been decreed liable to make good the damage to the plaintiffs' goods.

4.—That there was no warranty on the part of the plaintiffs in letting the said godown that the upper floor would stand any degree of pressure, or that it was fit to store merchandize in.

5.—That even if there were a warranty that the said godown should be reasonably fit for the storing of merchandize, there was on the evidence an overloading by the said defendants beyond the weight which the floor would reasonably have been expected to bear.

The judgments of the Appellate Bench were delivered as follow:—

Couch, C. J.—The substance of the plaint in this case is that the defendants were tenants to the plaintiff and his deceased partner, of the upper floor of a godown in Clive Street, Calcutta, and that they loaded on the upper floor an unreasonable and improper weight of white lead and other merchandize, whereby it broke and fell in, and the goods of the plaintiff and his deceased partner were damaged. The suit was heard before Mr. Justice Macpherson, who considered that the only issue upon the plaint was, whether or not the defendants used the upper floor in an untenant-like and improper manner, and loaded an unreasonable and improper weight upon it: and finding that in the defendants' favor, he dismissed the suit with costs The plaintiff has appealed from this decree.

Before considering the question of law which has been raised, it will be better to state the view I take of the facts. Mr. Justice Macpherson says: "It is clear upon the evidence that the general use of the godown by the defendants was not dissimilar to that of its former tenants; but there was this difference in the defendants' mode of using the room—that in addition to wine and light goods, such as had always been stored there, sixteen casks of white and red lead and certain cases containing tin plates were stored there at the time of the accident." This has not been disputed before us. Some evidence was given for the plaintiff that it is not usual in Calcutta to store heavy goods in an upper floor. That does not appear to have had any weight with the learned Judge, and, I think, rightly; because, if the floor is not loaded in any part with a greater weight than it ought to be able to carry, the description of the goods is not material, and the letter of the 5th of February 1869 puts no restriction upon the use of the godown except that no combustible or hazardous goods should be stored in it. And it is not alleged in the plaint that it was part of the terms of the tenancy that heavy goods were not to be stored in it. There was also evidence for the defendants that heavy goods are sometimes stored on an upper floor. Upon the evidence of the three professional witnesses, Mr. Justice

Macpherson held that a warehouse-floor should be able to carry 1½ cwt. per foot; and he concluded from the evidence that the goods which had been stored on the portion of the floor which fell gave a pressure of only 1 cwt. 1 qr. and 6 lbs. The learned Judge was satisfied with the evidence of Mr. Thomas Brown, an assistant to the defendants, as to the storing of the goods; and I see no reason for thinking that he was wrong in this, or that we ought to come to a different conclusion on this point. If the pressure was only 1 cwt. 1 qr. and 6 lbs., it would not make any difference whether the goods were light or heavy goods. But there is evidence in the case, not noticed in the judgment, which should be considered. Mr. Aitchison, one of the plaintiff's witnesses, who went to the premises a day or two after the accident and examined the floor, said he agreed with Mr. Clark as to the weight of the floor, and he should not have considered such a floor calculated to store merchandize on; "I mean," he said, "a floor having such a weight of brickwork on the girders;" that there ought to be a surplus strength of ¾ after the merchandize was on; he would not expect a floor to break with ½ cwt. above the average; and he said the floor had the appearance of having been a roof; he imagined it had been a roof originally. Mr. Osmond, another of the plaintiff's witnesses, said he did not consider the girders proper girders for a floor for merchandize; and that he would not anticipate danger from storing 1½ cwt. on a proper upper warehouse floor. Mr. Clark, the defendants' witness, said that he made about 35 tons, distributed, to be the breaking weight of the girders, in which the other witnesses agreed with him, and that he made the weight of the floor 15 tons on each girder, and considered the proper load for an iron girder certainly not exceeding ⅓ of its breaking weight; that he considered 1 cwt. a low estimate for the weight of goods that might be stored; and these girders were only sufficient for the floor, even then they were loaded above the ⅓; and that no unprofessional person who had not ascertained the state of the floor could have anticipated danger from it. Mr. Aitchison also said that no unprofessional man could judge that the floor was not suited for a warehouse. This evidence, I think, shows that the girders were not sufficient for the floor of an upper storey to be used as a godown, which was what the plaintiff and his deceased partner let it for; and that the defendants had no reason to suspect that the girders were not sufficient.

Upon these facts, then, I have to consider whether the defendants are liable for the damage which the plaintiff has sustained.

In the argument before us, the Counsel for the plaintiff relied upon the rule of law laid down by the Court of Exchequer Chamber and the House of Lords in Fletcher *versus* Rylands, Law Rep., 1 Ex. 265; Rylands *versus* Fletcher, Law Rep., 3 H. L. 330. There "A" was the lessee of mines, and B the owner of a mill standing on land adjoining that under which the mines were worked. B desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. A had worked his mines up to a spot where there were certain old passages of disused mines. These passages were connected with vertical shafts which communicated with the land above, and which also had been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or contractor to block up these shafts; and shortly after water had been introduced into the reservoir, it broke through some of the shafts, flowed through the old passages, and flooded A's mine. The Lord Chancellor (Lord Cairns) said that the principles upon which the case must be determined appeared to him to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of enjoyment of land, be used; and if, in what he might term the natural user of that land, there had been any accumulation of water either on the surface or under ground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which he might term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in manner not the result of any work or operation or under the land; and if, in consequence of their doing so, or, in consequence of any imperfection

in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appeared to him that that which the defendants were doing they were doing at their peril; and if, in the course of their doing it, the evil arose to which he had referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in his opinion, the defendants would be liable.

It appears to me that, applying that principle to the present case, the defendants are not, upon the facts which have been proved, liable for the injury which the plaintiff has sustained. The upper floor was let by the plaintiff and his partner to the defendants to be used as a godown, and the storing of goods there was a purpose for which it might, in the ordinary course of enjoyment, be used. The storing of the goods on the upper floor was a lawful user and authorized by the terms of the tenancy. As long as the defendants used the upper-floor in a reasonable and proper manner, and did not load an unreasonable and improper quantity of goods upon it, they were not using it for a purpose which the Lord Chancellor says he might term a non-natural use. To make the principle applicable, it was necessary for the plaintiff to show that the defendants used the floor in an unreasonable and improper manner, and this he has failed to do; because, although in some cases an accident of this kind might of itself be evidence that the upper floor was unreasonably and improperly used, it cannot be so where it is proved that the floor was insufficient to bear the weight which might ordinarily and properly be put upon it.

Where the facts are equally consistent with the presence or absence of negligence, the plaintiff cannot recover—Cotton *versus* Wood, 8 C. B.. N. S., 568—and the defendant is not bound to show that there was no negligence. Lord Cranworth said he concurred in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the Exchequer Chamber: "If a "person brings or accumulates on his land "anything which, if it should escape, may "cause damage to his neighbour, he does so "at his peril. If it does escape and cause "damage, he is responsible, however care-"ful he may have been, and whatever pre-"cautions he may have taken to prevent "the damage." But I think these words must be understood with reference to the facts of the case before him, where the person was not the tenant of his neighbour, and the bringing the thing on the land was not in accordance with, or authorized by, the terms of a tenancy between them. This appears more clearly in Mr Justice Blackburn's judgment. He says: "We think "that the true rule of law is that the person "who, for his own purposes, brings on his "land and collects and keeps there anything "likely to do mischief, if it escapes, must "keep it at his peril; and if he does not "do so, is *primâ facie* answerable for all "the damage which is the natural conse-"quence of its escape. But he can excuse "himself by showing that the escape was "owing to the plaintiff's default, or, perhaps, "that the escape was the consequence of "*vis major*, or the act of God; but as "nothing of this sort exists here, it is un-"necessary to enquire what excuse would "be sufficient. The general rule, as above "stated, seems on principle just. The per-"son whose grass or corn is eaten down by "the escaping cattle of his neighbour, or "whose mine is flooded by the water from "his neighbour's reservoir, or whose cellar "is invaded by the filth of his neighbour's "privy, or whose habitation is made un-"healthy by the fumes and noisome vapours "of his neighbour's alkali works, is damni-"fied without any fault of his own; and it "seems but reasonable and just that this "neighbour who has brought something on "his own property (which was not naturally "there) harmless to others so long as it is "confined to his own property, but which, "he knows, will be mischievous if it gets "on his neighbour's, should be obliged to "make good the damage which ensues, if "he does not succeed in confining it to his "own property. But for his act in bringing "it there no mischief could have accrued, "and it seems but just that he should at his "peril keep it there, so that no mischief may "accrue, or answer for the natural and "anticipated consequence. And upon author-"ity, this, we think, is established to be the "law, whether the things so brought be "beasts, or water, or filth, or stench."

Mr. Justice Blackburn does not say that, if the person damnified had let the reservoir to his neighbour, and he was only using it in the ordinary way, or had let the alkali works, and the fumes and vapours were only such as were ordinarily caused by the use of the works, that the tenant would be liable

for the injury. None of the cases which he proceeds to notice would have supported this proposition, and I think it is clear from the whole of his judgment that he would not have applied the rule in such a case.

In the case of landlord and tenant, the true rule seems to be that the tenant is not liable unless the premises are used in an unreasonable and improper manner, or for a different purpose from that for which they were let. The operation of the rule *sic uti suo ut non lædat alienum* is qualified by the tenancy, by which an authority is given to use premises in a certain manner. It would be obviously unjust to make the tenant liable to make good to the landlord any injury to him which is caused only by the premises being so used. The case of Murchie *vs.* Black, 34 L. J., C. P., p. 337, was decided upon this principle. There it was held that the license of the vendor of two adjoining lots of lands, the plaintiff standing in exactly the same position as if his lot had remained in the vendor's possession, took away that which would otherwise have been a cause of action for depriving his building of the support it had from the defendant's land; and Rowbotham *vs.* Wilson, 6 E. & B., p. 593, and 8 H. L., Cases, 348, is an analogous case. The landlord has taken upon himself the risk of the premises being used as a godown, and the rent may be considered as partly paid for it. I think the true principle has been applied in this case, and that, upon the evidence which was given, the plaintiff is not entitled to recover for the damage he has sustained.

Mr. Justice Norman has authorized me to say that, although he does not entirely concur in this judgment, he does not think it necessary to give a separate one.

Markby, J.—I am of the same opinion.

The 5th September 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Markby, *Judge*.

Limitation—Registration—Promissory Note—Clause 10, Section 1, Act XIV. of 1859—Clause 7, Section 16, Act XVI. of 1864.

Appeal from the judgment of the Hon'ble J. P. Norman, exercising the ordinary original civil jurisdiction of the High Court.

The Official Assignee on behalf of Peary Chand Mitter and another (Plaintiffs), *Appellants*,

versus

A. B. Fraser (Defendant), *Respondent*.

Ingram and *Cunningham* for the Appellants.

The Advocate-General (*Graham*) and *Goodeve* for the Respondent.

The words "any deed, bond, contracts, or obligation" in Clause 7, Section 16, Act XVI. of 1864, include a promissory note, which may therefore be registered. The promissory note in this case having been executed at a time when Act XVI. of 1864 was in force, the period of limitation applicable to this suit was held to be three years by reason of Clause 10, Section 1, Act XIV. of 1859.

THE plaint in this case, which was filed on the 7th of June 1870, was in the following words:—

"The plaintiffs seek to recover from the defendant the sum of rupees six thousand, the amount of two promissory notes made in Calcutta by the defendant in favor of the plaintiffs, each dated the seventeenth day of July one thousand eight hundred and sixty five, for rupees three thousand each, and payable respectively thirty and sixty days after the respective dates thereof.

"The plaintiffs also seek to recover from the defendant interest on the said sum of rupees six thousand from such dates and at such rates as this Hon'ble Court shall be pleased to allow."

The promissory notes were annexed to the plaint and were in the following terms:—

"Company's Rupees 3,000.

Calcutta, 17th July 1865.

Thirty/Sixty days after date I promise to pay Messrs. Peary Chand Mitter and Sons or order the sum of Company's Rupees three thousand only, for value received.

(Signed) "A. B. FRASER."

The defendant filed an affidavit in which, after reciting the terms of the plaint, he said that he was informed and believed that the said promissory notes might have been registered, but were not registered under the provisions of Act XVI. of 1864; that, on the 8th June 1870, he was served with the writ of summons issued in this suit, and on the 10th of June he entered an appearance in this suit through his attorneys Messrs. Pittar and Cammell; that on the 14th of June, an order was made by this Court on the application of the plaintiffs' attorneys, whereby it was ordered that the plaintiffs and the defendant should, within one week from the service upon the defendant's attorneys of the said order, file their respective written statements in this suit; that he was informed and believed the said order was served on his said attorneys on the 16th of June; that on that day he gave full instructions to his attorneys on the subject of this suit; and he had been since advised and believed that the plaintiffs' claim in this suit was barred by limitation; and also that the plaint in this suit disclosed no cause of action within the period of limitation.

This affidavit was supported by an affidavit by the defendant's attorneys, in which it was stated that after the above affidavit of the defendant had been settled and engrossed, they received a letter from the plaintiffs' attorneys, in which they forwarded the plaintiffs' written statement with a view to cover any defects in the plaint, and requested that it might be taken to supplement the plaint.

Norman, J., after calling on the plaintiffs to show cause to the contrary, ordered that the plaint should be taken off the file, on the ground that it disclosed no cause of action within the period of limitation, and directed plaintiffs to pay the defendant his costs on scale No. 2. His judgment was delivered in the following terms:—

In this case the Advocate-General obtained a rule calling on plaintiff to show cause why the plaint should not be taken off the file. The suit was brought on two promissory notes dated in July 1865. The plaint was admitted on the 7th of June 1870. The ground of the application was under Clause 10, Section 1 of the Limitation Act, which says that in a case in which there is a written contract which could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of limitation shall be three years from the time when the debt became due, or when the breach of contract in respect of which the action is brought first took place, unless such contract shall have been registered within six months from the date thereof. The Advocate-General pointed out that, under the 16th Section of Act XVI. of 1864, the Registration Act in force when these promissory notes were made, they might have been registered under 7th Clause of Section 16 under the words "any "obligation." Mr. Ingram has contended that the contract or obligation must be taken in a restricted sense, as including contracts between two parties actually contracting, and not contracts such as bills of exchange and promissory notes, which are transferable. I think it quite plain that a promissory note is a contract; and if there is any doubt whether the word "contract" is used in such a sense, there is no doubt that the word "obligation" is wide enough to take them in. There is no exception in the 16th Section as to any species of contract or obligation which the party is not to have the option of registering; and as the enactment is very beneficial and simply gives a privilege, there is no conceivable reason for limiting the words to any particular species of contract. The Schedule of the Stamp Act of 1862, Schedule A, Clause 10, in which bill, &c., are followed by the words, "or other order, &c.," show that the word obligation is used by the Legislature in a wide sense and includes promissory notes. I am of opinion that the notes might have been registered; and as they were not registered, the limitation is three years, and not six, and the plaint must be taken off the file, with costs.

The plaintiffs appealed from this judgment on the following grounds:—

First.—That the learned Judge was mistaken in holding that the plaint disclosed no cause of action within the period of limitation.

Second.—That the learned Judge was mistaken in holding that the promissory notes mentioned in the plaint could have been registered under the Registration Act of 1864.

Third.—That the learned Judge was mistaken in ordering the plaint in the above case to be taken off the file.

The judgment of the Appellate Bench was delivered as follows:—

Couch, C. J.—Clause 10, Section 1 of Act XIV. of 1859 provides that where there is a written engagement or contract which could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of limitation shall be 3 years from the time when the breach of contract in respect of which the action is brought first took place. The words are—"engagement or contract "which could have been registered by "virtue of any law or registration in force "at the time and place of the execution "thereof;" and the object of this provision appears to me to be to encourage parties to avail themselves of the power which may be enforced by any Registration Law in force for the registration of instruments, and it puts a written instrument, which ought to be registered and is not registered, in the same position as if no written engagement had been made at all. Now, could this promissory note have been registered at the time it was made? That depends on the words of Act XVI. of 1864, Section 16, which are—"any deed, bond, contract, or other obligation." I cannot, looking at the provisions of this Act, see any ground for limiting the ordinary meaning of those words. That they are intended to extend to contracts for money, is clear by the use of the word "bond." A promissory note is clearly a contract or obligation of that description, and comes within these words, taking them in their plain and ordinary meaning. No doubt a difficulty is apparently created by Section 28 as to the mode of registration. That Section provides that an instrument which is to be registered shall be presented by all the parties executing it. But I don't think that we would be justified by that Section in holding that these general words do not include a promissory note, because it is a strange provision that the party who executes a bond should go and have it registered. There might be a contract in which it would be singular that the party who executes the contract should go to register it. It might be that the party who gets the benefit of the contract should get it registered. This Registration Act has not apparently been drawn with reference to any instruments in the Act which require registration; but I

don't think we are justified in limiting the meaning of the general words, "any deed, bond, contract, or other obligation."

Then, with regard to the policy of the enactment, it was argued by Mr. Ingram with some force that it is impolitic that instruments such as these should be registered, and that they are not the sort of documents which the Legislature should think ought to be registered. We find that 3 years after, the Legislature in unmistakeable terms allows bills of exchange and promissory notes to be registered. Although the question is not without difficulty, I think that we would not be justified in limiting those words in the Act of 1864—the instrument being one which might have been registered if the parties had wished it. The only effect is this, that a promissory note not being registered, the party has only such a period to sue upon it as he would have had if no promissory note had been executed at all. It does not affect the negotiability of the instrument; nor does it become less operative as a security for money. It only deprives it of the advantage of having a longer period within which a suit might be brought. I don't see anything very impolitic that an ordinary promissory note for payment of money should be sued upon, as if a party had lent money and had taken no promissory note at all. I, therefore, think that the judgment of Mr. Justice Norman should be affirmed with costs to be paid by the appellant, the Official Assignee. Whether the Assignee will recover the amount of the costs through the Insolvent Court is not a matter for this Court.

Markby, J., concurred.

RULES OF THE HIGH COURT.

Alteration in the Jury Rules.

It is ordered that the Jury Rules passed by the High Court of Judicature at Fort William in Bengal, and which came into effect on the 1st of December 1869, be amended by omitting the words "of whom one-third shall be Natives" from Rule VIII. Clauses 1 and 2.* Dated this 16th day of July 1870.

(Sd.) R. COUCH.
" G. LOCH.
" H. V. BAYLEY.
" J. P. NORMAN.
" F. B. KEMP.
" L. S. JACKSON.
" J. B. PHEAR.
" E. JACKSON.
" W. MARKBY.
" F. A. GLOVER.
" DWARKANATH MITTER.
" C. HOBHOUSE.

Rules of the High Court of Judicature at Fort William in Bengal, relating to the admission of Appeals to Her Majesty in Council, and to the transmission of such Appeals to England.

I.—EVERY petition for the admission of an appeal, under Section 39 of the Letters Patent, shall contain, amongst other things, an application for a Certificate either that the—

(1) Value of the sum, or matter at issue, or of the property to which the claim or question relates, is not less than Rs. 10,000;

(2) Or that the case is a fit one for appeal.

Upon such petition and application being made, notice will be served on the opposite party to show cause, within the time specified in the notice, why such Certificate should not be granted; and any vakeel who appeared for such opposite party in the High Court shall be bound to accept service of such notice; and such service shall be binding on the client.

If such Certificate be not granted, the petition will be dismissed.

II.—With the petition, or within six months from the date of the decision appealed against, the appellant shall furnish security for the costs of the respondent, to the extent, in ordinary cases, of Rs. 4,000; such security may consist either of cash or Government Securities, or of immoveable property; or the appellant, if the appeal be against a judgment passed in Original Jurisdiction, may enter into a recognizance with two Sureties to be approved by the Registrar.

When the security offered consists of immoveable property, the appellant shall file a mortgage-bond duly registered, together with a specification of the Surety's title.

When such bond has been filed, the Court shall direct the security to be tested either by the Registrar, or by the Judge of the Zillah Court in which the immoveable property pledged is situated. If the security be found insufficient, the appellant shall be bound, within six weeks from the date of an order to that effect, to deposit cash or Government Securities to the extent of Rs.

* 12 W. R., Jury Rules, p. 2.

4,000, or to such amount as may raise the value of such security to Rs. 4,000.

But in any special case, the Court may, if it think fit, on the application of the respondent, require security to a larger amount, in no case, however, exceeding Rs. 10,000.

III.—It shall be competent to the Court at any time before the admission of the appeal, upon cause shown, to revoke the acceptance of any security, and to make further directions thereon.

IV.—With his petition for the admission of the appeal, the appellant shall deposit the sum necessary to defray the cost of translating, transcribing (or printing) and transmitting the record. Such sum shall be—in respect of appeals from the Appellate Side of the Court, either Rs. 2,000, or the sum certified by the Clerk of Privy Council Appeals as the probable cost of such transcript, and so forth, the estimate of such cost being prepared as directed in Rule XII.; and in respect of appeals from Original Jurisdiction, Rs. 500 when the record is not to be printed, or Rs. 700 when it is to be printed here.

V.—When the security has been approved and the deposit made for transcript, &c., under Rule IV., the Court may declare the appeal admitted; but if the petitioner shall not perfect his security, and make such deposit within such time as the Court may direct, his petition shall be dismissed.

VI.—After the lodging of the petition, or on the application of any party intending to appeal to Her Majesty in Council accompanied by a fee of Rs. 16, the Clerk of Privy Council Appeals shall forthwith prepare an estimate of the expense of translating, transcribing or printing, and forwarding to the Registrar of the Privy Council the record of the case, including a margin of Rs. 500, and shall furnish such estimate to the Vakil or Attorney of the appellant or applicant, who shall be bound to pay into Court, within one month from receipt of such estimate, the difference between the amount thereof and the amount already deposited, if any; provided that the appellant, within two weeks after his making payment, shall be at liberty to object to the estimate and to obtain the order of the Court on such objection.

VII.—The application for estimate shall state whether or not the transcript is to be printed in India.

VIII.—Ordinarily the whole record shall be transcribed with the following exceptions:

First.—Such formal documents as are directed by Clause 2 of Her Majesty's order in Council, dated 13th June 1853, to be excluded, and whereof the omission is to be certified in the second index.

Second.—Such papers as the parties may agree to omit.

Third.—Such accounts or portions of accounts as the Registrar or other officer empowered for that purpose may consider unnecessary, and as the parties may not have specifically prayed to include by application to the proper officer within one month from the filing of the petition in respect of the appellant, and from receipt of notice in respect of the respondent. Provided that neither of the parties shall be at liberty to apply for the inclusion of any account or part

of an account which has not been marked or endorsed as an exhibit under the 39th or 132nd Sections of the Code of Civil Procedure, unless with the special leave of the Court on motion made for that purpose. Provided also that if any party shall apply to have included in the transcript record any accounts or documents which the Registrar or other Officer may consider unnecessary, such document shall be translated and transcribed as an appendix to the transcript with a note of the circumstance.

IX.—All documents which are not originally in the English language, and which have not been translated for the use of the Court, shall be translated into English, and all translations made or used shall be revised and certified by the Sworn Examiner.

X.—An index of all the documents included in the transcript shall be prepared and annexed to the record in the form now in use, and shall be followed by a list of all other papers, documents, and exhibits in the cause not included in the transcript: the draft of this index, instead of a Vernacular list of papers (as hitherto supplied), shall be furnished to the parties, who shall be at liberty to object thereto within three weeks from date of receipt.

In the index and transcript, the papers shall be placed in the following order:

Plaint.
Written statements.
Examination of parties or their agents, &c.
Injunctions.
Orders of attachment, &c., (if any) obtained before judgment.
Issues framed (if any).
Exhibits of plaintiff.
———of defendant.
Depositions of witnesses for plaintiff.
——————— for defendant.
Report of Commissioner (if any) with maps, depositions, &c., annexed.
Judgment and decree.
Memorandum of appeal.
Cross-appeal or memo. of objections under Section 348 (if any).
Proceedings in Appellate Court (if any).
Judgment and decree of that Court.
Appendix (if any).
List of papers omitted under Clause 2 of Her Majesty's Order in Council, and under the 8th of these Rules.

XI.—The following charges shall be payable in respect of the matters specified :—

	Rs.	As.	P.
Estimate of costs	16	0	0
Translation of Vernacular portion of record, per 1,000 words	6	10	8
Examination of ditto	3	5	4
Copying English portion of record, for every 1,440 words, or part thereof	1	0	0
Examining ditto; for every 1,440 words, &c....	0	8	0
Transcribing (one copy) per folio of 72 words	0	2	0

(or at the option of appellant) Printing (55 copies), per printed page	3	8	0
Examination of transcript record for every 72 words or part thereof ...	0	1	0
Ditto correction of the Press, for every 1,125 words	1	0	0
Certifying two copies of printed record, for every 10 printed or manuscript pages, or part of 10 pages	1	0	0
Preparation of Index, for every 10 papers, or part of 10 papers ...	2	0	0

The above rates will be subject to alteration.

XII.—The estimate shall include these several matters, and be framed in accordance with the charges above specified; and any appellant who has filed his petition of appeal shall be deemed to have incurred the charge for the preparation of an index and estimate, whether the appeal be admitted or not.

XIII.—If at any time after the admission of the appeal, but before the transmission of the record to England, it be shown to the satisfaction of the Court that the security given by the appellant is insufficient; or it should appear to the Court that further payment is required for the purposes of the transcript, the Court may call on the appellant to furnish other and sufficient security, or to make the required payment within a time to be limited; and if the appellant fail to comply with such order, the proceedings shall be stayed, and the appeal shall not proceed without an order of the Judicial Committee, and in the meantime execution of the decree of the High Court shall not be stayed.

XIV.—When the record has been transmitted to the Privy Council, the appellant may obtain a refund of the balance, if any of the amount which he has paid into Court under Rules IV. and VII.

XV.—The foregoing Rules shall take effect from and after the 15th August next, all previous rules, including those made by the late Sudder Court by a Resolution bearing date 7th December 1858, being superseded and rescinded, and shall apply to all petitions now pending for the admission of an appeal to Her Majesty in Council, as if the same had been presented on the said 15th day of August.

(Sd.) R. COUCH.
" G. LOCH.
" H. V. BAYLEY.
" J. P. NORMAN.
" F. B. KEMP.
" L. S. JACKSON.
" J. B. PHEAR.
" E. JACKSON.
" W. MARKBY.
" DWARKANATH MITTER.
" C. HOBHOUSE.

30th July 1870.

Rules regarding Regular Appeals valued at 10,000 rupees and upwards.

The following Rules shall apply to all Regular Appeals, the value of which is Rs. 10,000 and upwards, which may be filed on and after the 14th day of November now next ensuing.

1. Within three weeks after the date of the notice of the arrival of the record of the suit, the appellant shall deliver to the Deputy Registrar, or to such other officer as the Chief Justice may direct, a list in writing in the English language, dated and signed by such appellant or his Advocate or Vakeel, of such of the documents and depositions of the witnesses, or of such portions thereof, as he requires to have inserted in the paper-book.

2. Any party, respondent, or his Advocate or Vakeel, may inspect and take a copy of such list at his own expense.

3. Within ten days after the date of such list, each party, respondent, shall deliver to the Deputy Registrar, or to such other officer as the Chief Justice may direct, a list in writing in the English language, signed by himself or by his Advocate or Vakeel, of such of the documents and depositions of the witnesses, or of such portions thereof as he requires to have inserted in the paper-book. Where several respondents appear by one Vakeel or Advocate, one list only need be filed; and it will not be necessary for the respondents to set down in this list any document or deposition or portion thereof, which the appellant has set down in his own list. But if any respondent considers that any document or deposition or portion thereof set down in the appellant's list is unnecessary, he is required to specify the same in his list, and to state that he objects to the translation and printing thereof.

4. If the suit has been already before the Court on appeal, the appellant shall so state in his petition of appeal; and each member of the Court shall be furnished with a copy of the paper-book printed on the former occasion. Nothing printed in the former book shall be again printed; but in the new book a reference shall be made to the page in the former book in which the paper is to be found.

5. Immediately upon the receipt of each list, the officer whose duty it is to receive the same shall make and deliver to the party furnishing the list an estimate of the costs of transcribing, translating, printing, and preparing the documents and depositions of witnesses or portions thereof required by such list, excluding from such estimate the plaint, written statements, issues, judgment of the Lower Court, and grounds of appeal; and the parties furnishing the list must, within one week after the delivery of the estimate, deposit with the Accountant of the Court the amount of such estimate; and in case of any party failing to do so, it shall be competent to the Court to treat him as in default.

6. If it shall be ascertained at any time that the sum deposited by any of the parties will not be sufficient to cover the actual costs incurred in respect of the papers specified in the list furnished by him or them respectively, the difference shall be estimated by the proper officer, and shall, on demand, be paid by the party whose deposit is insufficient, and if not paid within one week, none of the papers required by such party shall be inserted in the paper-book.

7. If the sum deposited by any of the parties shall exceed the actual costs incurred

in respect of the papers specified in the list furnished by him or them respectively, the difference shall be returned as soon as the actual costs incurred are ascertained.

8. The Court may at any time, upon sufficient cause shown or by consent of parties, enlarge the time for furnishing any list or making any deposit required by these rules.

9. A separate account shall be kept of the cost of transcribing, translating, and printing (1) the plaint, written statements, issues, judgment of the Lower Court, and grounds of appeal; (2) the documents and depositions of witnesses or portions thereof required by the appellant; (3) the documents and depositions of witnesses required by each of the respondents, and not required by the appellant.

10. The Deputy Registrar, or such other officer as the Chief Justice shall appoint, shall cause the documents and depositions or portions thereof so required by the said lists, and in respect of which the proper deposit has been made, to be (where necessary) translated into English, and shall cause the same to be printed, together with such lists and the grounds of appeal, all which, when so printed, shall form the paper-book to be used by the Court at the hearing of the appeal.

11. If there be cross-appeals against the same judgment, complete lists shall be filed by all the parties in each appeal, and the Deputy Registrar, or such other officer as aforesaid, shall, subject to the order of the Court, determine in what proportions the deposits are to be made. Nothing shall be printed twice over; but a reference shall be inserted in the proper place showing where a document not printed is to be found.

12. No document or deposition of any witness or portion thereof, which is not contained in the paper-book, shall be read at the hearing of the appeal without the special leave of the Court. It shall be competent to the Court to order such documents to be translated and transcribed or printed at the cost of the party requiring the same to be read.

13. The costs of transcribing, translating, and printing the documents and depositions of witnesses or portions thereof required by the several parties, other than the plaint, written statements, issues, judgment of the Lower Court, and grounds of appeal, and the costs of preparing the paper-books, shall be costs in the appeal, unless the Court hearing the appeal shall otherwise direct.

14. The costs of transcribing, translating, and printing the plaint, written statements, issues, judgment of the Lower Court, and grounds of appeal, shall not ordinarily be costs in the cause; but if the Court hearing the appeal shall consider that any portion thereof was unnecessary, and ought not to have been required, it shall so certify, and the costs of such portion shall be paid by the party requiring the same.

R. COUCH.
G. LOCH.
H. V. BAYLEY.
J. P. NORMAN.
F. B. KEMP.
L. S. JACKSON.
J. B. PHEAR.
E. JACKSON.
W. MARKBY.
DWARKANATH MITTER.
C. HOBHOUSE.

3rd September 1870.

Scale of fees for search, &c., in the offices of the High Court, appellate side

Notification.

(Appellate side.)

It is hereby notified that, with the sanction of His Excellency the Governor-General in Council, the following scale of fees has been introduced into the offices of the High Court on its appellate side; and that they will be chargeable from and after this date, *viz.*, the 14th November 1870.

Table of fees.

	Rupees.
For any Search in the offices, Record-rooms, and Books or Registers of the Court ...	1 0 0
For taking Solemn declaration or affidavit before the Deputy Registrar ...	2 0 0
For a certificate of enrolment as pleader of the High Court ...	50 0 0

By order, &c.,

(Signed) F. B. PEACOCK,

Registrar.

The 14th November 1870.

Rules regarding costs in suits in forma pauperis instituted in the original side of the High Court.

High Court, Original Jurisdiction.

In suits *in formâ pauperis* brought under the provisions of Chapter 5 of Act VIII. of 1859, no costs will be allowed to the pauper against the opposite party unless by special order.

2. No fees shall be payable by a pauper to his Counsel or attorney, nor shall any such fees be allowed on taxation of costs against the opposite party, unless by special order of the Judge who tries the case.

(Signed) J. P. NORMAN.
" G. LOCH.
" H. V. BAYLEY.
" F. B KEMP.
" L. S. JACKSON.
" J. B. PHEAR.
" E. JACKSON.
" W. MARKBY.
" F. A. GLOVER.
" DWARKANATH MITTER.
" W. AINSLIE.

The 25th November 1870.

Regulations as to the examination of persons desirous of being admitted attorneys of Her Majesty's High Court of Judicature at Fort William in Bengal.

1.—An examination for the admission of attorneys shall be held half-yearly on such days as the examiners, or any five of them, shall appoint.

2.—Every person applying to be admitted an attorney of the High Court shall, within

two weeks before the 1st of January, or the 1st of July, leave, or cause to be left, with the Registrar of the High Court, in case the applicant's qualification for admission depends on his service to an attorney, his articles or contracts of service, properly stamped (if entered into since the General Stamp Act, 1869), and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant and also by the attorney or attorneys with whom he shall have served his clerkship, or if his qualification depends upon his being an attorney or solicitor of Her Majesty's Superior Courts of Law or Equity in England or in Ireland, or the High Court of Madras or Bombay, due and sufficient proof of his admission in such Court.

3.—In case the applicant should show sufficient cause to the satisfaction of the examiners why the second regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the second regulation that they may think fit and reasonable.

4.—The applicant shall at the same time in all cases produce satisfactory testimonials to his good character and ability.

5.—Every person applying for admission shall also, if required, sign and leave, or cause to be left with the said Registrar, answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his said service and conduct; and also, if required, attend the said examiners personally for the purpose of giving further explanation touching the same, and shall also, if required, procure the attorney or attorneys with whom he shall have served his clerkship, as aforesaid, to answer either personally or in writing any question touching such service or conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

6.—Every person so applying shall also attend the said examiners at such place or places, and at such time or times, as shall be appointed for that purpose, and shall answer such questions as the said examiners shall then and there put to him, by written or printed papers, touching his fitness and capacity to act as an attorney.

7.—Upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present at and conducting the said examination (one of them being the said Registrar) shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so present, or the major part of them, shall certify the same under their hands in the following form, *viz.*:—

In pursuance of the rules of the High Court relating to the admission of attorneys, we, being the major part of the examiners actually present at and conducting the exa-

d

mination of A B, of, &c., do hereby certify that we have examined the said A B as required by the said rules, and we do certify that the said A B is fit and capable to act as an attorney of the said Court, and that we are satisfied with the assurance of his good character.

Questions as to due service of articles of clerkship to be answered by the clerk:—

1.—What was your age at your last birthday immediately preceding the date of your articles?

2.—Have you served the whole term of your articles at the office where the attorney or attorneys to whom you were articled or assigned carried on his or their business? and if not, state the reason.

3.—Have you, at any time during the term of your articles, been absent without the permission of the attorney or attorneys to whom you were articled or assigned? and if so, state the length and occasions of such absence.

4.—Have you, during the period of articles, been engaged or concerned in any, and, if any, what profession, business, or employment other than your professional employment as clerk to the attorney or attorneys to whom you were articled or assigned?

5.—Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business or employment, other than the profession of an attorney or solicitor?

Questions to be answered and certificate to be given by the attorney or attorneys with whom the clerk may have served any part of the time under his articles:—

1.—Has A B served the whole time of his articles at the office where you carry on your business? and if not, state the reason.

2.—Has the said A B, at any time during the term of his articles, been absent without your permission? and if so, state the length and occasions of such absence.

3.—Has the said A B, during the period of his articles been engaged or concerned in any, and, if any, what profession, business, or employment, other than his professional employment as your articled clerk?

4.—Has the said A B, during the whole term of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney or solicitor?

5.—Has the said A B, since the expiration of his articles, been engaged or concerned, and for how long time, in any, and, if any, what profession, trade, business, or employment, other than the profession of an attorney or solicitor?

And I do hereby certify that the said A B has duly and faithfully served under his

articles of clerkship (or assignment, as the case may be) bearing date, &c., for the term therein expressed, and that he is a fit and proper person to be admitted an attorney.

Directions to candidates.

Each candidate, on attending the place of examination, will have a number given to him, and will take the seat designated by such number. He will also be furnished with papers of questions on the several subjects of examination, which must be answered in writing.

The answers to the questions under the several heads are to be written on separate papers, prefixing to each answer the number of the question, and each paper should be written in a plain and legible manner and signed.

When the candidate has finished his answers, he will deliver them to the examiner or examiners present at the examination, together with his copy of all questions. No candidate is to communicate with, or receive assistance from, any one, or copy from the paper of another or from any body or writing, and any person who is found to have infringed this rule will be considered not to have passed his examination.

After the examination has begun, no candidate is to leave the room (without permission obtained) until he shall have delivered his answers, and any candidate who leaves the room without permission will not be allowed to return.

(Signed) R. COUCH.
" J. P. NORMAN.
" G. LOCH.
" H. V. BAYLEY.
" L. S. JACKSON.
" J. B. PHEAR.
" E. JACKSON.
" DWARKANATH MITTER.

Filed 1st December 1870.

Dates of the Criminal Sessions for 1871.

First Criminal Sessions			... Tuesday	... 17th January
Second	ditto	ditto	... Thursday	...23rd February
Third	ditto	ditto	... Tuesday	... 28th March.
Fourth	ditto	ditto	... Thursday	... 4th May.
Fifth	ditto	ditto	... ditto	... 8th June.
Sixth	ditto	ditto	... ditto	...13th July.
Seventh	ditto	ditto	... ditto	...24th August.
Eighth	ditto	ditto	... ditto	...21st September
Ninth	ditto	ditto	... Monday	... 4th December

CALCUTTA:
Crown Office,
The 2nd Dec. 1870.

C. C. MACRAE,
Clerk of the Crown.

The 19th December 1870.

Special Appeals.

Rules of Practice of the High Court, Appellate Side.

FROM and after the opening of the Court on the 4th day of January 1871, all applications for the admission of special appeals shall be presented in open Court.

By order, &c.,

(Sd.) J. H. BELCHAMBERS,

Depy. Registrar.

The 19th December 1870.

Reviews.

EVERY application for review of judgment, after having been submitted in the first instance to the Deputy Registrar or other proper officer of the Court, who will certify whether the petition is within time and properly stamped, shall be presented, either by the party in person or by a vakeel, by way of motion in open Court to the Judges whose judgment it is proposed to review, or to the senior of them, if they should not be sitting together.

This rule will take effect from the 4th of January next.

By order, &c.,

(Sd.) J H. BELCHAMBERS,

Depy. Registrar.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 4th June 1870.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Procedure—Magistrate of a District—Complaint—Section 66, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Beerbhoom.

The Queen *versus* Omesh Chunder Chowdhry.

A Magistrate of a District is competent, under Section 66 of the Procedure Code, and the Circular Order No. 6, dated the 16th March 1864, to make over a petition presented by a complainant for enquiry and trial to a Deputy Magistrate who exercises the full powers of a Magistrate.

Reference.—In accordance with the provisions of Section 434, Act XXV. of 1861, I have the honor to submit two cases tried by one of the Deputy Magistrates of this district, Baboo Nobeen Krishna Sircar, for the consideration and orders of the Hon'ble the Judges of the High Court. In both cases the objections have been raised on a point of law.

The parties in each case presented petitions to the Magistrate of the District, who, without examining the parties, and reducing the examination into writing, and without obtaining the signatures of the complainants or appending his own signature as Magistrate, referred the petition to the Deputy Magistrate for trial, the said proceeding being contrary to the provisions of Section 66, Act XXV. of 1867.

The Deputy Magistrate proceeded to the trial of the cases, and in one case convicted the defendants of rioting under Section 147 of the Indian Penal Code, and sentenced them to pay fines varying in amount, and in default to undergo rigorous imprisonment for one month. In the other case, he convicted the defendant under Section 379 of the Indian Penal Code, and passed a sentence of one month's simple imprisonment.

Under Section 411, Act XXV., 1861, neither of these orders are open to appeal. It is, however, quite clear that the Magistrate acted irregularly in not recording the examination of the complainants, as provided for under the provisions of Section 66, Act XXV., 1861, nor is it apparent that the Magistrate acted under the provisions of Section 66B, Act VIII., 1869.

A ruling of the High Court has also been quoted by the pleader who has requested the reference under Section 434, and in which similar proceedings were held to be irregular, *viz.*, the Queen *versus* Moheem Chundra Chuckerbutty and others, printed in the Bengal Law Reports, page 67, Appellate Jurisdiction, Criminal, dated 1st September 1869, and which is also printed in Volume XII., Weekly Reporter, page 49, Criminal Rulings, 1st September 1869—Bhuggobun Chundra Poddar *vs.* Moheem Chundra Chuckerbutty. According to this precedent, no complaint in either of the cases submitted having been made within the meaning of Section 66, the reference of the cases under Section 273, Criminal Procedure Code, by the Magistrate to the Subordinate Magistrate for trial, appears to be illegal, and consequently the proceedings of the Deputy Magistrate, being without jurisdiction, are, therefore, liable to be quashed, and the defendants discharged. In looking also into the evidence adduced on behalf of the prosecution in either case before the Deputy Magistrate, it can hardly be considered sufficient to substantiate the charge, and support the conviction.

I am well aware that, under Section 439 of the Criminal Procedure Code, no trial is liable to be set aside merely for irregularity of procedure, but under the precedent quoted above, and which appears to be directly in point, I have no alternative but to submit the two cases in question for the consideration and orders of the High Court.

The two records are herewith submitted.

Judgment of the High Court.

Kemp, J.—In the case referred to by the Judge—Weekly Reporter, Volume XII., page 50—there was a statement, but it was not

such a statement as to amount to the complaint contemplated by Section 66 of the Code of Criminal Procedure.

In the case referred to us, the Magistrate sent the petition presented by the complainant to the Deputy Magistrate, who exercises the full powers of a Magistrate. We think that, under Section 66 of the Procedure Code and the Circular Order No. 6, dated the 16th May 1864, the Magistrate of the District was justified in making over the petition to the Deputy Magistrate for enquiry and trial.

The 4th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Murder—Punishment.

Criminal Appellate Jurisdiction.

The Queen *versus* Bani Doss and others.

Committed by the Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of murder.

Baboo Kali Prosunno Roy for the Prisoners.

On a conviction for murder, the only punishments that can legally be awarded are death or transportation for life.

Bayley, J.—We are of opinion that this appeal must be rejected.

The first objection taken by the pleader is that, whereas the Judge and the Assessors referred to Section 299 of the Penal Code as indicating the offence of which the prisoners were guilty, the conviction should not have been under Section 302, and, therefore, the punishment should not have been that for murder; that the conviction should have been of culpable homicide, and the punishment for that offence.

In the main part of the judgment the Judge states that he concurs with the Assessors in finding the prisoners guilty *under Section 302.* In another part of the judgment, it is stated that the Assessors should consider all the prisoners as principals *in causing the death.* It is then urged that this is quite compatible with their verdict being one of culpable homicide only. This is plausible, but not a sound plea, for, comparing Section 300, Clause 4, with Section 299, there is really no material difference, the term in one case being "probable," and in the other "likelihood."

The vakeel for the prisoner then very strongly urges that the conviction is bad by reason of the evidence of witnesses being discrepant on material points, chiefly inasmuch as the evidence given before the Magistrate and that given before the Sessions Judge differs.

In all the instances that have been put before us, I really cannot find any such discrepancy as would make a reasonable man doubt that, on account of such discrepancies, the evidence of the witnesses is to be disbelieved.

The facts show there was angry abuse and then the assault. The time was twilight. The means of the witnesses' knowledge was the proximity of their residence. On the whole, we must be most fully satisfied that the finding of the Judge and Assessors is wrong on the evidence, before we should reverse the Judge's and Assessors' verdict. The Judge notes the demeanour of the witnesses as favorable to their credibility. Thus, upon the whole facts of the case, the Judge comes to an unanimous verdict with the Assessors against the prisoners, and, speaking for myself, I have not a shadow of doubt that the prisoners have been rightly found guilty upon the evidence.

Then it is urged that there was no premeditation, and that the second and third prisoners (Dutt and Hanoo) should have a lighter punishment, inasmuch as the evidence goes to show that they did not inflict the fatal blow, but that one gave a blow on the right side, and the other on the hand. On this point, I have only to say that the Judge is right in his law; that the prisoners concerned in a murder are all equally guilty; and that the law makes no distinction in the amount of their punishment for such offences. I have further to add that the law provides only two punishments for this offence, *viz.*, death and transportation for life. The Judge has awarded the lighter of these two to the prisoners, and, sitting as we do to administer the law as it is, we cannot make the punishment still lighter.

I would reject the appeal.

Markby, J.—I am of the same opinion. Upon the facts I do not think it necessary to say anything at all. The Judge and the

Assessors agree in their conclusions after a careful trial of the case on the evidence, and no sufficient ground is shown for us to interfere.

As to the ground that the Judge has overlooked the distinction between the last Clause of Section 299 and the 4th Clause of Section 300, if that is made out, no doubt it would be a good ground for us to interfere; but I think we must take the judgment of the Judge as a whole; and, taking it as a whole, I think it is quite clear that he finds upon the evidence that the parties concerned knew that the blow given was such as would, in all probability, cause death. Indeed, looking to the evidence and the nature of the weapon used, it is impossible that he could have come to any other conclusion.

As to the question of the mitigation of the sentence, I think that the sentence passed is the lowest permitted by the law, and that, therefore, we have no power to interfere.

The 11th June 1870.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Procedure—Trial of a case—Evidence.

Criminal Revisional Jurisdiction.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Judicial Commissioner of Chota Nagpore.

Kopil Nath Sahi *versus* Koneeram and others.

Where a case which has been partly heard by one officer is transferred to another officer for trial, the latter should hear all the evidence in the case before deciding it. The High Court, however, declined to interfere in a case of this sort, as the prisoners did not appeal or raise any objection to the trial on this ground.

Reference.—THE reason of this reference is that the evidence for the prosecution and the defence was taken by one Magistrate, whilst the officer who decided it only took the evidence for the defence, and then decided the case on evidence not given before him, and on it convicted the accused. It appears to me that such a proceeding is contrary to the provision of Section 276 of the Criminal Procedure Code, and that it was incumbent on the Magistrate, on the case coming into his file, to proceed in all respects as if no proceedings had been held by any other officer. It is, therefore, requested that, if this view of the matter be correct, then the High Court will be pleased to quash the trial, and order a new one to be held.

Judgment of the High Court.

Jackson, J.—The Judicial Commissioner is quite right in stating that the evidence should have been all heard by one officer, and he should point this out to the officer in fault. But, if the prisoners do not raise objections to the trial on this ground, we think we ought not to interfere. They have had the opportunity of appeal, and it does not appear that they have appealed.

The Judicial Commissioner has not called upon the officer, whose proceedings he states to be illegal, for any explanation, as directed by this Court in such cases.

The 11th June 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Procedure—Jurisdiction—Breach of the peace, —Affray—Riot—Cesses—Sections 62 and 282, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore.

Luchmiput Singh and Rautmul, *Petitioners.*

A Magistrate cannot pass an order under Section 62 of the Code of Criminal Procedure, directing a person to abstain from a certain act or to take certain order with certain property, unless he is satisfied that such direction on his part is likely to prevent, or tends to prevent, a riot or affray; nor can he pass an order under that Section or under Section 282 or any other Section of the law, calling upon a person to enter into recognizances not to collect certain cesses, though under Section 282 the Magistrate may bind him down to keep the peace, if there is sufficient evidence to show that a breach of the peace is imminent through his acts.

Hobhouse, J.—THE applicant before us, Rautmul, has been called upon by the Magistrate of Rungpore, first of all, to take certain order with certain property under his management under the provisions of Section 62 of the Code of Criminal Procedure; and, secondly, to enter into recognizance

to keep the peace in the sum of 20,000 rupees. The Judge was of opinion that neither of these orders could legally stand, and sent the record up to us, in order that, if we should agree with him in opinion, we should set the orders aside.

The first order is dated the 25th September 1869, and it runs in these terms :—

"An order under Section 62, Code of Criminal Procedure, to issue against Rautmul gomashta, that, with reference to the Batashun Pergunnah, he is to pass such orders on the zemindaree amlas, tehsildars, munduls, and putwarries so as to put a stop to the following exactions, *viz.* :—

The collection of the Gour Gosher Khazana.
" " " Shadi and Nika Salami.
" " " Fines for cutting trees and firewood.

"2. That copies of the orders issued by Rautmul be filed with the papers of the case within one week from this date.

"3. That a notice be also sent to the Cutcherry at Kootubpore, intimating that these collections are illegal.

"4. That a letter be written to Baboo Luchmiput Singh to the effect that the collection of all the arrears is likely to cause a serious disturbance in the pergunnah, and tend to affray and bloodshed, and that Rautmul be ordered to desist from the collection of the arrears and interest until further orders."

In a postscript it is added that "by arrears and interest are meant the arrears prior to the Bengali year 1275 up to the end of Bengali year 1274."

Upon the evidence on record it would seem that Rautmul before us is the gomashta of Luchmiput Singh, the putneedar of Batashun Pergunnah, and that, being such gomashta, he has been in the habit of superintending the collection of certain cesses. The order, therefore, is to direct him to discontinue the collection of these cesses for the arrears of the year 1274, or up to the year 1275. And the reason assigned for the order is that the collection of the arrears in question was likely to cause a serious disturbance in the pergunnah, and to tend to affray and bloodshed.

By the provisions of Section 62 of the Code of Criminal Procedure, it is declared that "it shall be lawful for any Magistrate by written order to direct any person to abstain from a certain act, or to take certain order with certain property in his possession or under his management, whenever such Magistrate shall consider that such direction is likely" (in this case it would be) "to prevent, or tend to prevent," a riot or affray.

Supposing, therefore, in this instance that, under the provisions of that Section, the Magistrate had authority to direct the applicant before us to abstain from collecting the cesses in question, and thereby, in the words of the law, "to abstain from a certain act, or to take certain order with certain property" under his management—supposing, I say, that this particular act of collecting cesses comes legitimately within the meaning of such an act as contemplated by Section 62 of the Procedure Code, still in the words of that Section the Magistrate would not be entitled to give a direction to the applicant before us to abstain from such act, unless he considered that such direction on his part was likely to prevent or tended to prevent a riot or affray. The Magistrate affirms in his order that such direction was necessary for such purpose; and, in the letter which he has addressed to this Court, he states that there is evidence on the record, showing that such direction was necessary for such purpose. We have, therefore, read very carefully every particle of evidence on the record, and we are of opinion that there is no legal evidence on the record showing that the direction to abstain from the acts in question—the acts of collecting the cesses—was necessary to prevent, or tended to prevent, a riot or affray: for there is not on the record one particle of evidence to show that the collection of such cesses was leading, or was likely to lead, to any riot or any affray.

We think, therefore, that this order of the 28th September 1869 must be set aside, as not having been passed upon any legal evidence.

Next, in regard to the order, also apparently of the 25th September 1869, to enter into recognizances. That order was in these terms :—

"Under Section 282 of the Code of Criminal Procedure, it is provided that it shall be lawful for the Magistrate of the District, whenever he shall receive credible information that any person is likely to do any act that may probably occasion a breach of the peace, to summon such person to attend and show cause why he should be

required to enter into a bond with or without sureties.

"The circumstances which led to the present proceedings have been detailed in full in my letter to Baboo Luchmiput Singh, Roy Bahadoor, the zemindar of the Batashun Pergunnah, a copy of which will be filed for ready reference with the papers of this case.

"While at Batashun, I was unable to obtain any credible information against Rautmul, the superintendent of Baboo Luchmiput Singh, simply because the zemindaree amlah were afraid to speak against him, and the ryots had no direct dealings with him, and therefore could only accuse him in general terms as the source of all their misfortunes. On my way back from Batashun, I took the evidence of Gooroo Gobindo Talukdar, formerly Naib Peshkar of the Batashun Pergunnah under Rautmul. His deposition was taken in the presence of Raj Chunder Roy, Rautmul's mooktear. His statement is clear, and shows what I all along suspected—that the orders for the collection of *shadi salami* emanated direct from Rautmul himself. I did not think it possible that a simultaneous attempt at collecting this illegal cess in all the villages of the pergunnah could have been made, had there not been some one guiding and directing the whole proceedings. That person, there is not the slightest doubt, was Rautmul. He admits that he was at the Kootubpore Cutcherry at the time of the Punga 28th Assar, and stayed there till the 24th and 28th of Srabun, when the Srabun kist began to be collected, and with it the *shadi salami*. He came back at the beginning of Bhadro, dismissed Gour Gobindo Talukdar, an old servant, and appointed Madhub Chunder Bhadoory in his stead. The evidence of Gour Gobindo is supported by all the facts which have been elicited in the course of the evidence taken by me; and I considered his evidence as sufficiently credible information on which to summon Rautmul to show cause why he should not be bound down to keep the peace. It must be recollected that Rautmul was bound down last year for the same act, *viz.*, for attempting to collect this *shadi salami*. He has so far disregarded the orders of the Magistrate as again to attempt to collect this very same cess. Had not the term of his former bond expired, I should have been compelled to hold it forfeited. As it is, Rautmul can plead nothing in his excuse. He only says that the ryots ought also to be bound down to keep the peace, and gives a long list of names of villagers, who, he considered, should be thus bound down. And why? because they complained at the Cutcherry of the exaction of his servants.

"As Rautmul has ever disobeyed and set at nought the order not to collect *shadi salami*, I consider it very likely that he will do so again, unless bound down under some very heavy penalty: should he repeat the attempt, a breach of the peace is almost certain.

"I therefore order Rautmul to give a bond of 20,000 rupees not to attempt to collect the *shadi salami* from the Batashun ryots for the space of one year."

The order, therefore, is an order not in so many terms to keep the peace towards certain persons, but in the words of the Magistrate an order upon Rautmul "not to attempt," under a penalty-bond of 20,000 rupees, "to collect the *shadi salami* from the Batashun ryots for the space of one year;" and the basis of that order is that, in the opinion of the Magistrate, if that *shadi salami* be continued to be collected, then in his own words "a breach of the peace is almost certain." Now, on turning to Section 282, it is clear that it is only necessary that a Magistrate should receive credible information that a person is likely to commit a breach of the peace, in order that the Magistrate may be justified in calling upon that person to show cause why he should not be required to enter into a bond to keep the peace with or without sureties; but when such person is called upon by the Magistrate to show cause why he should not enter into such bond, and appears for that purpose before the Magistrate, then, under the Full Bench ruling* of this Court, it would be necessary that the Magistrate should have legal evidence before him, showing that a breach of the peace was imminent by reason of the acts of the persons showing cause before him, before he can call upon that person to enter into recognizance to keep the peace. That is the Full Bench ruling as I understand it upon the words of Section 282—the words, namely, "If the Magistrate * * * shall be satisfied that it is necessary for the preservation of the peace to take a bond," then he should make an order accord-

* 12 W. R., Criminal, p. 60.

ingly. The Full Bench has ruled upon that Section that the word "*satisfied*" means satisfied by legal evidence properly taken before him.

Now, the Magistrate in this case states that the legal evidence taken before him was the evidence which we have now on the record before us, and especially the evidence of one Gooroo Gobindo Talookdar. We have looked through the record very carefully, and we have also specially considered the evidence of Gooroo Gobindo Talookdar. The first part of the record, consisting of evidence on oath that was taken on the 21st and 22nd September 1869, relates exclusively to the evidence of certain ryots as to the collection of certain cesses by the agent of the landlord, and in connection with the collections of those cesses the evidence relates to certain charges of extortion against certain agents of that landlord. Now, of course, if the agents of a landlord or any other persons are guilty of the offence of extortion, even though it be in the process of collecting dues which are legally theirs, then they are punishable under the proper Section of the Penal Code; and not only were they in this instance punishable, but certain of those agents were punished for the offence of extortion in the act of collecting the cesses in question. If those agents were acting under the direct instruction of Rautmul, the applicant before us, and the person called upon to enter into recognizance—if, that is, that person had been found upon the evidence to be abetting the offence of extortion on the part of his agents—then he might have been punished under that Section of the Penal Code by which abetment of the offence of extortion is punishable. But he has not been so punished, and rightly—for there is not on the record any evidence to show that he was a party to any such abetment.

But what we have to look to here is not whether any extortion was committed in the collection of those cesses, or whether, as the Magistrate evidently erroneously conceived, those cesses were legal or illegal; what we have to look to is whether there is on the record any evidence to show that a particular person, called upon to enter into recognizance to keep the peace, was likely to commit a breach of the peace or to do any act that might probably occasion such breach of the peace.

Now, there is no breach of the peace spoken of at all in any part of the evidence, nor does any single person say that the breach of the peace was imminent, much less that Rautmul was the person who was about to commit, or who was likely to occasion, a breach of the peace. None of the witnesses, whose evidence was taken on the 21st and 22nd September, say so.

It follows, therefore, that there is not on the record any evidence to show that Rautmul was a person from whom it was necessary for the preservation of the peace to take penal recognizance. Neither does the Magistrate in so many words call upon Rautmul to enter into recognizance for the preservation of the peace. What he calls upon him to do is something which the law does not in any way sanction, *viz.*, to enter into recognizance not to attempt to collect certain *shadi salami* cesses. Now, there is nothing in the law, except it be under the provisions of Section 62, which authorizes the Magistrate to direct Rautmul not to collect the cess in question; and even the provisions of that Section would not authorize the Magistrate to call upon Rautmul to enter into penal recognizance not to commit the act in question.

We are of opinion, therefore, as in the order passed under Section 62, so in the order passed under Section 288, that there is no legal evidence which justified the Magistrate in calling upon Rautmul to enter into the penal recognizance in question, and we direct that this order also be set aside, and the security-bond cancelled.

Loch, J.—It appears to me that the Magistrate had not authority to require the petitioner to enter into a recognizance not to collect certain cesses, though he might have been bound down to keep the peace, had there been sufficient evidence to show that a breach of the peace was imminent through his acts. I concur with my colleague that the orders of the Magistrate must be reversed.

The 18th June 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Whipping—Act VI. of 1864.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Rungpore.

Ruttun Bewa *versus* Buhur.

Jhowla *versus* Buhur.

Follows the Full Bench decision ruling that, when a person, who has been previously convicted (Section 4, Act VI. of 1864), is a second time convicted at one time of two or more offences, he may be punished with only *one* whipping in *addition* to any other punishment to which, under Section 46 of the Code of Criminal Procedure, he may be liable.

Hobhouse, J.—We understand the facts of this case to be these. On the information of one Ruttun Bewa, a person of the name of Buhur was found guilty of an offence within the meaning of Section 457 of the Indian Penal Code. Again, on the information of one Jhowla, the same person Buhur was found guilty of an offence within the meaning of Section 411 of the Indian Penal Code. The Deputy Magistrate, who tried the two cases, tried them apparently on the same day and at the same time, and on the 4th February 1870 passed a sentence upon the prisoner Buhur of two years' rigorous imprisonment and thirty stripes in each case. An appeal was made to the Judge in the case of Ruttun Bewa, and on that case the Judge very properly upon the record saw no reason for interfering, and dismissed the appeal. It is not certain whether any appeal was made to the Judge in the case of Jhowla *versus* Buhur. But, whether that was so or not, one thing is certain, and this is that the sentence of whipping in that case has not been carried out upon the prisoner. The Magistrate, therefore, points to the Circular Order No. 2 of the 6th April 1868,* and, apparently, though he does not say so, wishes us to set aside so much of the sentence passed against the prisoner Buhur in the case in which he was charged on the information of the complainant Jhowla as directs that he be whipped, on the ground that that part of the sentence is illegal.

On referring to the Circular in question, it would appear that it has been decided by the majority of the Judges composing the Full Bench of this Court,* "that when a person, who has been previously convicted of any offence, is a second time convicted at one time of two or more offences, he may be punished with one, but only *one*, whipping *in addition to* any other punishment to which, under Section 46 of the Code of Criminal Procedure, he may be liable."

In this case the prisoner Buhur was a person who had been previously convicted. He was, therefore, rightly sentenced on the first information, that of Ruttun Bewa, to stripes in addition to imprisonment. But, under the ruling of the Full Bench in question, so much of the sentence on the second information against the same prisoner, the information of Jhowla, as went to inflict stripes upon the prisoner, was illegal.

We, therefore, direct that so much of the said sentence be set aside, and that the Magistrate be informed that the sentence of whipping in that case must not be carried out upon the said prisoner.

The 25th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Procedure—Previousconviction—Evidence—Section 75, Penal Code.

Criminal Appellate Jurisdiction.

The Queen *versus* Naimuddi Sheikh *alias* Abbas Sheikh.

Committed by the Magistrate, and tried by the Additional Sessions Judge of the 24-Pergunnahs, on a charge of cheating.

To warrant a sentence awarding additional punishment under Section 75 of the Penal Code as on a second conviction, the evidence that there was a previous conviction against the accused under the Penal Code must be clear and precise.

Glover, J.—The conviction in this case must stand, as the trial was held with a Jury, and there is no point of law involved which affects the conviction.

But the additional punishment awarded by the Additional Sessions Judge, under Section 75, Penal Code, does not seem to be

* 9 W. R., Criminal Circulars, p. 3.

* 9 W. R., Criminal Rulings, p. 41.

warranted by the evidence. There was no record of any previous conviction put in on the trial, nor was there any previous evidence of the fact before the Sessions Judge. Two witnesses depose vaguely that the prisoner had been twice convicted of extortion, but they mention no dates, and do not produce any record of those convictions. Before the Magistrate there was a statement made by one of these witnesses, Ishan Chundro Dutt, that the prisoner had been convicted of the offence of extortion in 1859; but, if this were so, it would not bring the prisoner within the provisions of Section 75 of the Indian Penal Code—the previous offence having been committed before Act XLV. of 1860, the Indian Penal Code, came into operation.

The witnesses examined before the Sessions Judge speak only to the offence of extortion. There appears, however, to have been some evidence taken before the committing officer as to the conviction of the prisoner on charges of theft since the Penal Code came into operation; but the question was not raised before the Sessions Judge, nor was any evidence given in respect of such conviction at the trial.

The enhancement of punishment by the Sessions Judge proceeds solely on the ground that the prisoner had been previously convicted of extortion, so that, if it be admitted that the evidence was sufficient to prove that fact, which we should not be disposed to grant, it remains that that conviction, having accrued previous to the first of January 1862, would not bring the prisoner under the provisions of Section 75.

So much of the Sessions Judge's order as enhances the punishment under that Section is annulled. The sentence of seven years' rigorous imprisonment for the offence of cheating under Section 420, Penal Code, will stand.

The 25th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Procedure—Magistrate of a District—Discharge—Complaint—Section 435, Act VIII. of 1869.

Criminal Revisional Jurisdiction.

Revision of proceedings in the case of

The Queen *versus* Heera Lall Singh and others.

Mr. Hyde and *Baboos Jadub Chunder Seal* and *Mohinee Mohun Roy* for the Prisoners.

A Magistrate of a District has power, under Section 435, Act VIII. of 1869, of dealing with cases triable by a Court of Session or by a Magistrate of a District, in which an accused has been discharged by any Magistrate, and with cases in which a complaint has been dismissed without enquiry, provided that the proceedings were held by a Subordinate Magistrate; but *quære* whether in such cases he ought to order a commitment to the Sessions or a new trial before another Magistrate.

Jackson, J.—THE petitioners were charged with an offence under Section 148, Indian Penal Code, which is an offence triable before the Court of Session or the Magistrate of a District. The charge in the first instance was preferred before Mr. * * *, who seems to be a Subordinate Magistrate. This officer, after examining certain witnesses, discharged the accused. The case, however, being brought to the notice of the Magistrate of the District, Mr. Hankey, he was of opinion that the proceedings of the Subordinate Magistrate had been hurriedly and carelessly taken, and observed that the complainant was entitled to have his witnesses examined; and he, therefore, acting under the powers conferred by Section 435 of Act VIII. of 1869, ordered a further enquiry into the complaint, and directed that the case be made over for trial to another Magistrate, who, as I understand, exercises the full powers of a Magistrate. That Magistrate convicted the accused, and sentenced them to imprisonment and fine. The accused appealed to the Court of Session, objecting, amongst other things, to the proceedings on the ground that they were not warranted by Section 435. The Sessions Judge, however, overruled this objection, and, going into the merits of the case, confirmed the conviction and sentence. The case is now brought before this Court under Section 404 of the

Code of Criminal Procedure, and we are asked to set aside the proceedings of the Magistrate on the ground of their being contrary to law.

It is contended that the Magistrate of the District was not warranted in dealing with this case as one which had been dismissed without inquiry. It is further contended that, supposing the Magistrate to have been authorized to deal with the case, the only order that he could make was an order of commitment to the Court of Session.

The Magistrate, under the amended Section 435, has, like the Court of Session, power of dealing with cases in which an accused has been discharged by any Magistrate, and also cases in which a complaint has been dismissed without enquiry, always under the condition that the Magistrate, whose proceedings are the subject of notice, is a Subordinate Magistrate. The Magistrate of the District has dealt with the case as if the complaint had been dismissed without enquiry, and the Sessions Judge takes the same view of the case.

There is authority in a ruling (which, though, perhaps, not a judicial ruling of this Court, is contained in a letter written by way of direction to a Sessions Judge), which is to be found in III. Weekly Reporter, p. 21, for saying that a complaint dismissed without sufficient and full enquiry may be considered as dismissed without enquiry. I am inclined to think that this authority warranted the Magistrate of the District in dealing with the case as he did. If not, however, it is clear that he would still have authority to order a commitment, or do whatever is implied in the term "like powers;" and a question may arise what precisely is contemplated by those words, namely, whether it is intended expressly to limit the Magistrate of the District to order a commitment to the Court of Session, or to enable him by analogy to take order for the trial of the case before some competent Court of criminal jurisdiction. I incline upon the whole to the construction that a Magistrate is bound to order a commitment, and is not authorized to order a trial before another Magistrate.

But, whatever view may be taken of the meaning of this part of the Section, I think we are precluded from disturbing the proceedings of the Court below, by reference to Sections 426 and 439 of the same Act. Section 426 says: "No finding or sentence "passed by a Court of competent jurisdiction "shall be reversed, or altered on appeal or "revision, on account of any error or defect, "either in the charge or in the proceedings "or trial, unless the accused person shall "have been sentenced to a larger amount "of punishment than could be awarded for "the offence of which, in the judgment of "the Appellate Court, the accused person "ought, upon the evidence, to have been "found guilty, or unless, in the judgment "of the Appellate Court, the accused person "shall have been prejudiced by such error "or defect;" and Section 439 provides: "No trial in any Criminal Court shall be set "aside, and no judgment passed by any "Criminal Court shall be reversed, either "on appeal or otherwise, for any irregularity "in the proceedings or the trial, unless "such irregularity have occasioned a failure "of justice."

In this case the parties appeared to have been tried and convicted by a Court of competent jurisdiction. It seems to me that, unless we are of opinion that the irregularity, supposing an irregularity to have occurred, had been productive of failure of justice, we ought not to set aside the trial or to reverse the sentence by way of revision. It is not shown that anything of the sort has occurred; and I think, therefore, that this application must be disallowed.

The 30th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Procedure—Confession—Evidence—Magistrate's attestation.

Committed by the Magistrate, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of murder.

Criminal Appellate Jurisdiction.

The Queen *versus* Misser Sheikh and another.

Mr. H. E. Mendies for the Prisoners.

It is not necessary for a Sessions Judge to read out to prisoners confessions made by them before a Magistrate, and ask them if they have any objection to the reception of these confessions. The examination of prisoners before a Magistrate is to be received in evidence, and the attestation of the Magistrate is *primâ-facie* proof of the circumstances.

Jackson, J.—It seems to me no case is made out for disturbing the conviction and sentence of the Court below. The circumstances are, I think, stated fairly and properly to the Jury. The Judge told them that the two prisoners, who were the only other male adults residing in the village, were the only persons on whom suspicion could fall. That was the Judge's opinion, and it seems a very natural suggestion to make to the Jury; but it was one upon which the Jury would exercise their own judgment. This was a circumstance alleged by way of corroboration of the evidence given by the approver-witness.

In addition to that, it seems there were confessions made by the prisoners themselves before the Magistrate. Stronger corroboration than this it is difficult to conceive.

In respect of these confessions, an argument is advanced to the effect that it was the business of the Judge to read out the confessions to the prisoners at the trial, and specifically to ask them whether they had any objection to the reception of those confessions.

I am not aware that there is any warrant for this contention. The Code expressly declares that the examination of the prisoners is to be received in evidence; and that the attestation of the Magistrate (which is to be received without formal proof, unless the Court doubt its genuineness) is *primâ-facie* proof of the circumstances. It seems that in this case the prisoners had no objection. They said nothing upon the subject, and called for no witnesses.

I think the appeal must be rejected.

Glover, J.—I concur.

The 2nd July 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Procedure—Conditional Pardon—Examination before Magistrate—Certificate—Evidence—Sections 205, 211, and 366, Code of Criminal Procedure.

Criminal Appellate Jurisdiction.

The Queen *versus* Petumber Dhoobee.

Committed by the Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of murder.

Where a person to whom a tender of conditional pardon has been extended is considered by the Sessions Judge not to have conformed to the conditions under which pardon was tendered, the Sessions Judge, in exercising the power given him by Section 211 of the Code of Criminal Procedure, ought not to try him along with the prisoners in whose case he has already given testimony.

Where a statement made by a prisoner before a Magistrate, though signed by the Magistrate, does not contain the certificate directed by Section 205 of the Code of Criminal Procedure, it does not of itself constitute *primâ-facie* evidence of the examination within the meaning of Section 366 of that Code; and, if other proof is not given to show that the statement was made by the prisoner before the Magistrate, the statement is not admissible as evidence at the Sessions.

Phear, J.—We agree with the Judge that this is a most unsatisfactory case; but we think that part of this result is due to the mode in which it has been carried through the Sessions Court. It was certainly, to say the least of it, unfair to put Ishoree on her trial together with the other prisoners, in the course of whose trial, already commenced, she had given testimony as a witness under oath. The consequence of such a proceeding as this was necessarily, as far as the Assessors were concerned, that she was, in truth, put to trial upon evidence part of which she had given herself; for the statements which she had made before the Assessors involuntarily when under examination, and her behaviour at the time, could not possibly be without effect upon their minds when they came to consider her case. And, moreover, if other evidence had been taken before her own, so far as that may have borne against her, it was not properly material upon which to try her case, because she had no opportunity of cross-examining. Doubtless, the Court of Session had power under Section 211, upon its being made to appear to it that Ishoree in giving her evidence had not conformed to the conditions under which her pardon was tendered, to withdraw the pardon, and to direct her commitment for trial. Whether mere belief on the part of the Judge, drawn from the behaviour of the witness that he is not speaking the truth at the Sessions trial, is sufficient to satisfy the terms of the Section, may be doubted. But, at any rate, the Judge should have taken care that Ishoree was tried independently of the prisoners in whose case she had already given testimony, and so have prevented all matter of prejudice arising from this course, not only to herself, but to them. It is clear that much of the disinclination on the part of the Court to extend to Petumber the same favorable construction of the evidence which had been made in favor of the other prisoners arose from the circumstance that Ishoree appeared to be

nearly connected with Petumber, and had, as the Court thought, made an exhibition of prevarication and falsehood in the witness-box. We cannot help thinking that Petumber has been prejudiced by the circumstance that Ishoree was removed immediately from the witness-box to the dock.

If we look into the grounds given by the Judge and Assessors for convicting Petumber, we find that the evidence given against him in no way differs from the evidence which was given against the other prisoners (and which was disbelieved by the Judge so far as it affected them), excepting only that he made some statement before the Deputy Magistrate, which the Court considered to be sufficient to corroborate as against him the other evidence given in the case.

Now, in the first place, we fail to discover from the record that any legal evidence was before the Court of Session, of that which was stated by Petumber before the Deputy Magistrate. There appears to be a version of what he there stated, purporting to be signed by the Deputy Magistrate. But this does not contain the certificate which is directed to be given by Section 205, Criminal Procedure Code—a certificate under the signature of the Magistrate to the effect that the examination of the prisoner was held in his presence and in his hearing, and containing accurately the whole of the statement made by the accused person. An examination so signed by the Magistrate, and so certified, may, no doubt, be given in evidence at the trial at the Court of Session against the prisoner; and in that case the attestation of the Magistrate is sufficient *primâ-facie* proof of the examination. But, if this certificate is absent, the alleged examination does not bear on its face the proof which the law requires, and does not of itself, we think, constitute *primâ-facie* evidence within the meaning of Section 366, because the signature alone of the Magistrate is not the attestation which that Section contemplates. No doubt, the contents of this writing might otherwise by proper proof have been shown to be the statement which the prisoner made before the Magistrate. But it does not appear that this course was taken at the trial. But, even if the examination without this certificate be in its nature admissible, without further proof, as evidence against the prisoner, we cannot find anything in the record or in the judgment of the Sessions Judge to show that it was, in fact, put in as evidence before the Court of Session.

On the other hand, it does appear from the notes of the Judge, appearing at the commencement of the proceeding in the margin opposite to the plea of the prisoner Petumber, that some statements of his made before the Deputy Magistrate were brought under the notice of the Court. The statements go further than that which appears as the examination of the prisoner signed by the Magistrate, and, so far as we can see, they must have been irregularly admitted. But, moreover, if the statement of the prisoner before the Magistrate, which the Judge refers to in his judgment, really were properly before the Court, it does not seem to us that it affords the corroboration which the Judge considers it to amount to. Putting it on one side, the rest of the evidence goes to make out that the prisoners, Chundernath being at the head of them, with other persons commenced beating Jaffir and Lochun in Lochun's house; that they then dragged Lochun and Jaffir from Lochun's house to Ishoree's house, where Jaffir called for some water; that, upon this symptom of life on the part of Jaffir, Chundernath called out, "Jaffir is still alive; beat him," and then Takoo Mahomed stamped on him, and killed him. This story has been disbelieved by the Judge and Assessors so far as it affects the three prisoners other than Petumber. They, therefore, think that the witnesses spoke falsely, and could not be depended on. This story implicates Petumber in the criminal act neither more nor less than it does Chundernath and the others. Why then is it to be believed as against him while it is disbelieved as against them? The reason is that the Judge thinks the statement of Petumber corroborates the story as against himself.

Now, this statement is that he was asleep in his own house, and was awakened by hearing a noise and tumult outside; that he went out and saw Chand Gazee and several other persons beating the deceased; that he began to give *dohai;* that the deceased caught hold of his hair, and he, Petumber, gave him a blow, telling him, "I came to your rescue; why are you assaulting me?" This does not corroborate any statement of the other witnesses other than the implied statement that Petumber was present near Ishoree's house just about the time when the last blow was given to Jaffir. It is quite inconsistent with these statements in all other respects. Taken by itself, it shows no criminality on the part of Petumber; and we think that it does not so corroborate the evidence of the other witnesses upon whose testi-

mony alone his criminality must rest, as to make them worthy of credit on those points, where otherwise they deserved to be disbelieved. The conviction must, therefore, be set aside, and the prisoner must be discharged.

The 2nd July 1870.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Procedure—Transfer of case—Section 36, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Revision of proceedings in the case of

The Queen *versus* Nobocoomar Banerjee.

Although Section 36 of the Code of Criminal Procedure does not require a Magistrate to state his reasons for transferring a criminal case from a Court subordinate to him to his own or to any other subordinate Court, the High Court set aside an order of a Magistrate transferring a case after the subordinate Magistrate before whom it was had taken the evidence for the prosecution, and had expressed an opinion unfavorable to the prosecution.

Kemp, J.—The prisoner in this case is one Nobocoomar Banerjee, a late stamp-vendor of the Moonsiff's Court of Serampore. It appears that the nazir of the Sub-division of Serampore had absconded with certain property and moneys in his charge, in respect of which a charge was laid against him. There were also, it appears, two register-books of stamps missing; and the prisoner, Nobocoomar Banerjee, being suspected of having something to do with the books being missing, is charged with the theft of the said registers by the Deputy Collector of Serampore, Mr. Hopkins. The case was made over for trial to Mr. DeCruz, the Deputy Magistrate of Serampore. Mr. DeCruz, after taking the evidence for the prosecution, recorded his opinion that the discrepancies in the evidence for the prosecution were of so glaring a nature that it was impossible to sustain the charge brought by the prosecution against the prisoner Nobocoomar Banerjee; but, as the mooktear for the prosecution had asked the Court to postpone the case to enable him to procure copies of the evidence, stating that he would then be able to show to the Deputy Magistrate that the prisoner ought not to be discharged, he appears to have acceded to the request of the mooktear, and admitted the accused to bail. On another occasion the mooktear for the prosecution appears to have made a similar application, and the case was again postponed. After Mr. DeCruz had given the above expression of opinion, the case, it appears, was suddenly removed from his file by the Officiating Magistrate of Hooghly, Mr. Pellew. In the order removing the case no reasons whatever have been given for doing so. The transfer is made under Section 36 of the Code of Criminal Procedure; and, although that Section does not say that the Magistrate is bound to give any reasons, and enacts that the Magistrate is competent to withdraw any criminal case from any Court subordinate to such Magistrate within his district or division, and to try the case himself or to refer it for trial to any other such Court competent to try the same, we think that, under the circumstances of this case, considering that the case was complete, and that the Deputy Magistrate, Mr. DeCruz, had expressed an opinion that the evidence for the prosecution was not sufficient to support the charge, the Magistrate has not exercised a wise or proper discretion in removing this case from the file of the Deputy Magistrate of Serampore to that of the Joint Magistrate of Hooghly.

When the case came up on a former occasion before the Chief Justice and myself, we thought it necessary to call upon the Magistrate to show cause why he had acted in this manner, and he has now submitted an explanation. He refers to the fact of Mr. DeCruz being to a certain extent subordinate to the prosecutor, Mr. Hopkins; to a rumour that the Deputy Magistrate had made improper remarks to a mooktear in the case: thirdly, that Mr. DeCruz, residing in a small place like Serampore, and being in a position to hear much talk and rumour about the case, was unfit to try it; and, fourthly, that his amlahs were related to parties in the case. These reasons, we think, are wholly insufficient for removing the case from Mr. DeCruz's file at the late stage at which it was so removed. They may be good reasons for not making the case over to Mr. DeCruz: but not sufficient reasons, after he had expressed an opinion unfavorable to the prosecution, to suddenly withdraw it from his file. We think, therefore, that the Magistrate has not acted wisely in removing this case from the file of Mr. DeCruz to that of the Joint Magistrate of Hooghly. It will, therefore, be re-placed on the file of Mr. DeCruz, who will dispose of it in due course.

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The 2nd July 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Criminal Misappropriation of property—Charge—Depositions of witnesses—Section 403, Penal Code.

Criminal Revisional Jurisdiction.

Revision of proceedings in the case of

The Queen *versus* Parbutty Churn Chuckerbutty.

Mr. Mun Mohun Ghose and *Baboos Kalee Mohun Dass* and *Bhowanee Churn Dutt* for the Prisoner.

In a case in which the accused is charged with having dishonestly appropriated property under Section 403 of the Penal Code, the charge should specify the person to whom the property belonged. Where the accused is interested in the property jointly with others, he is not necessarily guilty of a criminal act if he takes possession of it, and disposes of it.

Before depositions of witnesses taken before a Magistrate can be used in appeal, it should be shown either in the depositions or elsewhere that the evidence was read over or interpreted to the respective witnesses.

Phear, J.—THIS is one of the most remarkable cases that has come under my notice since I have sat in this Court, not so much on account of the facts involved in it, although they indeed are peculiar as because the judgment of the Deputy Magistrate exhibits characteristics which, although they might be excellent in other composition, are hardly appropriate to so serious a matter as the judgment of a tribunal whose duty it is soberly to consider the evidence before it, and to administer criminal justice by strict reference thereto.

It is impossible to deny that the Deputy Magistrate possesses unusual powers of imagination and a graphic pen such as is seldom met with among those in whose language he writes. In truth, I may say that anything more entertaining as a narrative than his very lengthy well-written judgment I have not lately read. But, unfortunately, very few of the facts material to the structure of the case against the prisoner, which the Deputy Magistrate so agreeably describes, are, as it seems to me, supported by evidence on the record.

And it is painful to see that a case of alleged dacoity which occurred so far back as the 2nd of November last, and in which a charge was actually made against the present prisoner on the 8th of that month, did not come on to be tried and finally disposed of until the 8th of February following, although all the evidence, such as it is, which has been made use of in this case, was in the power and knowledge of the Deputy Magistrate so far back as November.

It is true that the gentleman, who held the office of a Deputy Magistrate in November, vacated it soon after he had entered upon the investigation of this case, but he was succeeded immediately by the Deputy Magistrate whose judgment is before us, and this latter gentleman took up the case where his predecessor had left it certainly as early as the middle of December. It appears that he, in the first instance, examined the prisoner together with other witnesses on oath, and that he framed charges against him on the 13th of January; he then put the prisoner on his defence, yet he did not try the case till nearly a month later.

But this is not the only irregularity and instance of carelessness on the part of the officer conducting the investigation which the record discloses; for, of three out of the four charges on which the prisoner has been tried, not one is framed with proper completeness. In some instances, no doubt, a prisoner would be little prejudiced by the informal character of the charge, supposing that the substance of the offence is stated in it in such a way that it cannot reasonably be mistaken. But here the infirmity of the charge arises from, and corresponds with, a defect in the substantive case against the prisoner.

The first of these three charges to which I refer is in these words:—

"That he, on or about the 18th day of October, at Teracher, dishonestly appropriated or "converted to his own use moveable property; "and that he has thereby committed an offence "punishable under Section 403 of the Indian "Penal Code."

The charge should have specified the person whose property this was; and, had the Deputy Magistrate addressed himself to this point, he would have found himself in the presence of a difficulty which would probably have al-

together put an end to the prisoner's trial on that charge, because he would have found that the property which the prisoner was accused of dishonestly appropriating and converting to his own use was property which admittedly belonged to the prisoner himself. No doubt, there is enough in the evidence on the record to indicate that other persons were interested in that property as well as the prisoner, but it seems to me impossible to say on this evidence that the prisoner had not such a title to the property, that he might take possession of it, and dispose of it without necessarily being guilty of any criminal act.

It was all-important in this case to establish clearly by evidence the actual rights of the parties in the property alleged to have been stolen; for I suppose they were, in fact, such that, if the prisoner had taken the money openly in broad daylight instead of at night, under the cover (as it is contended he did) which was afforded by the stratagem of a pretended dacoity, it would have been very difficult to maintain successfully that he had committed theft, though he might be otherwise responsible to his co-sharers. But not the least endeavour seems to have been made at the trial to bring out this part of the case.

The second of these charges is—

"That he (prisoner) dishonestly or fraudulently removed property of himself or of another person, or dishonestly or fraudulently assisted in the removal thereof, or personally abetted and aided the offence."

I cannot understand how any gentleman possessing the advantages of the education which we must assume that the Deputy Magistrate with his extraordinary powers of writing has had could have brought himself to frame such a charge as this, and could propose to himself the possibility of convicting the prisoner upon it.

If the property was simply the property of himself, there could be no fraud on the part of the prisoner in removing it. If the property was the property of another person, then the charge should have stated the person to whom it belonged, in order that the authority of the prisoner to deal with it might become a matter of investigation; and obviously, on the face of the charge as it stands, there is expressed no doubt whether the act of the prisoner was the lawful or the unlawful branch of a specified alternative. Now, a Court administering criminal justice is with us bound to give the prisoner the benefit of a doubt, so that, as far as this charge is concerned, the Deputy Magistrate ought at once to have acquitted the prisoner without trial; and, in truth, it would be simply an absurdity to find a man guilty of a charge framed in such language as that which is here used.

The third of these charges runs thus: "That he (prisoner) broke open or unfastened a closed receptacle, which contained, or which he believed to contain, property, with a dishonest intention, or personally aided and abetted the offence."

And why shouldn't he? There is not an element of fraud or dishonesty disclosed in that charge for anything that appears on the face of it. The closed receptacle which he is charged with opening might have belonged to himself, or might have been one which he had authority to open. Moreover, not only are the charges upon which the prisoner has been convicted thus imperfect, but the depositions also of the witnesses, which have been sent up to this Court, do not exhibit compliance with the provisions of the Criminal Procedure Code. They seem to have been written by the Deputy Magistrate himself in English, but there is nothing upon them or elsewhere to show that they were ever read over and interpreted to the respective deponents. They are not such as to constitute proper material for the trial of an appeal, and consequently, if no others were taken at the trial in the Court of first instance, that trial was so defective as probably to amount to no proper trial at all.

It is, I feel compelled to say, lamentable to see the administration of criminal justice effected by a highly-trained and, I hope, able Judge in the perfunctory manner in which the Deputy Magistrate appears to me to have dealt with this case; for I must add that the carelessness which I have already pointed out, he displayed in framing these charges, and in taking the depositions, only too truly reflects the inaccuracy of thought which, as it seems to me, pervades the whole of his judgment.

And when we look at the very voluminous evidence which is on the record, with a view to selecting from it that portion which has any tendency to incriminate the prisoner, we find that it consists, in truth, of scarcely more than the one statement made by Raj Luckhee, that she bit the finger of one of the members of the dacoit band; and, while she was giving her evidence to this effect, it seems to have been made apparent to the

Court that the prisoner had a slight wound on his finger, which corresponds with what might be the result of such a bite; and from the beginning to the end of this case this is absolutely the only fact which can be said to make out that the prisoner was an actor in the dacoit-transactions of the 2nd November.

Possibly from the nature of the case this might have been expected. The prisoner ordinarily slept almost in the same room in which the other witnesses passed the night. It was natural that he should be on the spot whether he took part in the dacoity or not, and it is certainly possible that he might have been the leader of the band, and yet have escaped recognition on the part of the female members of the family who appeared as witnesses. But this consideration does not justify the Court in stretching a link of evidence beyond its proper length, or giving to it an importance which it does not deserve.

Now, with regard to this alleged bite, there are certain circumstances which go a great way to invalidate even the little probative force which may at first sight be attributed to it. Raj Luckhee says that she bit the finger of a dacoit who was holding her; that he instantly withdrew it, but put forward another, and that she bit that also. There is not, however, a suggestion that the prisoner has either *two* of his fingers bitten, or *one* bitten in two places.

On the other hand, the prisoner made a statement in which he says that the dacoits held him down; that one of the men who was holding him had a band of cloth across the lower part of his face; that he, the prisoner, laid hold of this, and, when he did so, the dacoit bit him. Of course, this statement, taken by itself, amounts to very little, and might be almost disregarded as being nothing more than an excuse suggested by the facts of the case. But it appears from the evidence of Juggodumba, and I think of Raj Luckhee herself, that the prisoner immediately after the dacoity, and before these witnesses said anything about the biting to him, or even, as it seems to me, to one another, told them that his finger was bitten, and paraded the fact before the whole family. It seems to me that, if he, in truth, were the dacoit whose finger Raj Luckhee had bitten, this would be about the last thing he would think of doing, namely, letting out the damaging fact of his bitten finger, which he might reasonably hope to keep to himself if he was only silent about it.

I don't think it is necessary for me now to dissect any further the evidence of those witnesses who speak to the occurrence. It is in every respect essentially unsatisfactory.

These witnesses all admit that they were unable to recognize the dacoits; they were not able even to distinguish the prisoner. This in itself is very surprising if they are speaking truly. Raj Luckhee says that the person whose finger she bit spoke to her, and if this man were the prisoner, her own cousin, who had lived in the same house with her all his life, and was in the habit of talking to her and in her presence daily, it is marvellous that she should not have been able to detect him by means of his voice, even if he spoke in a whisper as she says he did. There was also a light at a little distance by which she herself accounts for having seen certain objects that she spoke of; she states that it was either by this light or by the light of the moon which was shining that she saw them.

It seems incredible to me that the lady who could speak to these facts should not have been able to recognize the prisoner, her own intimate relative, if he was really the man who struggled with and spoke to her. It may, no doubt, be imagined that these witnesses did, in fact, recognize him, and don't choose to say so, though there is nothing in the evidence to suggest this, but even in this view the prisoner still is entitled to the benefit of their silence. So far as I can make myself master of the evidence, it appears to me, as I have already stated, that it is only by a pure stretch of imagination which, I may say, invented facts out of bare suggestions that the most part of the supposed fabric of the case against the prisoner has been constructed.

I will end by referring to the first item of the summing-up of the evidence which the Deputy Magistrate makes toward the end of his very lengthy judgment, to show the pedantic yet incomplete sort of reasoning by which he has allowed his judgment to be influenced. He says: "Parbutty" (that is, the prisoner) "is a Brahmin, and wears a thread: "one of the alleged dacoits had a thread, and "was therefore a Brahmin."

But another Brahmin, namely, Anund Chunder, was actually seen by the witnesses, as they say, among the dacoits. If their evidence is to be trusted at all, this man was assuredly guilty of the offences which are charged against Parbutty, and in his person is satisfied so much of this pretended syllo-

gism as appeared to the Deputy Magistrate especially cogent against Parbutty, yet this man has never been put on his trial at all.

It seems to me, on the whole, impossible to uphold this conviction. Whatever grounds of suspicion there may be relative to the general conduct of the prisoner, of which I desire to say nothing, there is, in my judgment, nothing on the record which justifies in law the conviction of him on the charges of which he has been found guilty.

The conviction must be set aside, the fine must be remitted, and the prisoner must be discharged.

The 4th July 1870.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Procedure—Commitment.

Criminal Revisional Jurisdiction.

Revision of proceedings in the case of

The Queen *versus* Kishto Doba.

The necessity of making proper enquiries before committing to the Sessions pointed out. It is the duty of the Police and the Magistrate, not only to bring the parties suspected of being guilty to trial, but also to ascertain whether the suspected can clear themselves from the crime of which they are accused.

Jackson, J.—I UNDERSTAND that the Sessions Judge, Mr. Herschell, has referred this matter to the High Court, because he was of opinion that there were no sufficient grounds to justify a commitment to the Sessions of the accused; and because he thought that the committing Magistrate had not made a full and searching enquiry into the facts of the case previous to commitment.

I think it is very clear that there was certain evidence before the Magistrate, corroborated more especially by the confession of one of the prisoners, which evidence, if he believed it, justified Mr. Hopkins in making the commitment. I have not the papers of the case before me, and therefore I cannot give any opinion whether Mr. Hopkins ought to have made further enquiry before commitment. I have for some time felt from examination of criminal trials that many Magistrates are too hasty in making commitments, or rather that they do not make the thorough inquiry which, I think, they ought to make previous to commitment. In a case of murder more especially, there can be no doubt that it is the duty of the Magistrate to sift every fact bearing on the case, in order to ascertain whether the accused is guilty or innocent, and to examine the accused on the facts which bear against him. One of the points of the evidence in this case which led to presumption of the accused's guilt was that he had been absent about the time the murder was committed. His statement as to where he was at that time should have been recorded, and should also have been thoroughly enquired into. It is not sufficient to say that the accused might bring witnesses to prove his innocence at the trial. It is possible the accused may not know the names of the witnesses; and, if the witnesses can give evidence in his favor to exculpate him, he should not be committed. A long time elapses before a trial at the Sessions comes on, and witnesses cannot then give as clear evidence, more especially as to time and duty, as when the facts have only lately occurred. I think every enquiry should have been made previous to commitment, to ascertain, not only whether there was presumption of the guilt of the accused, but also whether he was innocent. It is the duty of the Police and the Magistrate, not only to bring the parties suspected of being guilty to trial, but also to ascertain whether the suspected can clear themselves from the crime of which they are accused. There is a Clause in the Procedure Code which empowers Magistrates to commit without enquiry into the defence of the accused. I believe the discretion given by this Clause is much abused. It may be applied in certain cases, but in serious charges of murder, when the life of the accused is at stake, I think this Clause should not be acted upon, because no certainty of the accused's guilt can arise until his defence is negatived, and proof that his defence is false is frequently very strong evidence in favor of the prosecution. If the result of the enquiry into the defence leaves the matter in doubt, it is the duty of the Magistrate to commit, and leave the Sessions Court to decide which is the true story.

The Magistrate in this case admits that, when he was holding the preliminary enquiry into this case, he had not the police-papers before him, and did not refer to them. I think in such a serious charge as this he should have been thoroughly acquainted with all the police-proceedings, and should have referred to them. Of course, eye-witnesses obtained at the last moment, who had been at an earlier stage of the enquiry examined, and had not then stated what they knew, can hardly be believed.

I am not prepared in any way to censure the Magistrate in this case. I think he had grounds for commitment; and I do not feel sure that, if the Sessions Judge had heard the Magistrate's explanation before he placed his censures on record, he would not have modified his views. If, however, this discussion will lead the Magistrate to make thorough enquiry into all such serious charges previous to commitment, it will have been of great benefit.

Kemp, J.—I am of opinion that the Joint Magistrate was justified in making the commitment. The censures of the Sessions Judge are very severe, and in some instances somewhat uncourteous. I concur with Mr. Justice Jackson that there is no reason whatever to censure the Joint Magistrate. I do not wish to remark further on the case.

The 9th July 1870.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Procedure—Section 62, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore.

Rai Luchmeeput Singh, *Appellant.*

Baboo Rashbehary Ghose for the Appellant.

Baboo Juggodanund Mookerjee for the Government.

A Magistrate cannot pass an order under Section 62 of the Code of Criminal Procedure without first calling on the defendant to show cause why the order should not be passed, and taking any evidence which the defendant may adduce.

Reference.—In the District of Bogra a dispute arose between two zemindars about two neighbouring hauts. A serious breach of the peace occurred, and a Deputy Magistrate investigated the case on the spot. The Magistrate of the District afterwards took up the matter, and bound down certain of the parties under recognizances to keep the peace. On the same day, without giving the parties any formal notice or any opportunity of showing cause against the order, he passed an order under Section 62, directing that the market-day in one haut should be changed.

The Magistrate's order is: "I direct, under "Section 62, Criminal Procedure Code, that "a written order be served upon the defendants, prohibiting them from holding the "haut at Midnapore on Mondays and Thurs "days."

The error in a point of law consisted, in my opinion, in the Magistrate passing the above order without notice, and without giving defendants an opportunity to show cause against it.

The grounds on which the order should be reversed are contained in the following extract from my decision, dated May 20th, 1870: "But a second plea is taken that the "defendants had no notice of the order that "was passed under Section 62, and were not "asked to show cause against it, or offered "the chance of adducing witnesses. This "plea appears to be true. The Deputy Magistrate in his decision of the case of breach of "the peace proposed that the days of holding "the hauts should be changed; and the Magistrate in his decision, on appeal, said the "question should be considered, but he gave "the defendant no actual notice that he "intended to pass such an order; and even "when they were present in Court, they "were not asked if they had any cause to "show or witnesses to adduce on this point.

"That such an order can be passed under "Section 62 has been held in the case of Kalipershad (11 Weekly Reporter 5); and it was "formerly held that Section 62 differs from "Section 308, in that, under the latter Section, the party is to be allowed to show cause; "while, under the former Section, the order is "absolute, and does not imply that the party "is to be afforded an opportunity for showing "cause against the order—case of Hurimohun "Malo, 10 Weekly Reporter 53. It might also "be thought from a quotation in O'Kinealy's "Penal Code, Section 188, that the intention "of the authors of the Code was that the "Magistrate's order should be summary and "prompt, and should be liable to examination and discussion only when the occasion "should arise by the order being disobeyed. "But, even in the case above cited of Hurimohun Malo, the leaning of the Judges was "towards affording all persons an opportunity of showing cause why orders of this "nature should not be passed; and the decisions in the cases of the Queen *versus* Bhyroo "Dyal Singh and others, 11 Weekly Reporter "46, and Kalidass Bhuttacharjee *versus* "Mohendronath Chatterjee, 12 Weekly Reporter 40, state clearly that the Deputy Magistrate should have called on "the Sub-Inspector to produce his witnesses, "examined them in the presence of the "defendants, and heard what the defendants had to say and any evidence they

"might wish to adduce in reply, before he "made any order under Section 62; and the "Magistrate ought to have given the defend-"ant Mohendronath an opportunity for "showing cause, either by giving evidence "or in any way in his power, why the pro-"visions of Section 62 should not be applied "to the case.

"I presume, therefore, that the order under "Section 62 must be held to be irregular, "and must be set aside, but that this will "not preclude the Magistrate from passing "the order afresh after going through the "proper preliminaries."

The Magistrate's explanation accompanies the reference.

Judgment of the High Court.

After reading the report of the Judge, we think that the order passed by the Magistrate under Section 62 of the Criminal Procedure Code must be set aside. Of course, as the Judge says, this will not prevent the Magistrate from passing a fresh order after hearing evidence, and giving the parties opportunity to show cause; but he cannot pass an order without first issuing a rule to show cause.

The 16th July 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Appeal—Non-Regulation district—Sections 445A and 445C, Act VIII. of 1869.

Reference to the High Court by the Judicial Commissioner of Assam.

Luntro Sing and others, Prisoners.

An appeal from a sentence passed by an officer in a Non-Regulation district, invested with the powers mentioned in Section 445A, Act VIII. of 1869, lies, under Section 445C, to the High Court only.

Reference.—FEELING a doubt as to the reading of Section 445C, Code of Criminal Procedure, Act VIII. of 1869, which enjoins that any persons convicted on a trial held by an officer invested with the powers described in Section 445A may appeal to the High Court, and that no appeal against such conviction shall lie to the High Court or Court of Session, I have the honor to solicit that the following may be placed before the Hon'ble the Judges of the High Court that they may be pleased toissue thereon their orders for my guidance.

An officer having been vested with powers under Section 445A, Act VIII. of 1869, are the provisions of Section 445C applicable to all judgments passed by him under the Penal Code, or are such orders as he may pass in cases exclusively cognizable by him as a Magistrate appealable to the Sessions Court?

I would beg to explain that the cases in which this reference arises are cognizable—No. 1, Section 411, Indian Penal Code; No. 2, Section 409, Indian Penal Code; No. 3, Section 409, Indian Penal Code, by the Court of Session or by the Magistrate of the District; No. 4, Section 295, Indian Penal Code, by the Magistrate of a District; and No. 5, Section 354, Indian Penal Code, by the Magistrate of the District or Sub-Magistrate of the first class; and that, in all of the cases, the sentences passed are according to powers exercised by the Deputy Commissioner as a Magistrate under Section 22, Code of Criminal Procedure.

I would notice further that, in all the cases mentioned, an appeal has been preferred to the Sessions Court over which I preside as Judicial Commissioner of Assam; and, as admitted already, I feel doubtful, upon the reading of Section 445C,* Code of Criminal Procedure, whether I have authority to hear any of the appeals; or whether I have power to take up those which refer to offences cognizable only (according to the Schedule to the Procedure Code) by a Magistrate; and beg to solicit that the Hon'ble the Judges of the High Court may be pleased to pass a rule for my guidance.

* Section 445C.—Any person convicted on a trial held by any officer invested with the powers described in Section 445A may appeal to the High Court, and no appeal against such conviction shall lie to the Court of Session.

Judgment of the High Court.

Loch, J.—It appears to us that an appeal from a sentence passed by an officer invested with the powers mentioned in Section 445A will lie to the High Court only.

An officer invested with the above powers has to deal with two classes of cases, viz., those triable by the Sessions Judge or the Magistrate. In the former class of cases he is required to try (445B) the accused parties as a Court of Session, in the other class of cases he proceeds as a Magistrate with extraordinary powers; but whatever be the sentence he passes, the appeal will lie (Section 445C) to the High Court, and no appeal against such conviction will lie to the Judicial Commissioner or the Court of Session. Any orders passed by the Judicial Commissioner on appeal from a Magistrate invested with the powers mentioned in Section 445A must be considered as of no effect.

The papers which accompanied the letter are returned.

The 16th July 1870.

Present:

The Hon'ble G. Loch and Sir C. Hobhouse, *Bart., Judges.*

Separate offences—Cumulative sentences—Section 71, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Judicial Commissioner of Assam.

The Queen *versus* Joyah Mohun Chunder.

HELD, on the facts of this case, that a party (*A*) who objected to accompany a constable who had been directed to produce him before the Court, and also seized the constable by the arm, and resisted his carrying away a pony which *A* was charged with having misappropriated, was guilty of separate offences under Sections 353 and 183 of the Penal Code, and the infliction of separate sentences for each offence was not prevented by Section 71 of that Code.

Reference.—I HAVE the honor to submit the record of this case, together with my proceeding, according to which a reference is made in the case under Section 434, Act XXV. of 1861.

In the matter of this appeal, the Court finds that the sentences, a fine of Rupees 50 in each* offence, taken separately, are not appealable; but for as-much as it appears that the Magistrate's proceedings are irregular, that he has passed a cumulative sentence for acts which pertained to one offence, which is opposed to the provisions of Section 71 of the Indian Penal Code, the case, which is as follows, will be referred under Section 434 of the Code of Criminal Procedure for the orders of the High Court of Judicature.

* Assault or use of criminal force to deter a public servant from discharge of his duty: Section 353, Indian Penal Code.
Resistance to the taking of property by the lawful authority of a public servant: Section 183, Indian Penal Code.

It is to be gained from the record of the trial that one Phelek Mussulman, on the 7th April, lodged a complaint under Section 403 against Joyah Mohun Gossain and others for criminal misappropriation of a pony, whereupon the Magistrate directed under Section 80, Code of Criminal Procedure, an enquiry by the police; that this led to a policeman, by name Kali Ram, being deputed with a written order from the Sub-Inspector in charge of the Jorehaut Police Station to cause the attendance of the parties, as also for the production of the pony said to have been misappropriated.

The written document was to the following effect:—

"Sri Momor Koliah, constable in the case "under Section 403 brought by Phelek "Mussulman, Purbutteah Mouzah: an enquiry "having been ordered, you are hereby di-"rected to produce the parties and their wit-"nesses, together with the pony claimed. "Herein fail not. Dated 17th April.

"Sealed and signed. Bholanath, Head "Constable."

The evidence then went to show that the accused, after seeing the written order as above, objected to accompany the constable, and that, upon the constable then making to take away the pony, the accused resisted him, seizing the constable by the arm, and preventing him from taking the animal away, and in this manner perpetrated in one and the same act the offences of using criminal force, and offering resistance to the taking of property by a public servant.

Under the circumstances mentioned, as it appears to this Court that the sentences passed on the accused Joyah Mohun Chunder Gossain, being cumulative, are contrary to law as laid down in Section 71, Indian Penal Code; and as, for reasons already placed on record, the Court is of opinion that it has not jurisdiction to interfere, as there is no

appeal, it determines that this proceeding, together with the record of the trial and the petition of appeal, shall be submitted to the Honorable the Judges of the High Court for such orders as they may be pleased to pass.

Judgment of the High Court.

Hobhouse, J.—The offences were distinct as to time and nature, and were two, and not one offence only. We think, therefore, that the provisions of Section 71, Penal Code, do not govern the case, and that the Assistant Commissioner's sentences must stand.

The 20th July 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Procedure—Warrant—Witness—Disobedience of order—Preliminary investigation—Section 174, Penal Code—Sections 206 and 260, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

In the Matter of

The Queen *versus* Sutherland;

and

In the Matter of

The Queen *versus* Narain Singh.

Mr. Hyde for Petitioners.

A Magistrate cannot issue a warrant of arrest against a witness under Section 260 of the Code of Criminal Procedure, unless he is first satisfied that the witness has disobeyed a summons which was served on him.

In order to make a person summoned as a witness liable under Section 174 of the Penal Code, the fact must be that he intentionally omitted to attend at the place or time mentioned in the summons, or that he wilfully departed from the place where he had attended before the time at which it was lawful for him to depart.

A Magistrate is not justified by Section 206 of the Code of Criminal Procedure to take a person, without any previous notice or summons, from among the audience or attendant witnesses in open Court, and place him in the dock to be immediately tried upon a charge which had already been commenced to be entertained against other prisoners, and on which evidence had already been given. That Section applies to investigations preliminary to commitment for a subsequent trial, and not to cases where the trial is actually being proceeded with.

Phear, J.—We think that the proceedings in both these cases have been indiscreet and irregular.

Taking the case of Mr. Sutherland first, it is perfectly clear that the warrant of arrest was without any legal foundation. Mr. Sutherland had, in fact, obeyed the summons, and, so far as we can see from anything on the record which has been sent up to us, there was nothing to justify the Magistrate in supposing that he had jurisdiction to issue a warrant under Section 260, Criminal Procedure Code. It does not appear that there was any other ground than disobedience to the summons, upon which the Magistrate could have considered himself called upon to issue a warrant of arrest against Mr. Sutherland; so that it seems to us that the arrest under that warrant was altogether without cause, and possibly capable, as against the Magistrate, of being construed into false imprisonment.

It is not necessary, however, for us now to set that warrant aside, because it is already *functus officio.*

Then, with regard to the conviction of Mr. Sutherland of the offence which is made punishable by Section 174 of the Indian Penal Code, the finding of the Magistrate certainly does not disclose the existence of any facts which can support this conviction.

In order to make a person summoned as a witness liable to punishment under that Section, the fact must be that he intentionally omitted to attend at the place or time mentioned in the summons, or that he wilfully departed from the place where he had attended before the time at which it was lawful for him to depart.

The Magistrate in his recorded finding and sentence says *simpliciter*, Mr. Sutherland left the Court before it was lawful for him to depart. But there is no finding whatever of any specific fact as to when he did depart, or what would have been a time when he might have lawfully departed.

There is also no evidence on the record from which we can supply those facts ourselves, and indeed it does not appear from the record that the Magistrate took any evidence at all before making this conviction, and sentencing Mr. Sutherland upon it.

If, as has been stated to us, he actually had before him no other evidence as to Mr. Sutherland's behaviour in the matter than is furnished by the copy of the summons served on Mr. Sutherland, and bearing an endorsement in his handwriting, it seems to us that there was nothing to show that Mr. Sutherland left the Court intentionally or wilfully before the time when it was lawful for him to depart. The summons directed him to appear at 10 o'clock, and, as far as the evidence goes, he did obey the directions of that summons. He remained ready to answer the charge named in that summons for upwards of an hour—certainly a full hour; and on then making enquiry, he was told by the officers of the Court that it was quite uncertain whether the Magistrate would or would not be there till the middle of the day.

I don't think that he was bound to infer from the terms of the summons that he was under a legal obligation to remain in Court for waiting the arrival of the Magistrate any uncertain period up to the middle of the day.

In truth, I will go further and say that, in my judgment, a summons couched in the terms of this summons did not oblige him to remain waiting in attendance at Court for the Magistrate's arrival more than a reasonable time; and, as I think, he was quite justified in considering, if he did so consider, that, when he had remained there under the circumstances which I have mentioned from 10 o'clock till after 11, he had been in attendance a reasonable time; and, therefore, it seems to me that it cannot rightly be inferred from these facts alone that Mr. Sutherland wilfully left the Court before it was lawful for him to depart. The case would have been entirely altered if the Magistrate had been present, engaged in other business of his Court during the time of Mr. Sutherland's attendance, or if it were shown that Mr. Sutherland was aware that there was any other such cause for the delay in taking up his case as he was in reason bound to submit to.

At any rate, in the bald condition of the record, I cannot avoid the conclusion that the finding and sentence with regard to the charge against Mr. Sutherland, which has been sent up to us by the Magistrate, is imperfect in itself, and also has been come to without any legal evidence which could serve to justify it. For these reasons, I think that the conviction must be quashed, the sentence must be set aside, and the amount of fine, if paid, must be returned to Mr. Sutherland.

I also agree with the learned Counsel, who has argued this case before us, that it would have been well if the Magistrate had taken care that the charge against Mr. Sutherland was tried by some other officer than himself. It is not a case, properly speaking, of contempt of Court, which, no doubt, could be entertained only by the Court against which the offence is committed. But it was a specific charge under one of the Sections of the Penal Code, which could have been better and more impartially tried by another Judicial Officer than the Magistrate who felt himself obliged to make the complaint.

With regard to Narain Singh, we think that there also the conviction must be quashed.

It was, in our opinion, a serious irregularity to take the prisoner, without any previous notice or summons, from among the audience or attendant witnesses in open Court, and place him in the dock to be immediately tried upon a charge which had already been commenced to be entertained against other prisoners, and on which evidence had already been given.

This course was not justified, and is not covered by the provisions of Section 206, Code of Criminal Procedure, which applies to investigations preliminary to commitment for a subsequent trial, and not to cases where the trial is actually being proceeded with.

We need not point out the injustice which might be done by a proceeding of the kind. Obviously, it practically deprives the prisoner of those opportunities of preparing his defence to which he is rightly entitled under the provisions of the Criminal Procedure Code, and moreover it in effect subjects him to be tried on evidence which was taken before he was put into the position of a prisoner. It was impossible for the Magistrate to separate that portion of the evidence which had been given before Narain Singh was placed in the dock, from that which followed afterwards when he stood there on his trial.

We think that the irregularity has had the effect of prejudicing the trial of Narain Singh, and, therefore, that his conviction ought to be set aside, and the fine refunded; also, the order for security must be quashed, and the recognizances or security given must be voided.

The 23rd July 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Defamation—Report by public officer—Section 499, Penal Code.

Criminal Revisional Jurisdiction.

Raj Narain Sein, *Petitioner,*

versus

Deegobur Paul, *Opposite Party.*

Mr. Sandel for Petitioner.

Baboo Ashootosh Dhur for Opposite Party.

A report made by an officer in execution of his duty and as the result of an order from his superior, which contained sweeping imputations against others, imputations which did not appear from the report to be made recklessly or unjustifiably, does not amount to defamation, and is covered by the 9th exception to Section 499 of the Penal Code.

The following are the remarks of the Sessions Judge in this case:—

THE accused is an Inspector of Police, who was sent to enquire whether it was true that one Brojonath Saha was a leader of dacoits. He reported that it was false. He said in his report, dated 10th May: "There are in the village of Juggutbullubpore a great number of Banias, who are inhabitants of this village, and are wealthy men. Also there are Shah Baboos who are wealthier than the Banias. From a long time past lawsuits are going on between the two parties, but, as Brojonath is a rich and influential man, he gained almost all the cases, and now the Banias are trying to get him punished some way or other. Especially the moral character of Brojonath has been the main cause of this petition. I learned from private enquiries that there is scarcely a woman in the houses of the Banias who has not passed a night or two with the defendant Brojonath. So some of the Banias are trying to beat him down, although they cannot give out the character of their own females, and have, therefore, made out a petition in such a form as it may turn to be a police cognizable case."

The first question is whether this does harm the reputation of the two women who are presented by the complainant in this case, or whether it does harm the reputation of the Bania females of Juggutbullubpore as a collection of females. I think it clear that it does the latter, and that, therefore, every Bania woman of that village has a right to turn to the Magistrate for protection, and that the complainant may appear on behalf of one or more such women.

The intention to harm must be inferred from the context and the statement itself. It was evidently the intention of the writer to induce the belief that Brojonath Saha had disgraced almost every Bania woman in Juggutbullubpore in the eyes of their friends, and so to establish a ground of hostility between the male members of the Bania families and the accused Brojonath.

Following the precedent laid down in the case of Ramnarain Bose of the 8th November 1865* (which is the only criminal case on record in the High Court Appeals from the mofussil), I think it must be held that it lay on the speaker to prove that he made this statement with due care and attention. Good faith will, no doubt, be presumed in the mofussil, as in the original side of the High Court, until the contrary appear. But I think the petitioner is right in his contention that the statement is, on the face of it, made without due care and attention. With a mere show of reserve and caution, it does really touch the character of every woman, young and old, in the village. It is almost impossible to suppose that the Inspector's enquiries were of such a searching character as to justify him in describing Brojonath's intrigues among Bania women in such sweeping terms as these.

It may, I think, be conceded that the statement was made with no other object than to protect the interests of Brojonath Saha; but, I cannot think that it was for the public good to make the sweeping imputation here made. It was sufficient, as far as the public advantage of defeating a false charge went, that the existence of intrigues with certain females not further described, or with any particular females of whom the Inspector could make the statement with certainty, should be alleged; and such a statement would have sufficed for the protection of Brojonath Saha's interests also. But though the Inspector may have had no other object in view than the protection of Brojonath Saha's interests, I do not think he can be said to have shown good faith towards the collection of Bania females in making it in the extreme form he used. I think he must be presumed to have acted recklessly towards them, until he can show that he had

* 4 W. R., *Criminal*, p. 22.

sufficient and reasonable trustworthy information on which to make it.

The Magistrate will, therefore, commit the accused to the Sessions under Section 499.

Judgment of the High Court.

Phear, J.—If there were no other grounds wherewith to support a commitment than those which have been set forth by the Judge, we should think it exceedingly difficult to say that a commitment would be a good exercise of the discretion which the Legislature has reposed in the Sessions Court under Section 435, Criminal Procedure Code. For, if we look at the Report which is said to be defamatory, it certainly has been made by an officer in execution of his duty; in truth, made directly as a result of an order from his superior; and, notwithstanding that the accusations or imputations against the Bania women are sweeping, it does not, as I think, appear from the document itself that they were made recklessly or unjustifiably; so that, if there were no further evidence appearing in the case of the prosecution than the document itself, I think that accused would be covered by the 9th exception to Section 499 of the Indian Penal Code. He would appear to be almost precisely the subject of illustration (*b*) to that Section.

But we have had some other portion of the evidence read to us to which the Judge made no reference, and from that it certainly does seem to us that there are materials on which the accused may well enough be sent to trial on the charge for which the Sessions Judge commits him.

We cannot, therefore, interfere with his commitment, and we accordingly reject this petition.

The 23rd July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Pleader—Private prosecutor.

Reference to the High Court by the Sessions Judge of the 24-Pergunnahs.

Chunder Charan Chatterjee

versus

Chunder Coomar Ghose and another.

A pleader may appear in criminal cases, not only on behalf of an accused person, but also on behalf of a private prosecutor.

Jackson, J.—It seems to us quite clear that pleaders are empowered by Act XVIII. of 1865 to appear, plead, and act in the Criminal Courts, and they may so plead and act as well on behalf of prosecutors as on behalf of accused persons.

Section 419 of the Code of Criminal Procedure expressly recognizes the right of the Counsel or Agent of the complainant to be heard upon appeal. We can see no reason for supposing that the right varies in the case of appeals from what it is in the case of proceedings in the Court of the Magistrate. Section 432, Act VIII. of 1869, in my opinion, is merely intended to limit the right of an accused to be defended by a barrister or attorney of the High Court, or pleader, or otherwise by other persons with the leave of the Court.

We think, therefore, that the order of the Deputy Magistrate, ruling that a pleader was not entitled to appear on behalf of a private prosecutor, is erroneous, and ought to be set aside.

The 23rd July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Municipal Commissioners—Act III. of 1864, B. C.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of the 24-Pergunnahs.

Bani Madhub Banerjee, *Petitioner.*

Mr. G. Twidale and *Baboo Bacharam Mookerjee* for Petitioner.

The Municipal authorities have no power under Section 57, Act. III. of 1864, Bengal Council, to impose a fine on a person for blocking up a drain, which is not shown to be public property, or along the side of any highway.

Reference.—I have the honor to submit for the orders of the Court the record of a case in which one Bani Madhub Banerjee has been fined Rupees 50 by the Rev. C. E. Driberg, sitting as a Municipal Commissioner with the powers of a Magistrate.

The case apparently originated in a sworn deposition of an overseer, named Ismael Sheikh, charging certain agents of Bani Madhub with blocking up a "nikasi" drain with earth in contravention of Section 57, Bengal Act III., 1864. He appears to have written his own deposition. It is not signed by any one but himself, but a summons was issued citing Bani Madhub and two agents by the Vice-Chairman.

The evidence adduced, though defective in some respects, proves that Bani Madhub, in digging a tank, has stopped a certain drain on the east of holding No. 207; that is to say, that water is not allowed to fall into the tank, and its passage to the main drain is blocked. It appears that Mr. Driberg personally examined the spot, and satisfied himself that Bani Madhub had, for his own purposes, subjected his neighbours to inconvenience.

If there was nothing more in the case, I should not trouble the Court with this reference; but it appears to me that the Municipal authorities have no jurisdiction in the matter, and I think that it is necessary to restrain them from interfering in the concerns of the inhabitants when the law has given them no power of interference.

The prosecution has sought to show that the drain in question is a "municipal drain;" and the meaning of this term seems to be a drain that is cleared by servants of the Municipality. But there is no proof that the Municipality has ever taken charge of the drain in question, or taken it out of the possession of its private owner, if they have the power to do so; and it is not shown that any portion of the drain is public property. It seems to me, therefore, that the Municipality have no right to call it a municipal, that is to say, a public, drain, or to interfere with it in any way beyond compelling the owner to keep it clean.

If a neighbour can claim a right of drainage, and is so advised, he may complain in such a case in the Criminal or the Civil Court; but that would not give jurisdiction to the Municipal Commissioners to interfere in the matter.

But, moreover, it seems that the Section to which Mr. Driberg, following the complaint of the overseer, refers, does not give any authority to the Municipality to interfere in the matter of the obstruction of any drain, unless it is "along the side of any such highway." Now, in this case, there is no pretence of there being any highway or even a path on the spot.

It appears to me, therefore, that the sitting Commissioner imposed the fine without any authority; and I recommend that his order be set aside, and that the fine be refunded.

I forward with the record the map sent to me by the Vice-Chairman, and a map, showing the drain in question, filed by the appellant.

Judgment of the High Court.

Jackson, J.—We think that, for the reasons stated by the Judge in his letter, the conviction by the Municipal Commissioner is erroneous, and not warranted by law. It must be set aside.

The 30th July 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

False evidence—Matters not judicial—Section 193, Penal Code.

Criminal Revisional Jurisdiction.

Revision of proceedings in the case of

Audheen Roy and others, *Petitioners.*

Baboo Kissen Succa Mookerjee for Petitioners.

A conviction may be had for giving false evidence under Section 193, Penal Code, even if the evidence be given in matters not judicial (such as before the Collector acting in his fiscal capacity under Regulation XIX. of 1814), but it must be proved that the false statement was made under the sanction of the law.

Bayley, J.—Two points have been taken before us in this application.

1stly.—That there is nothing to show that the offence with which the prisoners are charged comes under Section 193 of the Penal Code, inasmuch as it is not a case of false evidence given in any stage of a judicial proceeding.

2ndly.—That no written answers of the prisoners are duly taken.

With regard to the first objection, I would observe that the case in which the false evidence is given was pending before the Collector acting in his fiscal capacity under Regulation XIX. of 1814. Now, this case is covered by these terms in page 163 of the Penal Code, in the notes given by Morgan and Macpherson: "To support a "charge under the latter Clause of the "Section, the general requisites are the "same as those already mentioned, except "that the proceeding in this case is *not a* "*judicial one.* It is equally essential to "show that the false statement was one "made under *the sanction of the law,* whe-"ther upon oath or on a declaration which "the law allows to be substituted for an "oath *in matters not judicial.*"

As to the second objection, I would observe that there was a petition put in by the prisoners, setting forth all they intended to urge. They had also a vakeel to plead, and mooktear to act for them. The mere fact of there being no separate answer put in by the prisoners will not, I think, under such circumstances, *prejudice the case of the prisoners.* The plea is, I think, a mere technical objection; and, save and except this technical informality, there is nothing in the whole case to justify interference under Section 404. I have no doubt that, if the prisoners had been asked whether they would prefer filing an answer or plea in form or doing what they did—give in a lengthy petition, and, besides that, appointing a vakeel or mooktear in their defence —they would have unhesitatingly preferred the latter course, as giving them the fullest opportunity of laying before the Court what they had to say in their defence.

I would reject this application.

The 30th July 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Criminal Trespass—Procedure—Reference to the High Court—Joint Magistrate—Section 441, Penal Code—Section 434, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Magistrate of the 24-Pergunnahs.

The Queen *versus* Chooramoni Sant.

It is essential to a conviction for criminal trespass, under Section 441 of the Penal Code, that there should be the intent to commit an offence, or to intimidate, insult, or annoy any person.

A Joint Magistrate of a district has no power to make a reference to the High Court under Section 434 of the Code of Criminal Procedure. Such references can be made only by the Sessions Judge or by the Magistrate of a district.

Jackson, J.—THIS is a reference by the Magistrate of the District, submitting for revision the proceedings of a Deputy Magistrate, Baboo * * *, who has convicted a person named Chooramoni Sant of criminal trespass, and sentenced him to a fine of 10 rupees, and in default of payment to imprisonment for 3 days.

The conviction in question is absolutely illegal, in the first place, because there has been no proper trial. The complainant was not examined in the presence of the accused, nor was any evidence whatever recorded in his presence. The Deputy Magistrate justifies this proceeding by reference to Section 265 of the Criminal Procedure Code, which, he says, does not require that the complainant

should be examined, but merely that "the substance of the complaint shall be stated to the accused person, and he shall be asked if he has any cause to show why he should not be convicted." That Section, however, goes on to say: "If the accused person admit the truth of the complaint, and show no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly."

Now, strange to say, the accused person was not even asked whether he had committed the offence imputed to him or not; but several questions were put to him by the Deputy Magistrate, of which the first was, "Did you bring out certain articles from the plaintiff's house as stated by him?" secondly, "Whose property are these articles?" thirdly, "What authority had you to enter the plaintiff's house?" and, fourthly, "Have you any excuse?"

Section 266, however, provides that, "if the accused person do not admit the truth of the complaint, the Magistrate shall proceed to hear the complainant, and such witnesses as he may produce in support of his complaint; and also to hear the accused person and such witnesses as he shall produce in his defence."

The Magistrate, on the back of this examination of the accused, stated: "The admission of the accused amounts to a confession of guilt, so far as the charge of trespass is concerned, and his pleader declines to examine any evidence." Now, most manifestly, the accused made no sort of admission which amounted to a confession of guilt. He stated that he had accompanied the peon of the Moonsiff's Court in execution of a decree against the judgment-debtor; that he had only entered the house at the direction of the peon, but did not admit the commission of any offence, for the reason, amongst others, that he was not asked whether he had committed any offence or not. Under these circumstances, it was clearly the duty of the Deputy Magistrate to proceed to take the evidence.

But, admitting the facts stated by the Deputy Magistrate, I think it is quite clear that no offence was committed. Section 441, Indian Penal Code, defines the offence of criminal trespass in these words: "Whoever enters into or upon property in the possession of another with intent to commit an offence, or to intimidate, insult, or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass."

It is, therefore, essential to this offence that there should be the intent to commit an offence, or to intimidate, insult, or annoy any person. Now, it is not pretended in this case that the accused person did more than enter the house with the view of bringing out the property alleged to belong to the judgment-debtor.

The Deputy Magistrate states his opinion as to the extent of the power of Civil Courts in such matters, and as to the propriety of entering the premises of third persons in execution of Civil Court decrees; but into such questions I think it unnecessary to enter. It is quite clear that the act imputed to the accused in this case had none of the elements of criminal trespass, and that no such offence had been committed. The Deputy Magistrate, I think, has acted with great precipitation, and his order must be quashed.

This reference appears to have been made, in the first instance, by the Officiating Joint Magistrate of the District. The Joint Magistrate has no authority to make such a reference. That power appears to be restricted to the Court of Session and to the Magistrate of the District. Although Section 434 of the Code of Criminal Procedure does not, in express terms, use the words "Magistrate of the District," yet a Magistrate is only empowered to make such references in respect of the proceedings of a Magistrate immediately subordinate to him and there is nothing to show that the Deputy Magistrate here was subordinate to the Joint Magistrate. On the contrary, Section 239 Act VIII. of 1859, describes all Magistrates and Subordinate Magistrates as being subordinate to the Magistrate of the District in which they exercise jurisdiction. He, therefore, is the proper officer to make references under Section 434.

I desire also to add that the letter of the Deputy Magistrate in this case is less in the term of an explanation of the proceedings complained of than that of an argument to show that the opinion of the Magistrate who made the reference was incorrect.

Mitter, J.—I concur.

b

The 3rd August 1870.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Reference to the High Court—Defamation—Publication—Section 499, Penal Code.

Criminal Revisional Jurisdiction.

Reference to the High Court, under Circular Order No. 17, dated 17th June 1863, by the Sessions Judge of Tipperah, in the case of Dr. J. A. Greene versus *Mr. J. P. Delanney.*

Object of Circular Order No. 17, dated 17th June 1863, pointed out.

The act of filing in Court a petition containing imputations concerning a person calculated to harm his reputation, with the intention that it should be read by other persons, amounts to making or publishing the imputation within the meaning of Section 499 of the Penal Code.

The criminal law of this country with regard to defamation depends on the construction of Section 499 of the Penal Code, and not on what may be the English law on the same subject.

Phear, J.—It appears to me that the present reference to this Court has been irregularly made. Circular Order No. 17 of 17th June 1863 is only applicable to cases where the Judicial Officer, who has passed a decision on a matter duly brought before him, himself entertains doubts as to the correctness of the construction which he has therein placed on some part of the two Criminal Codes. It was never intended to enable a subordinate officer to call in question the decision by which his official superior overrules his judgment. In the instance which is now before us, the Officiating Joint Magistrate is so far from entertaining any doubt as to the soundness of his own decision that he especially invites us to declare that the Judge committed error in taking a view of the law different from that which he, the Joint Magistrate, took. Notwithstanding, however, the irregular character of the reference, I thought, on its coming before us, that the record of the case ought to be sent for in exercise of our general powers of revision, because it seemed to me from the copy of the Judge's judgment, which was attached to the reference, that that officer had found facts such as would render Mr. Delanney in law guilty of the offence charged against him, and yet had improperly refrained from convicting him of that offence.

Assuming that the petition which is the subject of complaint in this case contained matter of imputation concerning Dr. Greene, which was calculated to harm his reputation (and that this was so, I suppose there is no room for doubt), I am of opinion that the act of filing it in Court, necessarily with the intention that it should be read by other persons than the writer of it, amounted to *making* or *publishing* the imputation within the meaning which these words bear in Section 499 of the Indian Penal Code. The Judge appears to have thought otherwise on this point, and for that cause solely to have reversed the Magistrate's decision; but it seems to me that, on coming to his conclusion, he has reasoned erroneously upon the authority of certain *English* cases. It is nowhere laid down, as far as I am aware, by the English decisions that the uttering of defamatory matter, whether spoken or written, in a Court of Justice, does not constitute a publication in fact. The doctrine which governed the decision in Henderson *versus* Bromehead and other like cases is that the occasion protected the utterer from an action for damages, *i. e.*, prevented the publication from being such a wrong as that for which the sufferer could claim damages. In the very case of Henderson *versus* Bromehead,* Mr. Justice Earle said: "The point, in reality, proposed for our consideration is whether the plaintiff, instead of prosecuting for perjury, has a right to bring this action;" and, undoubtedly, even in England, if the defamatory allegations made on oath are false to the knowledge of the utterer, he is generally liable to be criminally punished in one form or another. But I think further that the Judge erred in looking outside the Penal Code itself for the purpose of ascertaining the criminal law of this country with regard to defamation. If the facts, which are the subject of a complaint, fall within the limits of the definition in Section 499, construed as the Section ought to be according to the plain meaning of the words therein used, and if they are not covered by any of the exceptions to be found in the Code, then, in my judgment, they amount to defamation quite irrespective of what may be the *English* law on the same subject.

Now, on turning to the record, it appears to me that the Sessions Judge did find, as a fact, that Mr. Delanney, in the civil suit of Mahomed Ghazee *versus* Delanney, filed or caused to be filed in Court the petition

* 4 H. and N., p. 569.

defamatory of Dr. Greene, which is now complained of, and also found that Mr. Delanney, in so doing, did not act in good faith. I think that, having so found the facts, the Sessions Judge was bound in law to convict Mr. Delanney of the offence specified in Section 499, with which he was charged, and that it was a mistake of law on his part, in the face of such facts, to acquit Mr. Delanney as he did by reversing the decision of the Magistrate.

In this view it is open to this Court on revision to correct the error which the Sessions Judge has committed. In truth, the very occurrence has taken place here, which Sir Barnes Peacock imagined and put forward by way of illustration in the judgment delivered by him in Regina *versus* Gora Chand Gope, and reported in 5 Weekly Reporter, Criminal Rulings, page 45. He then said:—

"If a Judge on appeal should uphold the finding of a Magistrate on the facts, and reverse his decision in point of law, and pronounce a judgment of acquittal, and order the prisoner to be discharged, there, as the acquittal would be merely on a point of law, this Court, as a Court of revision, might reverse the judgment of acquittal, and order the sentence of the Magistrate to stand."

It seems to me fitting that we should in this way interfere in the present case. The conduct of Mr. Delanney in one respect, no doubt, is so purely contemptible as to be perhaps unworthy of notice. The statements made by him in this petition are just those which fall from the mouths of the meanest prisoners in the dock in the vain hope of influencing the Court when the evidence against them proves conclusive; and, besides, they are so un-English that an English gentleman might afford to disregard them; but, on the other hand, it is, I think, most important in the interests of the public that the procedure of our Courts of Justice should not with impunity be used as the means of indulging feelings of personal spite. It is quite time for litigants in many of our mofussil Courts to learn that, if they make written statements and petitions the vehicle of groundless accusations against their opponents or other persons, whatever may be their purpose, they do so at their own peril.

The Sessions Judge says, probably with much truth, that, if the Subordinate Judge, who tried the case of Mahomed Ghazee *versus* Delanney, had acceded to the prayer of the petition, and had recalled Dr. Greene as a witness, Mr. Delanney's attack upon Dr. Greene's reputation would have been rendered ineffectual by the result of the renewed examination. But I do not agree with the Judge in thinking that the Subordinate Judge ought to have taken this course. It appears that Mr. Delanney was present by himself and his vakeel during the time of Dr. Greene's examination, which took place on the 14th January; yet it was not till the 27th of the same month, just a fortnight afterwards, that Mr. Delanney filed the petition in question, and thereby asked to have Dr. Greene recalled for renewed cross-examination. In my opinion, the Subordinate Judge exercised a wise discretion in refusing to recall the witness after that lapse of time, when no sufficient reason was assigned for the delay.

On the whole, then, I am of opinion that the order of the Sessions Judge should be reversed, and that the conviction and sentence of the Magistrate should stand.

Jackson, J.—I fully concur in the observations recorded by my learned colleague, and in the order which he has passed. If Mr. Delanney made the imputation in the petition presented by him to the Civil Court without good faith, he is liable to punishment for defamation. His act will not come within the ninth exception to the 499th Section of the Penal Code, in which defamation is defined. I also think with Mr. Justice Phear that in this country, where litigants are so habitually regardless of the allegations they prefer against their opponents, it is right and proper that they should understand that false defamatory allegations made without good faith are punishable under the criminal laws of the country.

The 6th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Judges.*

Right of way—Civil suit—Section 320, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Purneah, in the case of Bhoiro Mundul.

A Magistrate is bound, under Section 320 of the Code of Criminal Procedure, to investigate a case in which the complainant alleged that his right of way had

been interfered with, and ought not to refer the complainant to the Civil Court.

Reference.—ONE Bhoiro Mundul petitioned the Magistrate of this District, alleging that certain persons had closed up a path along which he (the petitioner) had a right of way, and the use of which was necessary for egress from his house to the public road. The Joint Magistrate referred him to the Civil Court. He repeated his application the next day, but with no further success. It appears to me that the petitioner had every right to have his case investigated under the provisions of Section 320 of the Criminal Procedure Code. That Section exactly meets this case, and the Joint Magistrate was bound to ascertain whether the path "*in dispute was open to the use*" of the petitioner, and, in the event of his finding that it was, to order "*that possession thereof should not be taken to the exclusion*" *of the petitioner.*

I would not trouble the High Court were it not that the position of the petitioner is very materially affected by the Magistrate's order. If he can prove his recent enjoyment of the use of the path, he is entitled to relief from the necessity of going to the Civil Court, and a burden of proof will be transferred from his shoulders on to those of the closers of the path. If the Court consider my view correct, I would ask it to quash the two orders of the 17th and 18th May respectively, and to direct the Magistrate to proceed under Section 320. I may mention that I find my view fortified by a case exactly in point reported at page 64, Volume 2 of the Weekly Reporter.

Judgment of the High Court.

Hobhouse, J.—We think that the Judge is right; and we direct that the orders of the Magistrate of date 17th and 18th May respectively be set aside, and that he proceed to enquire into and determine the question in the manner provided by Section 320 of the Act.

The 10th August 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Labourer—Breach of contract—Act XIII. of 1859.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Beerbhoom.

Koonjobeharry Lall on behalf of Messrs. Lyall & Co.

versus

Raja Doomney;

and

Koonjobeharry Lall

versus

Rughoonath Dome.

Where a labourer contracted with the manager of a silk-factory for a money-consideration to work at the factory for four months in a year for a period of three years, and broke the terms of his contract, he was held liable to a prosecution under Act XIII. of 1859, and the order of the Magistrate, holding that such a contract was an unreasonable one, and therefore one which ought not to be enforced by him, was set aside.

Hobhouse, J.—THIS reference is made by the Sessions Judge of Beerbhoom, who states the case as follows:—

"Messrs. Lyall & Co., silk-manufacturers in this zillah, have sued certain spinners for breach of contract during the last silk-manufacturing season. The contracts are filed with the records, and purport to extend over three years from 1868. The Magistrate has declined to go into the merits of the cases, considering that the contract in each case is an unreasonable one, and has dismissed both cases.

"Under Act XIII. of 1859 extended to Beerbhoom by Resolution of the Lieutenant-Governor, dated 2nd January 1863, printed and published at page 24, *Calcutta Gazette* of 7th January 1863, both these cases can be tried before the Magistrate of this District. The order, therefore, of the Magistrate is irregular and contrary to the laws in force.

"The matter has already once been disposed of by the Honorable the Judges of the High Court on 21st April 1864, in the case of Messrs. Lyall & Co. *versus* Ro-

meshwar Korah, and in which orders were passed for the Magistrate to try the case. The present suits under Act XIII. of 1859 are of a similar nature, and I solicit the orders of the High Court thereon. Both records are submitted for the purpose of being laid before the High Court."

The Magistrate passed the following order dated the 28th June 1870:—

"It appears to me that this contract is an unreasonable one, which ought not to be enforced here. The accused is bound to work for the factory for three years, not continuously, but only for the particular months when silk-spinning goes on, *viz.*, Shrabun, Agrahun, Magh, and Choit. The complainant in no wise binds himself to employ accused even in those months, and no provision whatever is made for the accused in the eight months in which no employment is found. This contract would, in fact, render accused liable to starvation, unless plenty of work could be obtained in the neighbourhood for the eight idle months. If complainant undertook to employ defendant for twelve months continuously, it would be a different thing; but it is unreasonable to bind down defendant, a mere labourer, to such an agreement, which would prevent his leaving the neighbourhood, or perhaps doing anything to support himself. Charge is dismissed."

The complainants in these cases charged one Rajah Doomney and another with a breach of contract under the provisions of Act XIII. of 1859—an Act especially in force in the District of Beerbhoom, whence this reference has proceeded. The Magistrate, having taken the evidence of the complainant, refused to proceed with the case, on the ground that the contract was unreasonable, and so ought not to be enforced in the Magistrate's Court.

In the opinion of the Magistrate, the unreasonableness of the contract would seem to have consisted in this, *viz.*, that it was not a continuous contract for every month of the year, but only for certain months in the year; and also that, whereas the complainant did not bind himself to employ the accused for any length of time at all, on the other hand no sort of provision was made for sustenance and employment of the accused for the eight months of the year not covered by the contract.

We do not think that this is a sufficient reason on the part of the Magistrate for declining to enter into the case, and to summon the accused and the witnesses for the complainant. The law says that, when any labourer shall have received an advance of money on account of any work which he shall have contracted to perform, and when such labourer shall wilfully and without lawful or reasonable excuse neglect or refuse to perform such work according to the terms of his contract, then the master or the employer may complain to the Magistrate, and the Magistrate shall thereupon issue a summons or a warrant, as he shall think proper, for bringing the labourer before him, and shall hear and determine the case.

And then the law goes on to say: If it shall be proved to the satisfaction of the Magistrate that such labourer has received money in advance from the complainant on account of any work, and has wilfully and without lawful or reasonable excuse neglected or refused to perform such work according to the terms of his contract, then the Magistrate shall proceed against the labourer in the way thereinafter described.

Now, the contract in this instance was of this nature: The complainant is the agent of Messrs. Lyall & Co., who have extensive silk-manufactories in the District of Beerbhoom, and one especially, a Cootee called Gonatea. The Manager for the Cootee swore that he had advanced the accused a sum of money, and had summoned him to work at the above silk-manufactory in accordance with the terms of the contract, which he averred had been given by the accused, and which he filed on record. The contract was of this nature. The accused was to receive wages at the rate of 5 rupees a month, and these wages were apparently to be given for such periods as the silk-manufacture was going on at the Cootee—that is, for 4 months out of the 12 months of the year; and the contract was to last for a period of three years, namely, from the 1st October 1868 to the 30th September 1871. The accused contracted to attend every day at the Cootee during the manufacturing season, and to work on every such day in spinning silk; and he agreed that, if on any day he should be absent, or if he should go to spin for any other person, then he should be liable for breach of his contract. We do not see anything unreasonable in such a contract. The labourers, whose business

is to spin silk, and who are skilful in that business, must know that the business is only carried on for a certain number of months throughout the year. Where, therefore, a laborer undertakes to work at such business for the limited period of three years, he must be held to do so with his eyes open, and knowing well what he was about.

On the other hand, the manufacturer is perfectly aware that the business of the factory will stop if he does not arrange beforehand with the labourers to work at the factory in such detail of the factory-work for the limited period during which the factory is at work.

There was nothing, therefore, unreasonable either on the part of the contractor or the contractee, and, where the contractee received a sum of money in advance of his contract, had been summoned in accordance with the terms of his contract to work at the factory, and had neglected (if he had neglected) to attend, he was clearly liable to a prosecution under Act XIII. of 1859. This view is supported by a decision given by the learned Judges of this Court on the 24th April 1864, in a case referred from the Beerbhoom District, No. 18 of the 15th July 1863.

We direct that the Magistrate's order of the 28th June 1870 be set aside, and that he be directed to proceed with the hearing and determination of the cases referred.

The 12th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Cattle-trespass—Mischief—Section 425, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Nuddea.

Major Forbes *versus* Grish Chunder Bhuttacharjee.

Mr. Mun Mohun Ghose in support of the reference.

To render a person liable under Section 425 of the Penal Code for mischief in consequence of damage done by cattle-trespass, he must in some way have caused the cattle to enter the prosecutor's fields, knowing that, by so doing, he is likely to cause damage. Mere neglect to keep the cattle from straying is not sufficient.

Couch, C.J.—In this case the Magistrate says: "It is quite clear on the prosecutor's "statement that a prosecution for mischief "against the owners of the trespassing cat-"tle will properly lie, for, though it is quite "possible, and in fact most probable, that "they did not intend to do actual damage, it "is proved that they must have known that "it was likely to occur, and, in fact, were "warned of what damage had been done by "the prosecutor. Again, it is no excuse to "plead that they did not actually take the "animals to the compound and drive them." "In the case of Shiraz he was seen watch-"ing them while they grazed; while it is "plain that Grish Chunder, by the mere act "of letting loose the animals to stray at large, "turned them into Major Forbes's compound, "where they daily repaired, and were daily "seen."

I understand the Magistrate, then, to find at the utmost that there was no intention on the part of Grish Chunder to do damage, but that he let loose the cow, and that the cow had, on previous occasions, strayed into the compound of Major Forbes. I think that it is not a causing cattle to enter upon the compound within the meaning of Section 425 of the Penal Code. This Section requires something more than neglect on the part of the owner of the cattle to keep them from straying. He must in some way cause the cattle to enter the field, knowing that, by so doing, he is likely to cause damage. It does not appear to me that, taking the finding of the Magistrate to be supported by the evidence, there was here an offence for which Grish Chunder was liable to be punished. It was not even shown that the cow was let loose. So that, supposing that the letting the cow loose with a knowledge that it had such a propensity to go into Major Forbes's compound, that it would inevitably go there on being let loose, would be a causing within the meaning of Section 425, there was no evidence here that the accused person did so. All that seems to have been shown was that there was a neglect to keep the cow fastened up, so as to prevent it from straying in any place. That is not a case within Section 425. If Major Forbes has got a compound which is open to the incursions of the cows of the neighbouring people, he ought to protect it in some way, and not seek the aid of the criminal law. Where the owner of the cattle does nothing which

may fairly be considered as a causing the animals to go into the compound, he is not liable to be punished. I think upon the finding of the Magistrate this is clearly not a case within the criminal law, and the conviction must be annulled.

Jackson, J.—I am of the same opinion. That which is set up against the accused person amounts merely to negligence in suffering his cow to go abroad with the knowledge, no doubt, that the cow was likely to enter the compound of Major Forbes or some other person, and there do some damage. Now, this negligence is not the same thing as by an illegal omission causing a thing to be done. I entirely concur in thinking that the Section requires an actual causing; and that it is that active causing, coupled with the intention or the guilty knowledge, so to say, that constitutes the offence under the Section.

The 13th August 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Procedure—Registration Act—Jury—Irregularity.

Criminal Appellate Jurisdiction.

The Queen *versus* Abdool Kurreem.

Committed by the Magistrate, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of making false statements under the Registration Act.

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for the Appellant.

An offence under Section 91 of the Registration Act ought not to be tried with the assistance of a Jury. Where, however, such offence was tried with the assistance of a Jury, and the verdict of the Jury, who were unanimous in convicting the prisoner, was approved of by the Sessions Judge, the High Court considered it unnecessary to quash the proceedings.

Jackson, J.—In this case the Court of Session tried the defendant, who has been convicted of an offence under Section 91 of the Registration Act (XX. of 1866) with the assistance of a Jury. This seems to have been by some mistake, inasmuch as the Local Government does not appear to have authorized or ordered the trial of offences under the Registration Act to be by a Jury; and the pleader for the appellant has consequently asked the Court to quash the proceedings, on the ground that such trial was irregular and void.

It appears that the Jury were unanimous in finding the prisoner guilty, and that the Judge approved of the verdict. We, therefore, thought it unnecessary to quash the proceedings, but intimated to the vakeel that he was at liberty to deal with the case as if the prisoner had been convicted by the Judge in conformity with the opinion of Assessors, and that he might go into the facts.

He thereupon read to us some portion of the evidence; but it seems quite clear that the prisoner was most properly convicted of committing an offence unfortunately too common, namely, of selling himself for the purpose of falsely identifying persons of whom he had no knowledge, and thereby inducing the Registrar to register a document. I think that he was quite correctly and rightly convicted, and that the sentence is by no means excessive.

Mitter, J.—I concur.

The 13th August 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Rash driving—Section 279, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Hooghly.

Mr. A. W. Larrymore *versus* Pernendoo Deo Rai.

Mr. R. T. Allan for Petitioner.

The actual driver, and not the owner of a carriage, is liable under Section 279 of the Penal Code in case of a collision and injury to another arising out of rash driving.

Reference.—I have the honor to submit the papers of this case for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, together with the explanation of the Joint Magistrate.

Section 279 contemplates that the actual driver of a carriage shall be criminally responsible for an injury arising from his act, and not the owner of the vehicle, although he may be civilly liable for damages.

In the present case, Mr. Larrymore was riding along a narrow road, and called the coachman to stop. The man disregarded the order, and, as there was no room to avoid the carriage, the result was a collision, in which Mr. Larrymore was injured.

Mr. Larrymore does not say that he addressed himself to the Baboo inside the carriage, but only to the coachman; and the Baboo declares he was sleeping, and knew nothing about the matter, until his coachman told him of the accident. The Joint Magistrate assumes that the Baboo must have known what was happening; and that, as he did not interfere, he is liable under Section 279. But there is nothing on the record to show that the Baboo incited his coachman to drive on after Mr. Larrymore called out, or that Mr. Larrymore called upon the Baboo personally to stop the carriage; and as, therefore, no overt act has been proved or even charged against the Baboo, I think that the mere fact of his presence in the carriage could not make him criminally liable. It is not at all impossible that he was, as he states, too sleepy to know what was going on, especially as the carriage does not appear to have stopped at all; and, as there is no evidence to the contrary, or grounds for assuming that, although hearing Mr. Larrymore's calls to the coachman, he tacitly assented to the latter disregarding them, I think that the conviction of the Baboo under Section 279 ought to be quashed.

Judgment of the High Court.

Kemp, J.—The coachman, and not the Baboo, is liable under Section 279 of the Penal Code. The conviction of the Baboo must be quashed, and the fine, if paid, refunded to him.

The 23rd August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, F. B. Kemp, L. S. Jackson, and J. B. Phear, *Judges*.

Appeal — High Court — Non-Regulation Districts—Section 445A, Act VIII. of 1869.

Criminal Appellate Jurisdiction.

The Queen *versus* Dhonah Bhooyah and others.

Committed by the Magistrate, and tried by the Deputy Commissioner of Singhbhoom, on a charge of house-trespass by night in order to commit theft.

An appeal lies to the High Court from an order of an officer in a Non-Regulation District invested with the powers conferred by Section 445A, Act VIII. of 1869, only when the conviction has been come to under the powers specified in that Section.

This case was referred to the Full Bench, by L. S. Jackson and Dwarkanath Mitter, JJ., with the following remarks:—

Jackson, J.—THIS is an appeal against a conviction before the Deputy Commissioner of Singhbhoom. The prisoners having been found guilty of committing house-trespass by night, in order to the commission of theft, under Section 457 of the Indian Penal Code, they were sentenced, respectively, to one year and two years' rigorous imprisonment; in the latter case corporal punishment was superadded. The appeal of the prisoners has been transmitted to this Court apparently on the ground that the Deputy Commissioner is an officer invested with the powers conferred by Section 445A of the Code of Criminal Procedure, amended by Act VIII. of 1869.

There is nothing on the record, that I can find, to show that the particular Deputy Commissioner is invested with the powers in question; but, assuming that he is so, it appears to me, for more than one reason, that the appeal does not lie to the High Court. In the first place, in deciding the case of the prisoners, the Deputy Commissioner does not appear to have exercised those powers at all. The case was referred to him by a Subordinate Magistrate under the 27th Section of the Code of Criminal Procedure, which directs that, "when a Subordinate "Magistrate shall consider the offence es-"tablished against the accused person to "call for a more severe punishment than "he is competent to adjudge, he shall record "the finding, and submit his proceedings to "the Magistrate to whom he is subordinate, "and such Magistrate shall pass such sen-"tence or order in the case as he may deem "proper, and as shall be according to law." I apprehend, therefore, that this conviction was made by the Deputy Magistrate in the course of his ordinary jurisdiction and duties as a Magistrate, and that, accordingly, the appeal would lie to the Court of Session.

prisoner brought before it upon the charge of a Magistrate who is authorized to make a commitment, although it should be objected that there has been some irregularity or defect of form in recording the complaint.

2nd.—Whether, in the class of cases to which the 21st Chapter of the Code of Criminal Procedure relates, the complaint or authorization of the Court before which, or against the authority of which, such offence is alleged to have been committed, is not sufficient warrant for commencement of criminal proceedings?

Miller, J.—I concur in the order of reference.

Judgment of the Full Bench.

We are of opinion that the Court of Session is competent, and ought, to proceed to the trial of a prisoner who is brought before it upon a charge exhibited by a Magistrate who is authorized to make a commitment, notwithstanding any irregularity or defect of form in recording the complaint.

Also that, in the class of cases specified in the second question referred, the complaint or authorization of the Court concerned is a sufficient warrant for the commencement of criminal proceedings.

The 3rd September 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Complaint—Summons—Section 66, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack.

Ameer Mahomed *versus* G. Brass.

A Magistrate cannot refuse a summons to a complainant, even in a case in which the charge might have been laid at the police in the first instance, but is bound, under Section 66 of the Code of Criminal Procedure, to examine the complainant on oath, and pass orders on the case.

Reference.—THE complainant in this case charged the accused with theft under Section 379 of the Indian Penal Code. The Officiating Magistrate of Cuttack, before whom the charge was made, has refused to issue a summons, and against this order the prosecutor appeals.

The order appears to me illegal, in consequence of the complainant not having been examined as directed by Section 66 of the Procedure Code; and I, therefore, forward the papers of the case in order that the proceedings may be quashed, and that the Magistrate may be directed to follow the procedure laid down in Section 66.

Judgment of the High Court.

Loch, J.—We think the view of the law taken by the Judge is correct. The Magistrate was bound, under the provisions of Section 66 of the Code of Criminal Procedure, to examine the complainant when he applied to him. No doubt, the complainant might have laid the charge of theft at the police in the first instance; but, as he preferred making the complaint direct to the Magistrate, that officer should have examined him on oath, and then passed such orders as the case seemed to require.

We have read the charge as stated in the complainant's petition, and are satisfied that it does not comprehend any charge of theft: and, under these circumstances, we think it unnecessary to interfere. The papers are returned.

The 3rd September 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Procedure— Complaint — Special Law— Sections 20 and 270, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack.

The Queen *versus* Abdool Azeez Khan.

A Magistrate is bound, with reference to Section 20 of the Code of Criminal Procedure, to proceed in the investigation of cases arising under a special law (such as the Salt Law) according to all the provisions of the Code of Criminal Procedure.

Section 270 of the Code of Criminal Procedure does not apply to complaints under a special law, but only to complaints triable by the Magistrate and punishable under the Penal Code with imprisonment for a period not exceeding 6 months.

Hobhouse, J.—IN this case the following was the judgment passed by the Deputy Magistrate:—

"The evidence adduced before me is in no way trustworthy. The evidence of the informer is entirely different from that of the head constable. The head constable says that the informer, who resides in the same village in which three of the four defendants reside, made mention before him of the names of the four defendants in Court and of another as the persons who were engaged in the illicit manufacture of salt, and that he accordingly made search in their houses, while the informer's evidence is diametrically opposed to such statements. Then the article found and brought into Court is only a pot for each defendant, bearing marks of salt having been manufactured in them. Those pots have been found outside the houses of the defendants in a spot accessible to every body, and therefore the circumstance does not conclusively show that the pots are the property of the defendants. Again, the evidence of the informer bears the appearance of falsehood. He says that he saw at 1 ghori at night some persons enter into the village with baskets on their heads; is it probable that he could distinguish the salt-earth, and not its carriers?

"I consider the case as false, and discharge the defendants.

"The law directs (Section 28) that a house is to be searched only on receipt of information that may reasonably cause one to believe that salt is being manufactured in it. In the present case, the information furnished to the police-officer was a mere assertion, and was not such as might lead one to believe of illicit manufacture of salt, admitting the evidence given by the police-officer as the correct one. I, therefore, consider that the head constable, Abdool Azeez Khan, exceeded the powers given to him by law, and would fine him under Section 33 of Act VII. of 1864, B. C., to the amount of Rs. 20, in default to undergo one month's simple imprisonment. On recovery of the fine, I recommend it for distribution to the defendants in Court in equal portions. I would request the District Superintendent of Police to find out the proportion of the cases instituted at the instance of Bhandher Ramgrohi, informer, which has been dismissed, and, if he found it to be more than reasonable, to prohibit his subordinates to take action on his information in future.

"The papers to be laid before the Magistrate of the District for his perusal."

The Judge in making this reference stated the case as follows:—

"The applicant, a head constable, has been sentenced by Baboo Dwarkanath Sein, Deputy Magistrate of Balasore, to pay a fine of Rs. 20 under Section 33, Act VII. of 1864, or in default to undergo a month's simple imprisonment, for searching the houses of certain defendants in a case relating to the breach of Salt Laws on such information as might not have reasonably caused one to believe that illicit salt was being manufactured by them.

"The order appears to me to be an illegal one, as the applicant was not put on his trial, and was allowed no opportunity of defending himself. I, therefore, forward the papers of the case, together with the explanation of the Deputy Magistrate, with a view that the proceedings may be quashed as illegal."

The explanation of the Deputy Magistrate referred to in the reference of the Sessions Judge was as follows:—

"It was not my impression when I disposed of the case referred to, and I do not even now think it to be the intention of the law, that in any case instituted at the instance of any police-officer under Section 5, Act VII., 1864, B. C., in which that officer is found to have acted in contravention of the provisions of the law, so as to bring his act within the meaning of Section 33, it is necessary to hold a separate trial to punish the police-officer; inasmuch as if he be called upon to make a defence, he cannot possibly put in any other evidence or make any other statement than what he did in the case prosecuted at his instance. The provisions in Section 33 bear, I think, a greater semblance with that of Section 270 of the Criminal Procedure Code; and, under the latter Section, I do not think it necessary that any regular trial need be held to award compensation to a party unnecessarily prosecuted. In the present case, the charge on which I convicted the head constable was that the information which he received was not such as would have justified him in entering upon an enquiry; and, consequently, I do not see what evidence he could have put in were he called upon to defend himself. If a police-officer enter on an enquiry on information which is *not reasonable*, I think he is punishable under Section 33 of the Act. The question at issue in the case is, there-

fore, whether the information which formed the basis of all subsequent proceedings of the head constable was of the nature contemplated by law. This can only be judged by inferences drawn from the nature of the proceedings held and of the evidence adduced.

"I beg to submit the records of all the cases regarding illicit manufacture of salt prosecuted before me this year at the instance of the said head constable, because I think that the nature of the evidence adduced in all the cases may be made use of to come at a conclusion on the aforesaid issue. It will be seen that I have dismissed all the cases; and, if I may be allowed to speak without reserve, I would say that the impression which the decision of these cases has left on my mind is that they were all concocted by the police under the garb of doing their duties. There is nothing difficult in setting up a false case. All that is necessary is to leave unseen at the premises or within a hut of the poor ryots, whose property does not go beyond one or two miserable huts, a pot bearing marks of salt and some salt-water and earth, plenty of which articles could be had without cost and trouble. To introduce a quantity of salt among the articles found in search entails some cost, hence I presume the absence of that article in the list of things found. A ryot, who is habitually engaged in the manufacture of illicit salt, is reasonably expected to be always found in possession of a quantity of salt, and, in all true cases, such has been found to be the case; but in none of the cases brought in by this head constable was the least quantity of salt found, although no less than nine houses were searched, and nine different ryots were sent up for trial. This seems to me somewhat extraordinary.

"My judgments will speak for themselves, and will, I hope, show that my finding in the negative in the above issue was not without foundation. In addition, I beg leave to point out that in none of the cases have the requirements, directing commission into writing the information received, of Section 28 of the Act, been complied with. That Section enjoins that any information which a police-officer receives shall be committed into writing. The omission on the part of the head constable rendered the finding out of the exact nature of the information which he received more difficult. Such writing, though, could not have been used in evidence against the persons charged by the police, but it certainly could be used as evidence against the police-officer who recorded it. The answer of the head constable to my question, as to what information he received, was invariably to the effect that 'such and such persons are in the habit of manufacturing salt.' To prove that the information he received was nothing further than what he had said in his examination before me, there could have been no other witness save the informant; and when this informant's deposition materially differed, not in a single case, but in all the cases which were tried at his instance, from what the head constable had said, and when the general appearance of the cases displayed more falsehood than truth, I believe I had every reason to conclude that the information which the head constable had received was not reasonable enough to proceed upon an enquiry.

"I pointed out to him more than once the necessity of questioning his informant to enable him to judge whether the information was reasonable enough to act upon, but without effect; and, to set an example, I was at last compelled to fine him—and, in doing so, I believe I had the best proof that such a case admits of.

"In the case which forms the subject of this correspondence, I have omitted to mention in my judgment a valid argument tending to show its falsity. I beg leave to note it here. The informer deposed that he saw the defendants, who were his neighbours, to carry salt-earth in baskets; on search next morning, no salt was found. If the informer spoke truthfully, either the salt-earth would have been found or a quantity of salt in its stead, on the ground that the salt-earth seen to be conveyed on the previous evening was transformed into salt during the night."

The facts out of which this reference has arisen are these:—

Abdool Azeez Khan, described as a head constable, searched a person's house under the provisions of Section 28 of Act VII. of 1864, B. C., in order to make a discovery of salt illicitly manufactured and supposed to have been kept or concealed in that house, and, for the purpose of that search, the head constable in question entered the house. Subsequently, the head constable preferred a charge against certain persons for having salt illicitly manufactured in their possession. The persons were apparently those whose house he

had entered. The Deputy Magistrate considered that the case was false, and discharged the defendants, and then, without laying any special charge against the head constable, or taking any explanation or defence from him, or taking any evidence against him, found that he, the head constable, had entered and searched the house in question without having reasonable cause to believe in the information that had been given to him, that he would find any salt illicitly manufactured in that house, and, therefore, the Deputy Magistrate considered that the head constable had exceeded the powers given to him by law, and, under Section 33 of the Act I have above quoted, sentenced him to pay a fine of Rupees 20, or in default to suffer one month's simple imprisonment.

The Judge considers that the finding and sentence under the circumstances of the case are contrary to law, and asks us to set aside the order, and discharge the person punished under it.

The Deputy Magistrate considers that the case was somewhat of the nature of that provided for by Section 270 of the Code of Criminal Procedure, and that it was, therefore, not necessary to take any evidence against the constable, nor to take his defence, but that he had jurisdiction summarily to convict and to punish him in the way that he has done. But the provisions of Section 270, we would remark, are peculiar, and apply only to the case of certain definite complaints, and have no application to any complaints other than those of that nature. The law says: "In any case where the "Magistrate shall dismiss the complaint as "frivolous and vexatious, it shall be lawful "for him in his discretion, by his order of "dismissal, to award that the complainant "shall pay to the accused person such "amends, not exceeding fifty rupees, as to "such Magistrate shall seem just and rea-"sonable."

And the provisions of the law in question refer only to complaints of the nature described in Chapter XV. of the Code of Criminal Procedure, that is, to offences triable by the Magistrate, and punishable under the Indian Penal Code with imprisonment for a period not exceeding six months. Now, in this case, the offence of which the head constable had been found guilty is not an offence punishable under the Indian Penal Code. It is an offence punishable under a special law, *viz.*, Section 33, Act VII. of 1864, B. C. Obviously, therefore, the provisions of Section 270 do not in any way apply to the case which was before the Deputy Magistrate. On the other hand, by the provisions of Section 20 of the Code of Criminal Procedure, the Criminal Courts of the several grades—that is, in this instance, the Deputy Magistrate—are given jurisdiction in respect of offences punishable under any special or local law: that under the special law in this case is the Salt Law. Then the Section goes on to say—"and in the investigation and "strial of the offences hereby declared to be "within their jurisdiction," *i. e.*, in this instance, the offence under the special Salt Law, the Courts shall be guided by the provisions of this law.

Then by the provisions of the law, before a person can be convicted of any offence, the complainant and the witnesses must first be heard, and the defendant and his witnesses must next be heard, before any punishment can be inflicted. It is clear, therefore, that the Deputy Magistrate, in the case before us, acted contrary to law in convicting the head constable without having previously tried the charge against him in the manner provided by the law; and we direct that the order of the Deputy Magistrate of the 23rd June 1870 be set aside, and the fine, if it have been paid, be refunded, and, if not paid, be remitted, and the person accused, namely Abdool Azeez Khan, be discharged.

The 30th July 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Selling a minor for purposes of prostitution—Sections 372 and 373, Penal Code.

Criminal Appellate Jurisdiction.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of selling a minor, for the purposes of prostitution, &c.

The Queen *versus* Noor Jan and Juggut Tara.

Held by L. S. Jackson, J., that, on the facts of this case, the conviction of the prisoners on a charge of

selling a minor for purposes of prostitution under Sections 372 and 373 of the Penal Code was erroneous.

Held by Glover, J., contra.

Jackson, J.—In this case I have the misfortune to differ from Mr. Justice Glover, the question in which we differ being a point of law, that is to say, whether the facts established by the evidence are insufficient to support the conviction under the 372nd and 373rd Sections, Indian Penal Code.

I think we may most safely take the facts of the case from the evidence of the girl, Sona. This girl is the daughter of an adopted son of the prisoner, Noor Jan. She appears to be under the age of 16, but has been for some years married to a Mahomedan named Ruheem. She has occasionally resided with her husband for short periods, and the marriage appears to have been consummated; but she generally lives with her grandmother, and, while she so lived, it seemed that she formed an adulterous intrigue with two Hindoos.

These persons appear to have considered that scandal would arise if it became known that they visited a Mahomedan married girl for the purpose of illicit intercourse; and they persuaded the girl and her grandmother that it would be advisable that the girl hould take up the trade of a prostitute, and that, if she did so, they would visit her without disgrace or inconvenient consequences. Thereupon the girl herself and her grandmother proceeded to a village at some distance, where they went to the cutcherry of the zemindar. There they met the other prisoner, Juggut Tara. An arrangement was arrived at between them under which the girl and her grandmother took up their abode for some days at the house of Juggut Tara, and the girl assumed the dress and appearance of a courtezan, received visitors on the introduction of Juggut Tara, and received the money paid by these men for the girl's favors, and by whom the girl and her grandmother were fed. At the end of a few days she proposed to take the girl to the nearest thannah for the purpose of registration as a prostitute, and there enquiry was made by the police-officers, who sent for the girl's husband, and made her over to his charge.

On these facts the grandmother has been convicted under the 372nd Section of disposing of a minor for the purposes of prostitution, and sentenced to three years' rigorous imprisonment; and Juggut Tara has been convicted under the 373rd Section of obtaining possession of a minor for the purposes of prostitution, on which charge she has been sentenced to two years' rigorous imprisonment, and also under Section 372 of letting for hire a minor for the purpose of prostitution, on which charge she has been sentenced to further imprisonment for one year.

As to the case of Noor Jan, it seems to me clear that she has not disposed of the person of her granddaughter. The girl appears to have acted entirely as a free agent upon the persuasion of the two Hindoo men I have mentioned. Of her own choice, primarily for the purpose of the more conveniently carrying on the intrigue with them, but ultimately for her own ends, she leaves her house, and goes to reside in another village. The conduct of the grandmother in consenting to, conniving at, and in some degree profiting by, the arrangement is morally, no doubt, infamous; but it does not, so far as I can see, amount either to the offence of which she has been convicted, or to any other offence under the Penal Code.

As to Juggut Tara, in like manner, it seems to me that neither of the two offences of which she has been convicted is made out. She has not, I think, obtained possession of any minor, because, as I have stated, she met the girl: the girl accompanied her to her house, and acted entirely as a free agent. She certainly had not let her out for hire. That which she did was to receive the sums of money paid by the girl's visitors, apparently in exchange for the board and lodging which she gave. That which Section 372 contemplates is the selling, letting to hire, or otherwise disposing of any minor with intent that such minor should be employed as stated; that is to say, making over to a person either in perpetuity, or for a term, for a consideration, or otherwise transferring, the possession of a minor. Nothing of the sort has taken place here. That which did happen is, I believe, a common arrangement enough; that is to say, that prostitutes—the younger women—live with a brothel-keeper, and receive such visitors as she introduces, are fed and clothed by her, and allow her to receive the wages of their shame.

I think, therefore, that the conviction of the prisoners has been erroneous, and that the sentence which has been passed on them must be reversed.

Glover, J.—These prisoners have been convicted under Sections 372 and 373 of the

Penal Code; Noor Jan of having disposed of a minor for the purposes of prostitution, and Juggut Tara of obtaining possession of the girl for the purposes of prostitution, and of letting her for hire for the same purposes.

The girl, Shonaban, is a daughter of the adopted son of the prisoner, Noor Jan, and is married. She does not appear to have lived much with her husband, the witness, Ruheem Khan, but to have remained in her grandmother's house. Whilst there, and whilst her husband was employed in another part of the district, she formed an intrigue with two Hindoos, and she did this with the knowledge of her grandmother. These two Hindoos, not liking to be talked about as the lovers of a Mahomedan girl, induced the grandmother to remove Shonaban to another village, and to set her going as a prostitute there, which being done the two Hindoos proposed to continue their intimacy with the girl. Noor Jan, accordingly, took the girl to Bhanderea, where they met the prisoner, Juggut Tara, a prostitute of the place, and put up with her. During the time Shonaban lived in Juggut Tara's house, she was made to receive visitors, and the proceeds were taken by Juggut Tara. After a week of this life, both prisoners took the girl to the police-station for the purpose of having her registered as a public prostitute.

I consider these facts clearly proved by the evidence, and that they are sufficient for conviction under Sections 372 and 373, Penal Code.

Noor Jan, the grandmother, has been convicted under Section 372, and it appears to me that the words of the Section "otherwise disposes of" cover her case. It is proved that she left her house at Amooa, and proceeded to Bhanderea for the express purpose of making her granddaughter a prostitute: that she afterwards went, and lived with the girl at the house of a professional public woman, and allowed her granddaughter to follow the ways of the house, and receive visitors. It appears to me that she did all this in furtherance of her original intention, and that, when she thought her granddaughter sufficiently initiated into her new trade, she, in company with Juggut Tara, took the girl to the thannah to have her name entered on the list of public women. Noor Jan appears to me to have taken an active part throughout in this most shameful business, and it was by her own individual act that the girl went to Juggut Tara's, and lived there as a prostitute. I think she was properly convicted.

Juggut Tara has been convicted under both Sections 372 and 373. If the evidence be credited, and I have already said that I think it is, both these offences are brought home to the prisoner. She certainly obtained possession of the girl, Shonaban, and that too for the purpose of prostitution, even if she did not actually hire the girl of her grandmother; and, having so obtained her, it is clear that she made money by the transaction, and received from the girl's visitors the hire of the girl's person.

I would reject the appeals of both prisoners.

The 3rd September 1870.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Procedure—Police-enquiry—Local Act—Jurisdiction—Irregularity—Section 133, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Revision of proceedings in the case of Prankisto Pal, *Petitioner.*

Mr. W. L. Mackenzie and *Baboo Sharoda Pershad Sein* for Petitioner.

Mr. Westland, Legal Remembrancer, for the Government.

Mr. F. J. Marsden for the East Indian Railway Company.

A Magistrate is competent, under Section 133 of the Code of Criminal Procedure, to direct an enquiry to be made by a police-officer into an offence punishable under a Local Act—such as the Police Act.

HELD that where a Magistrate professes to act under one Section of the Criminal Procedure Code under which he has no jurisdiction, but it is found that he has jurisdiction under some other Section of the Code, the mistake is one which does not justify interference with the Magistrate's order, if otherwise good, and if the accused has not been prejudiced thereby.

Bayley, J.—THIS is an application under Section 404 of the Criminal Procedure Code. That Section enacts that this Court may, "whenever it thinks fit, call for the record "of any criminal trial, or the record of any "judicial proceeding of a Criminal Court

"other than a criminal trial, in any Court "within its jurisdiction, in which it shall "appear to it that there has been error in "the decision on a *point of law*, or that a "*point of law* should be considered by the "Sudder Court, and may determine any "*point of law* arising out of the case, and "thereupon pass such order as this Court "shall seem right."

The prayer of the petitioner is to set aside the order of the Sessions Judge of Hooghly, dated the 2nd August 1870, by which he affirmed the order of the Joint Magistrate of Serampore, so far as regarded his fining the petitioner, Prankisto Pal, 1,000 rupees under Section 161 of the Penal Code.

I use the words of the grounds of the application, though very lengthy, as the learned Counsel, when the judgment was being orally delivered, raised a question as to the correctness of the abstract then given.

The grounds taken by me, in the petitioner's own words, are:—

1stly.—The Joint Magistrate's proceedings were illegal and without jurisdiction, as they are not founded upon any complaint made either under Section 66 or Section 135 of the Code of Criminal Procedure, or upon personal knowledge, or knowledge derived from testimony legally given, as required by Section 68 of the Criminal Procedure Code.

2ndly.—As the proceedings in this case were not instituted either under Section 66 or Section 68 of the Code of Criminal Procedure (and as the case was tried under Chapter 14 of the Criminal Procedure Code), it was not competent to the Joint Magistrate to direct an enquiry by the police, or to issue process on the report of the police.

3rdly.—Not only was the prosecution not instituted in any one of the modes prescribed by the Code of Criminal Procedure, or upon any legal evidence or sworn testimony, but it does not clearly appear who was the prosecutor in this case; for the Joint Magistrate admits in his deposition on oath that "the "Railway Company did not interfere to "take up the prosecution until I directed "them to do so." And the Joint Magistrate remarks that "Eshan Mullick, mook-"tear, appeared *for some one* in the interest "of the prosecution."

4thly.—It was most improper on the part of the Joint Magistrate to instruct the Railway Company to take up the prosecution, not only after the proceedings had commenced, but when the case against the petitioner was breaking down; and such act of the Joint Magistrate shows that he was, however unintentionally, biassed and prejudiced against the petitioner whilst the trial was pending.

5thly.—It is clear from the decision of the Joint Magistrate that, for the reasons recorded by him, he distrusted the evidence of Biddyanidhi Dey (whom he, in his decision, treats as a prosecutor) and of Biddyanidhi's servants, the two eye-witnesses, Ram Nath Dutt and Preo Lall Dey; but that he relied on the evidence of Russick Lall Dey and Shumbhoonath Mullick as to the petitioner having, in the course of a negotiation for a compromise, admitted that he had taken money.

6thly.—The Sessions Judge in appeal has, for the reasons recorded by him, properly excluded the alleged *khatta* books, and the evidence adduced to prove the same, and appears to have taken the same view as the Joint Magistrate of the rest of the evidence both *direct* and in support of the alleged admissions. It follows that his conviction has been based and maintained on the evidence of Russick Lall Dey and Shumbhoonath Mullick; in other words, rests on admissions alleged to have been made.

7thly.—Alleged verbal admissions and alleged extra-judicial confessions of guilt are always, and as a rule, received with the greatest caution, and cannot, for a moment, be allowed to support a case in which the direct evidence has been found untrustworthy; in other words, a case which has otherwise broken down.

8thly.—The two witnesses to the alleged admission do not state that the petitioner admitted he had taken the specific sums of money which he has been accused of having taken on the dates specified, but Shumbhoonath Mullick says: "I asked P. "K. Pal about the statement that B. N. Dey "had paid Rs. 700 or Rs. 800; he said he "had it in different times, and that he had "to pay others, and P. K. Pal begged the "pardon of B. N. Dey." And Russick Lall Dey says: "S. N. Mullick asked P. K. "Pal whether it was a fact that he had "taken the money; he replied he had; that "he did not know how much, for he had "taken it on different occasions, and paid

"away in part to others." It is simply incredible that he should have admitted the receipt of Rupees 700 or 800 when Biddyanidhi in his list of alleged payments (filed during the police-enquiry), made to the booking clerk and head constable as well as to him, states the total amount paid to be Rupees 455-1-3.

9thly.—The Sessions Judge cannot apply the provisions of Section 426 of the Code of Criminal Procedure to a case like the present, where the proceedings of the Joint Magistrate were so utterly illegal, and without jurisdiction.

I am of opinion that these grounds are untenable. I will first take up the Sections of the law relied on by the learned Counsel for the petitioner.

Section 66 of the Criminal Procedure Code enacts that, when, for the issue of a summons or a warrant for any offence, a complaint is made before a Magistrate, "the "Magistrate shall examine the complain-"ant. The examination shall be reduced "into writing, and shall be signed by the "complainant, and also by the Magistrate."

Section 135 is to the effect that, on any complaint or information being lodged to the police, the police shall send immediate intimation to the Magistrate who may have had jurisdiction. The Magistrate, on receiving the intimation of the commission of any offence, may "at once proceed, or "depute an officer exercising any of the "powers of a Magistrate to proceed, to hold "a preliminary enquiry into or *otherwise* "*to dispose of such case* in the manner "provided in the Act."

Section 68 provides that the Magistrate of the district, or in charge of a division of the district, as the case may be, "may, "without any complaint, take cognizance "of any offence which may come to his "knowledge, and may issue a summons or "warrant of arrest against the person "known or suspected to have committed "the offence in the same manner as if a "complaint had been made against such "person."

The argument of the learned Counsel for the petitioner on all these three Sections is, in fact, that there was no complaint legally made before the Joint Magistrate at all, and nothing on which he could act.

Now, the facts, so far as they are necessary to be set forth for the purposes of this application, are (to adopt the Joint Magistrate's rather inaccurate expression for a criminal matter) that this "suit" was "instituted" by Mr. Hunter, but that he brought no actual charge.

On the 18th April one Biddyanidhi Dey presented a petition to Mr. Heely, the District Traffic Superintendent, charging the petitioner with taking money, and, on the 25th April, the Joint Magistrate, Mr. Hopkins, recorded this order on that petition which had been sent to him, *viz.*, "Police to enquire."

On the 17th May, Mr. Rochfort, the Assistant Inspector-General of Railway Police, forwarded his own and other police-reports.

On the 25th May summons was issued on the petitioner, it being stated to be on the complaint of Biddhyanidhi Dey as against the petitioner for bribery.

This summons the petitioner Prankisto Pal himself receipted. The case then proceeded to trial.

There is on the record a memo. in the handwriting of the Joint Magistrate, stating "the Railway Company ought to pro-"secute the case, or at any rate appoint "a competent pleader to see after it. The "case is not a false or malicious one; but "there is reason to expect that the peti-"tioner will escape, unless the case is better "managed." This memo. bears date 7th May 1870, but it is stated by Mr. Mackenzie, the learned Counsel for the petitioner, that this must be a clerical error, and that it ought to have been 7-6-70, that is, the 7th of June. The other side, while they do not admit the mistake, show nothing to contradict the statement, except what appears on the face of the memo. This memo. of the Joint Magistrate, the learned Counsel urges, is so illegal that the conviction by the Judge cannot stand. I will notice this plea hereafter.

The real point pressed on us is that the conviction is against the precedents in XIII. Weekly Reporter, page 27, and in XII. Weekly Reporter, page 49.

The former was an application under Section 404, seeking to set aside the proceedings of Mr. Monro, the Magistrate of Kishnaghur; but, as a matter of fact, those proceedings were not set aside, and the remarks of the learned Judges in that case, though they, in some respects, favor the contention of the

learned Counsel for the appellant, also show the real intention of Section 68. Mr. Justice Phear remarks: "We must look "upon Section 68 as a provision of the law "for making a public official to take care "that justice may be vindicated, notwith-"standing that the persons individually "aggrieved are unwilling or unable to pro-"secute." Mr. Justice Phear also ruled that the proceedings of Mr. Monro were not to be set aside. I do not think that the above case has really any bearing on the present case, for the judgment is qualified with reference to the peculiar circumstances of that very case, which are not the circumstances before us.

The other case was decided by Kemp and Markby, JJ. Much stress has been laid here on the words used by Mr. Justice Markby, where he says: "It has been con-"tended that, under Sections 426 and 439, "we ought not to interfere with the "sentence passed on account of a mere "irregularity or defect, which does not affect "the amount of punishment awarded; but "I do not think it can be contended that "either of these two Sections apply to "a case like the present, where the com-"plaint which is laid down in the Pro-"cedure Code as the commencement of a "prosecution is altogether absent. I do not "think, we ought to say, that the conviction "must stand good, because the punishment "awarded would probably have been the "same, had the proper proceedings been "observed. I think it never was intended "that these Sections should be used to the "extent of doing away altogether with the "procedure laid down by the Court, and to "rendering convictions valid when the "proceedings prescribed as preliminary to "the institution of criminal prosecutions are "altogether omitted, and the jurisdiction of "the Court which passed the sentence is "affected by the omission. If carried to this "extent, *Magistrates might altogether de-"sert the Code of Procedure.*"

The words *italicized* have been much pressed on us. But in the first place that case was very materially different, as it turned on the illegality of the transfer of a case to a Subordinate Magistrate; and, in the next place, were it a case in point, it remains to be proved that the Joint Magistrate did desert the Code. I do not think he has; but I think he has acted according to it. Section 133 enacts that "it shall be competent "to a Magistrate, upon the report of a "police-officer or *otherwise*, to direct enquiry "to be made by a police-officer into the "*offence* punishable under the Indian Penal "Code, or under any special or local *law*." One of the local laws to which the Section refers is the Police Act.

Thus, by this Section, enquiry can be directed judicially, and the Magistrate can also, as the head of the executive police, act under the local Police Law, Act V. of 1861.

Now, according to the current of decisions, the mere miscitation of a Section will not justify the setting aside of a conviction in regular appeal, if the prisoner has not been prejudiced. It follows, I think, that this Court would not be justified, on a mere motion under Section 404, to use its discretional and extraordinary power to set aside a conviction, if otherwise good, and the prisoner be not really prejudiced on a mere technical ground.

Before the Full Bench* the question was put in these terms: "Whether a Court of "Session is not competent to proceed to the "trial of a prisoner brought before it, upon "the charge of a Magistrate who is au-"thorized to make a commitment, although "it should be objected that there has been "some irregularity or defect of form in re-"cording the complaint;" and the judgment "of the Full Bench was this: "We are of "opinion that the Court of Session is com-"petent, and ought, to proceed to the trial "of a prisoner who is brought before it "upon a charge exhibited by a Magistrate "who is authorized to make a commitment, "notwithstanding any irregularity or defect "of form in recording the complaint."

In the view of the principle of the law so laid down, it is clear that the Joint Magistrate here, even if it be admitted for argument's sake that he acted wrongly in saying that he was acting under Section 68, really had legal power to act under Section 133, and that his act is, therefore, not illegal. This part, therefore, of the grounds of the petition fails.

Then it is said that there was no prosecutor in this case; that no such person was examined on oath; in fact, no charge was made by any one acting in that charac-

* *Ante*, p. 34.

ter. It is added that there was no Crown Prosecutor, and that in effect the prisoner was so far prejudiced that he could not know who the prosecutor was, whose charge he had to meet, and, therefore, could not duly defend himself.

This plea is unreal. We find that not only was the subpœna duly issued in the name of Biddyanidhi Dey *versus* the applicant on a charge of bribery, but that the summons itself bearing that title was receipted by the petitioner Prankisto Pal himself. It is urged by Mr. Mackenzie, the learned Counsel (who has done everything that he could for his client), that his client was not aware that the subpœna had gone out under that title. We think, however, that, in giving a receipt himself for the summons, the petitioner was legally made aware who it was that the Court indicated to him as the prosecutor. We think, then, that, under such a state of facts, this is a mere technical objection, and that, as the petitioner is not shown to have been really prejudiced by it, we should be failing in doing substantial justice, were we to admit such plea under the discretionary power vested in us under Section 404.

It is, however, further urged that the Joint Magistrate was examined, and he stated on oath he did not know that Biddyanidhi Dey was the prosecutor. Some little surplusage of argument has been made by Mr. Mackenzie, the learned Counsel, on this point; but the Joint Magistrate might have erred in this particular, and yet the prisoner might not be prejudiced, as it is shown above that he was not. But, if there is any doubt on this point, it is removed by the fact, as pointed out by Mr. Justice Kemp, that the applicant Prankisto Pal himself put in a memorandum of the witnesses whom he wished to examine for his defence in respect of *a charge of bribery* by *Biddyanidhi Dey*. The applicant also appointed a vakeel to conduct his defence.

After this, it is urged that Mr. Hopkins acted without jurisdiction in calling on the Railway Company (who had refused) to prosecute. I have before shown that, under Section 133, the Joint Magistrate had full power to direct the police to enquire, and there is nothing in the law prohibiting the Magistrate after this, or intermediately, to look to the Railway Company, whose servant the petitioner was, to move in or prosecute the case, though it might have been more judicious merely to give a formal notice to them of the case, that they might proceed as advised. The learned Counsel, Mr. Mackenzie, puts it that the Joint Magistrate wrote the memo. to the East Indian Railway Company only because the case had "*broken down.*" But the memo. does not contain any such words as these last-mentioned, and, indeed, it suggests the alternative, *viz.*, that the Railway Company might appoint a competent pleader to see after the case.

Another portion of this memo. of the Joint Magistrate has, in argument, been considerably amplified beyond its real meaning. Stress has been laid on the words: "The case "is not a false or malicious one, but there "is reason to expect that the prisoner will "escape unless the case is better managed," and it is said these words show the case to have been "*prejudged*" and "*bolstered up.*"

As to the case being prejudged by the Joint Magistrate as argued from the words, "the case is not a malicious or false one," &c., I look upon these words as a loose mode of expressing the doubts that the Joint Magistrate had in the case, that is, he thought there might be something real and true in the charge which needed a careful enquiry, and that, if all the evidence were not brought forward, and the case properly conducted, there was a likelihood of justice not being done, and that he meant no more.

It is, moreover, argued by the learned Counsel for the petitioner that the Judge erred in law in treating admissions of taking money in the manner in which the Judge did. This, however, is a matter of fact. The weight given to these admissoins is not a matter of law. The Judge has taken the admissions as the evidence which he thinks sufficient to justify his order.

We are not bound under Section 404 to go into questions of the weight of evidence, and do not think it necessary to do so in this case.

The last ground is that the petitioner has been prejudiced, and that Section 426, relied upon by the Lower Court, does not apply. But it is clear, from what has been stated above, that the Magistrate acted with jurisdiction under Section 133, and that the prisoner was not really prejudiced throughout.

Order.—Application rejected.

The 10th September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Summing up to Jury—Recommendation to mercy.

Criminal Appellate Jurisdiction.

The Queen *versus* Dassee Mosulmany.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of exposure and abandonment of a child under 12 years.

A Judge ought not to introduce into his direction to the Jury any question as to recommending a prisoner to mercy, but should leave that entirely to the Jury.

Jackson, J.—THIS was a Jury case, and there is no ground for interference with the sentence.

The Judge ought not to introduce into his direction to the Jury any question as to recommending the prisoner to mercy. That should be entirely left to the Jury themselves, as the Court has full discretion in passing sentence to give effect to any circumstances which seem to tell in favor of the accused.

The 10th September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Sessions record—Examination of accused.

Criminal Appellate Jurisdiction.

The Queen *versus* Bilash Mosulmany.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of exposure and abandonment of a child under 12 years.

There ought to be only one Sessions record, which should be continuous, and should contain accurately and consecutively the whole of the proceedings in the trial, including the examination of the accused.

Jackson, J.—THE evidence in this case satisfied the Jury, and there could have been no doubt as to the guilt of the prisoner.

The sentence, though severe, is not, we think, too severe.

We observe that the Judge anticipated the recommendation to mercy, and made some observations to the Jury on the subject. We think these would have been more properly reserved until the Jury had made such recommendation.

We observe, moreover, that there are two (not quite complete) records of the trial in the Court of Session, which, in some particulars, are not quite consistent one with the other; there should be but one record, which should be continuous, and should contain accurately and consecutively the whole of the proceedings in the trial.

The Judge should also attend carefully to the directions contained in Circular Order No. 11, dated 2nd September 1867.* In this case the examination of the accused is not annexed to the Sessions record.

The 17th August 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, F. B. Kemp, L. S. Jackson, and J. B. Phear, *Judges.*

Obstruction—Judicial proceeding — Sections 62 and 404, Code of Criminal Procedure.

Miscellaneous Case.

Abbas Ali Chowdhry, *Petitioner,*

versus

Illim Meah and others, *Opposite Party.*

Baboo Bhowanee Churn Dutt for Petitioner.

Baboo Juggadanund Mookerjee for the Government.

HELD (Phear, J., dissenting) that an order passed by a Magistrate under Section 62 of the Code of Criminal Procedure is not of the nature of a judicial proceeding, and, therefore, cannot be interfered with by the High Court under Section 404 of that Code.

This case was referred to a Full Bench by Loch and Hobhouse, JJ., with the following remarks:—

Hobhouse, J.—WE think this case must be submitted to the Full Bench for a

* 8 W. R., Criminal Circulars, p. 6.

decision upon the point material. It appears that a market had for a long time been held by certain persons on Tuesdays and Fridays at a place called Phullbaree, on one side of the river Barak, in Cachar. It appears also that the petitioners before us, at some time within a year previous to this application, established a similar market at a distance of about a mile from the first market, and on the opposite side of the same river, and held their market there on Tuesdays and Fridays also. It appears also that the police reported various disturbances arising from the efforts of the rival market-keepers to induce the villagers to go either to the one market or to the other; and that boats, in which persons were lawfully employed in carrying their produce for sale, were intercepted by either the one party or the other party. It appears also that complaints were made of violence committed either on the one side or on the other side in the attempt to prevent villagers from taking their produce either to the one market or to the other. The Magistrate also was of opinion that this disturbance and annoyance were likely to continue, unless the two rival markets were held on different days; and as the market in Phullbaree had been established ever since the time of the British rule, and, therefore, long before the market which the present petitioners set up on the opposite side of the river, and as also there were empty days on which the present petitioners could very easily hold their market without interference from any one else, so the Magistrate, under the provisions of Section 62 of the Code of Criminal Procedure, directed the present petitioners to abstain from holding their market in Panchgram, in Cachar, on Tuesdays and Fridays.

The Magistrate further explains in his letter No. 341 of the 27th April 1870 that the order upon the present petitioners was passed after evidence taken; and it is admitted by the pleaders on either side, *i. e.*, the pleader on the side of the petitioners and the pleader on behalf of the Government, that there was such evidence taken, and that it resulted in the Magistrate's convicting certain persons of the offence of wrongful restraint in connection with the rival market—a conviction which was afterwards modified by this Court into a conviction against those persons of assault or hurt.

It would seem, therefore, that when the Magistrate in this instance directed the petitioners to abstain from the act in question, namely, the act of holding the market in Panchgram on Tuesdays and Fridays, he had legal evidence before him that such direction was likely to prevent obstruction or risk of obstruction, annoyance, or injury to persons lawfully employed; and it seems probable also that he had evidence before him to show that such direction was likely to prevent riot or affray. But, at any rate, he had legal evidence before him to show that such direction was likely to prevent obstruction or annoyance to persons lawfully employed.

Under these circumstances, the question before us is whether the Magistrate had jurisdiction, under Section 62 of the Code of Criminal Procedure, to pass the order in question upon the petitioners.

In a decision to be found at page 12, Volume 4 of the Weekly Reporter, Criminal Rulings, the Judges seem to have held that, in a case very similar to the one before us, the Magistrate had not authority to direct the discontinuance of any such market as the one in question; but, in a case to be found at 11 Weekly Reporter, page 5, Criminal Rulings, the Judges seem to us to have held what to us appears to be the contrary of this.

In this state of things, we think it proper to refer the question for the decision of a Full Bench, and the question is whether, under the circumstances stated by us, the Magistrate had authority to direct the petitioners in question to abstain from the act of holding their market of Panchgram on Tuesdays and Fridays.

We may as well mention that Baboo Juggadanund Mookerjee, on behalf of the Government, has contended that the order passed by the Magistrate in this instance is not an order of the nature of a judicial proceeding, such as is contemplated by Section 404 of the Code of Criminal Procedure, and that, consequently, we have not jurisdiction to interfere with the order in question.

We are of opinion that the order is of the nature of a judicial proceeding, and that, in fact, it has been directly so treated by the Magistrate in this instance. But we state the point in order that, when the Full Bench shall have to consider the question which we have now submitted to them, they may consider also, if they think

proper so to do, this further question whether the order in question is of the nature of a judicial proceeding, and is, therefore, an order which it is within the province of this Court to revise under Chapter XXIX. of the Code of Criminal Procedure.

The judgments of the Full Benc hwere delivered as follows:—

Phear, J.—With regard to the last question put to us by the Division Bench, namely, whether or not the order of the Magistrate in this case is of the nature of a judicial proceeding, such as to give us jurisdiction to entertain the reference, I have the misfortune to differ from the rest of my colleagues, and this fact alone renders me necessarily distrustful of my own judgment.

Still I am bound to say that the little opportunity which I have just now had of considering the matter leaves me of opinion that the power which is given to the Magistrate under Section 62 of the Criminal Procedure Code is of a judicial character, within the meaning of the word *judicial* as it is used in Section 404. The Magistrate by Section 62 is directed to act when he considers that any person by the course of his conduct is likely, to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any other person lawfully employed. Thus, the Magistrate in a case falling under this Section has, in the first place, to arrive at a conclusion of fact between the offender on one side, and the person who is likely to be injured or annoyed on the other side; and the order which he passes, if he does pass an order under this Section, is not merely (to use a word very familiar to us on this side of the Court) a ministerial act, nor is it such an order as a policeman makes in his capacity of peace-officer when he directs a person to pass on, or to go to the other side of the street with the view to prevent or provide against the occurrence of any immediate obstruction, annoyance, or breach of the peace; but it is truly an injunction which, if it has been properly and duly made, will legally affect the person against whom it is issued in the enjoyment of his property as long as the order endures.

I find that a Division Bench of this Court, in a case reported in Vol. 12, W. R., page 36, Criminal Rulings, took, as far as I can see, precisely this view of the force of the Section. Mr. Justice Norman there says: "It is clear that the order contemplated by Section 62 is a particular "and specific order addressed to a particular "person, or particular persons, to do or "abstain from a particular act or particular acts: an act, in short, of the "nature of an injunction or command "which the Magistrate is to make in his "judicial capacity as the Judge in a "Criminal Court—not a regulation or bye-"law."

No doubt, many of these orders, whether rightly or wrongly, are passed very summarily indeed, and with the slightest possible show of proceeding, but I do not think that this circumstance alters the character of the power, or the nature of the jurisdiction under which the Magistrate makes them, though I can easily conceive it to be a special reason why such orders should be rendered subject by the Legislature to the revision of this Court, rather than exempted from it. To say the least of it, I think it strange, having regard to the very extensive powers of revision which the Court undoubtedly does possess under the Criminal Procedure Code, that a person aggrieved by an injunction of this particular kind should be forced to disobey it, and so to run the risk of being convicted of a serious criminal offence, before he can question its legality.

I cannot myself at present avoid the conclusion that an order passed under this Section is one which falls within the scope of Section 404 of the Criminal Procedure Code, *viz.*, that it is within the meaning of that Section, "a judicial proceeding of a "Criminal Court other than a criminal "trial," which we have authority to call up to this Court.

Jackson, J.—The question whether the order made by a Magistrate under Section 62 of the Code of Criminal Procedure is judicial in its nature is one which has not been raised before in any Division Bench in which I have sat, and, therefore, I have not had an opportunity of considering it. In a case which has been cited by the Magistrate, which will be found in XI. Weekly Reporter, and also in the case referred to us, this question was not raised, but the question whether an order of the kind which has been made in this instance could be lawfully made by the Magistrate under that Section was considered, and we were of opinion that the order was one within the Magistrate's competency to make

But now, that the question has been fairly raised, I confess the inclination of my mind is to the opinion that the order is not one of a judicial character.

There are certain Chapters and Sections of the Procedure Code in which a specific procedure is laid down for the Magistrate in cases which might appear to be such as would come under Section 62. In cases which did come precisely within the scope of those Sections, in which a specific procedure is laid down, I think the Magistrate would be bound to act according to that procedure; and where that procedure requires the hearing of the parties, and the arriving at a conclusion upon the evidence, or the decision of any contested point, no doubt the enquiry becomes judicial, and the order is judicial. But it seems to me that, in regard to a great number of orders which come to be made under Section 62, the Magistrate has to decide, not between a person wh ois taking some order with his property, or omitting to take certain order with his property, and another person to be affected by such act or omission, but he has, in reality, to provide for the safety or comfort of many persons who, at the time, are not aware that their safety is in question, or annoyance or obstruction is threatened. From the nature of the case it seems to me that very frequently it would be incumbent upon the Magistrate to make such order as is authorized in Section 62, without any formal enquiry. The Magistrate might, for instance, receive intelligence that the fall of a building was imminent, or that some other circumstances existed which were likely either to cause danger to the lives of persons, or to cause obstruction, annoyance, or injury, or lead to an affray. The Section, however, it may be noticed, does not require that something which is done or omitted to be done by a person in possession of property should be likely to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed, or likely to cause danger to human life, health, or safety, or should be likely to prevent an affray; but, if the Magistrate considers that the direction which he proposes to give is likely to prevent obstruction, annoyance, or injury, and so on, or is likely to prevent danger to human life, &c., or is likely to prevent a riot or an affray, it is lawful for him to make such an order. The Magistrate, therefore, will often be called upon to act on the shortest notice, and without any delay; and I think there is another good reason why it should not be necessary to regard the act of a Magistrate under this Section as being a judicial decision, which is simply this—that the issuing of the order under the 62nd Section entails no further consequences than that the person contravening that order does so at his peril, and is liable to be dealt with for such conduct under Section 188 of the Penal Code.

That, then, it seems to me, is the proper way of trying the legality of an order issued under Section 62 by a Magistrate or by any other public servant; for the operation of these Sections is by no means confined to the orders of Magistrates.

I may mention that I have stated pretty nearly this view of the case on a former occasion in a case which is to be found in VIII Weekly Reporter, page 37, Criminal Rulings. There I pointed out that the Magistrate, "if he thought such a direction tended "to prevent obstruction to persons lawfully "employed, might order any person to take "action with the wall in his possession in "the sense of removing it; and if the order "were disobeyed, and the obstruction antici-"pated were to arise, the person disobeying "might be proceeded against under Section "188, Indian Penal Code. If convicted, he "might appeal, or might bring his case before "this Court by motion, and the validity of "the proceedings would then be enquired "into."

Therefore, I am now inclined to say that the act of the Magistrate, under Section 62 of the Code of Criminal Procedure, was not a judicial proceeding of a Criminal Court, and, therefore, does not come within the scope of Section 404 of the Criminal Procedure Code.

Kemp, J.—I am of opinion that the order of the Magistrate in this case is not a judicial proceeding. It appears that the petitioner before us established a new market on the bank of the river Barak, in Zillah Cachar, and that parties proceeding with vegetables, &c., to the new as well as to the old market were obstructed and annoyed by the rival proprietors of the two markets. This was brought to the notice of the Magistrate, and he proceeded to the spot. The Magistrate took no evidence whatever, nor did he summon either of the proprietors of the markets, or put them on their defence. There is a memorandum on the record, to the effect that certain parties, whose names

were given, bore marks upon their persons of injury and violence. It is noted that one of them had his head broken, and that the other was wounded. Upon this, the Magistrate, not with a view of preventing riot or affray, but with a view of removing the obstructions and annoyances to persons lawfully employed, directed the petitioner to abstain from holding the new market upon the same days on which the old market was held. No evidence having been taken, and no party having been put on his defence, this order of the Magistrate was, in my opinion, not a judicial order, but an executive order to prevent people who were lawfully employed in bringing their goods for sale in the markets from being obstructed and annoyed.

I concur in the judgment delivered by Mr. Justice Louis S. Jackson.

Bayley, J.—I am of the same opinion with Mr. Justice Kemp and Mr. Justice L. S. Jackson. I do not think that this is a case coming within the scope of a judicial proceeding contemplated by Section 404 of the Code of Criminal Procedure. Under Section 62 of that Act, the Magistrate, by a written order, may direct any person to abstain from a certain act, whenever such Magistrate shall consider that such direction is likely to prevent, or tends to prevent, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed, or a riot or an affray. Such an order might be required to be made by the Magistrate on matters of sudden emergency, where the case would not suffer the delay of a judicial proceeding by the taking and recording of evidence, and so forth. Such a judicial proceeding was not held by the Magistrate in this case. The facts shown are that parties who frequented the rival *hâuts* had their boats with saleable articles intercepted on the way by the opposite party, and frequent disputes and affrays in consequence arose between the two proprietors, and people were found wounded in them.

In order to prevent such obstruction, annoyance, and injury to the parties, the Magistrate, by a written order, directed that one of the rival proprietors might change the days of his *hâut* so as not to interfere with the day of the *hâut* of the other proprietor, and thus remove the cause of such frequent injury, annoyance, and affrays. I think such an order legally correct under Section 62, and that such an order by the Magistrate under Section 62 is not a judicial proceeding contemplated as capable of revision under Section 404 of the Code of Criminal Procedure.

Couch, C.J.—It has always appeared to me that the object of the Legislature in Section 62 was to provide for cases where there might be obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any person lawfully employed, or danger to human life, health, or safety, or any likelihood of a riot or an affray, where it would be necessary to act speedily, probably at once, in order that the danger might be prevented, and where the case would not admit of the delay of a judicial proceeding caused by summoning the parties to answer, which delay might be such that the mischief intended to be averted might actually be done before any order could be made. I think this is the object of Section 62 and of Section 318, which seem intended to apply to cases of danger arising from the construction or state of a building or other causes of that kind that ought to be at once removed. I agree with Mr. Justice Phear that, if we look upon this provision in the Code of Criminal Procedure as in the nature of an injunction, where the Court would exercise its power in the same way as it would in the case of an injunction, it would be necessary to give the parties an opportunity of being heard and having the matter tried as in a judicial proceeding. But it seems to me that the object of the Legislature was to avoid doing this, and to invest the Magistrate with discretionary powers—very considerable no doubt—but that which might be properly exercised under the circumstances. In my opinion, that is why this cannot be regarded as a judicial proceeding; and that the Legislature in framing the Code of Criminal Procedure intended that it should not be, is clear from the terms of Section 318. That is a Section intended to prevent a breach of peace, and it is there provided that, if the Magistrate is satisfied that a dispute likely to induce a breach of peace exists within his jurisdiction, he shall record a proceeding of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court within a stated period, and to give in a written statement of their respective claims—clearly showing that the Legislature, when it meant to direct the Magistrate to proceed judicially, pointed

out the course that he ought to pursue. But we find no provision of the kind in Section 62. The language of it seems to point out that it was intended to give the Magistrate a power to be exercised with the utmost promptitude; and, if he should make an order which he had no authority to make, and the party on whom that order is made should not obey it, and be convicted, its legality may then be tried. That is the ground upon which I have always been of opinion that this is not a judicial proceeding; and, although I feel some doubt as to its correctness, as Mr. Justice Phear takes a different view, I am confirmed in it by finding that it is shared by the three other Judges who form this Bench.

The 10th September 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

High Court—Court of Session—Private Prosecutor—Sections 419 and 435, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rajshahye.

Sudduruddeen Sircar on part of Ranee Surutsoonduree Debea *versus* Ram Joy Mojoomdar.

A private prosecutor cannot move a Court of Session under Section 419 of the Code of Criminal Procedure in a case which is not before that Court *in appeal,* though he may do so under Section 435 of that Code in cases in which the Court of Session can interfere. A private prosecutor has no right to be heard before the High Court in a case in which he could not be heard in the Sessions Court.

Reference.—THE complainant charged Ram Joy Mojoomdar with having, on the 27th of March 1867, as the Ranee's mooktear and agent, received the interest on certain Government promissory notes belonging to the Ranee, being Rupees 2,887-8, and with having dishonestly misappropriated that sum, and converted it to his own use.

The case was referred to Mr. * *, Deputy Magistrate, exercising full powers of Magistrate, and it came on for hearing before that officer on the 18th July last. On the 18th of July, the Deputy Magistrate recorded the deposition of the complainant, who stated that the prisoner kept a current account with the Ranee in which he had failed to insert the transaction in question that the accused had denied the receipt of the money, and attempted by falsification of the Government Treasury Books to prove to his mistress that another agent of hers, by name Nobokumar (now deceased), had received the money from the Treasury. The complainant allowed that the accused had not submitted a nikhas for 1273, but added that there was no nikhas demanded, as the accused was trusted by the Ranee.

The Deputy Magistrate, without calling up the witnesses for the prosecution, next examined the accused, who admitted the receipt on the 27th March 1867 of the said interest-money, *viz.*, Rupees 2,887-8, and stated that it was paid that same day into the Treasury, and was a portion of a total sum of Rupees 5,174-5, which he paid in as Government revenue on the 27th March 1867 on the part of the Ranee.

The Deputy Magistrate then took evidence as to the truth of the allegation of payment of Rupees 5,174-5 on 27th March 1867, and, the evidence on that point being furnished, he considered that, as the accused's nikhas for 1273 (corresponding with 1866 and 1867) had not been submitted to the Ranee, the latter had it still "in her power to compel "the accused to make out his nikhas with "her for the year 1273 still unsettled, either "amicably or by a suit in the Civil Court;" and that there remained, therefore, no further ground for continuing the criminal prosecution. The Deputy Magistrate, accordingly, on the 19th July, discharged the accused under Section 225 of the Criminal Procedure Code.

Dissatisfied with the Deputy Magistrate's decision, the complainant petitioned this Court to order a full enquiry into the case under Section 435 of Act XXV. of 1861, and this Court would have complied with the complainant's petition, had not the Officiating Judge's eye fallen on a printed charge-sheet filed with the record of the case, bearing the signature and seal of the Deputy Magistrate, and containing an order dated 18th July for the trial by the Sessions Court of Ram Joy Mojoomdar, charged with having committed criminal breach of trust in respect of certain interest-money drawn by him on behalf of his client Ranee Surutsunduree Debea out of the Rajshahye Treasury, on the 27th March 1867.

The Officiating Judge, understanding from this charge-sheet that the accused Ram Joy

had been regularly committed by the Deputy Magistrate on the 18th July to be tried by the Sessions Court, declared that the order of discharge of the accused dated 19th July was without jurisdiction and void, and directed the Magistrate to instruct the Deputy Magistrate to complete the commitment-proceedings in accordance with Sections 227 and 228 of the Criminal Procedure Code, and to forward the record for trial at the next ensuing Sessions. The Officiating Judge further ordered that all the persons named in the list of witnesses filed by the prosecution before the Deputy Magistrate should be summoned in the trial before this Court.

On the receipt of the remarks of this Court, the Deputy Magistrate submitted to the Magistrate an explanation to the effect, as I understand it, that the order of commitment was a mistake altogether ; that it was drawn up hastily after the order of discharge had been passed on the 19th July, and dated the 18th July to rectify what appeared to him to have been omissions on his part with respect to the drawing up of a formal charge against accused under Section 250 of the Criminal Procedure Code before putting accused on his defence, and that, after signing it, it occurred to him that he had discharged the accused under Section 225 of the Criminal Procedure Code, which Section applies to cases enquired into with a view to the commitment of the accused to the Sessions Court, and that, therefore, he mechanically substituted in the printed form, which was meant for use in cases cognizable in his own Court, the words "the cognizance of the Sessions Court" for the words "my cognizance."

There can, I think, be no doubt that the Deputy Magistrate's proceedings in the matter of the drawing out of this order of commitment were very irregular, and showed very great carelessness, and that the order of commitment, which was, in fact, signed by mistake without any intention on the part of the Deputy Magistrate to commit the accused to the Sessions Court, and at a time when jurisdiction in the case had passed away from the Deputy Magistrate, cannot legally subject the accused to a trial before the Sessions Court.

It will, however, be seen by the Court, from the letter of the Officiating Magistrate, Mr. Heeley, dated 24th August, that he, as Officiating Judge, being impressed with the belief that the order of commitment, dated 10th of July 1870, was a regular order passed by the Deputy Magistrate on the last-mentioned date, annulled the order of discharge passed by the Deputy Magistrate on the 19th July, and directed the accused to be sent for trial before the Sessions Court at the next ensuing Sessions, and that order, which bears date 12th August 1870, it appears to me, can only be quashed by the High Court. I have the honor, therefore, to request that the Court will be pleased to annul both the order of this Court dated 12th August 1871, and that of the Deputy Magistrate dated 18th July, ordering the commitment of the accused, and that, in the matter of the petition of the complainant Sudduruddeen Sircar, praying for an order for further enquiry under Section 435 of the Criminal Procedure Code, the Court will be pleased to issue such directions as to it shall seem proper.

Judgment of the High Court.

Loch, J.—I think in this case the private prosecutor has not a right to appear, first, because he was not a party to the rule; and, secondly, he cannot come under Section 419 of the Criminal Procedure Code; for, whatever may be the interpretation put upon the word "plaintiff" in that Section, and whether that word is rightly used or not in that Section, it is a Section which relates simply to cases of appeal, which is not the case here. In certain cases the private prosecutor might, under the provisions of Section 435, move the Court of Session, but there is nothing in that Section which says that he may come up to this Court, and, looking at the circumstances of this case, it is clear that he cannot come up here and be heard. He could not appear in the Court of Session, because the case was one in which that Court could not interfere under the provisions of Section 435, and, if he could not appear, he cannot have a right to come up to this Court to be heard against the rule. If he be heard at all, he can be heard only by the permission of the Court.

The rule must be made absolute, and the order of the Magistrate of the 18th July 1870 committing the petitioner to the Court of Session be set aside, and also the order of the Judge of the 12th August 1870, directing the Deputy Magistrate to re-commit the petitioner, be set aside.

The 12th September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Perjury—False evidence—Evidence—Punishment.

Criminal Appellate Jurisdiction.

The Queen *versus* Issen Chunder Ghose Patri.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of giving false evidence.

Baboos Bama Churn Banerjee and *Khettur Mohun Mookerjee* for Appellant.

The evidence of one witness in cases of perjury is sufficient to establish the *factum* of the statement which is charged as being false.

The measure of punishment is a matter entirely in the discretion of the Court of Session.

Jackson, J.—THE only point of law which it seems to be necessary to notice in this case is the contention of the vakeel, Baboo Khettur Mohun Mookerjee, who appears for the appellant, that the evidence of a single witness is not sufficient in cases of perjury to establish the *factum* of the statement which is charged as being false. I have no hesitation in saying, both on the English authorities and by the law of this country, that one witness is sufficient for this purpose. It has been held by a Full Bench of this Court, * and I am not inclined to question the decision at present, that either the falsity of the deposition made must be established by more than one witness, or that the testimony of that witness must be corroborated by circumstantial evidence. In this case it was so, and the falsity of the statement made by the prisoner is not in question. I, therefore, see no reason to disturb the conviction which has been based upon the verdict of a Jury, arrived at after careful consideration; nor do I see any reason to interfere with the sentence. The prisoner has been sentenced to seven years' rigorous imprisonment; he might have been also sentenced to pay a fine, but no fine has been imposed upon him. It is not stated that there are any circumstances of extenuation, but only that there are some of aggravation. The measure of punishment is a matter entirely in the discretion of the Court of Session. In this case the prisoner was guilty, not merely of giving false evidence, but also of false personation. He appears to be a person of intelligence and some amount of education, because the statement which he makes in regard to his having learnt to write subsequent to the execution of the deed is most probably untrue. It appears to me that no reason is shown why we should interfere with the sentence passed by the Court of Session in this case.

* 5 W. R., Criminal Rulings, p. 23.

The 13th September 1870.

Present:

The Hon'ble G. Loch and Sir Charles Hobhouse, *Bart., Judges.*

Pleader—Suspension—Section 16, Act XX. of 1865.

In the Matter of

Mr. R. Cruise, Pleader of the Judge's Court of Purneah.

Case in which the High Court declined on the facts to strike a pleader off the rolls for using improper expressions during the argument of a case before a Zillah Judge, who recommended, after observing the requirements of Section 16, Act XX. of 1865, that such punishment should be awarded. The Zillah Judge should have called the pleader to order, and required him to apologize.

Hobhouse, J.—MR. CRUISE, who is a pleader of the Judge's Court of Purneah, has been charged with committing certain offences in the presence of the said Court, and the Judge has, under the provisions of Act XX. of 1868, submitted the charges and the papers referring thereto to this Court with his recommendation that, with reference to the two last charges, Mr. Cruise should be dismissed from his pleadership. The charges made are as follows:—

"Grossly improper conduct in the discharge of his professional duty in the following respects, that is to say:—

"*1st.*—In having, on the 27th of April 1870, while conducting a case in the Purneah Civil Court, interrupted the Judge, and used words identical with, or to the effect of, the following: 'I have no opinion of the Judges of the High Court with the exception of Sir Barnes Peacock. I could show you a decision in this Court which has been "burked," but which, if published in England, would have cost the Judges their seat.'

"*2ndly.*—In having, on the same day, in his pleading, used words identical with, or to the same effect as, the following: 'What have we then? A decision of Mr. Justice Phear, servilely followed by a few other Judges.'

"*3rdly.*—In having, on the same day, in Court, used the identical words recorded in my memorandum marked A of that date, and, under the circumstances, represented in my memoranda A and B of the 27th and 28th April, respectively, both filed with the record.

"*4thly.*—In having, in the 15th para. of his memorandum marked X, and dated the 11th May 1870, made the following statement: 'I perfectly well remember, however, that the exact words I made use of were—Because, Baboo, as a general rule, they are liars—meaning the native witnesses of whom I had been speaking.' Such statement being contrary to fact on a very material point."

The memorandum A of the Civil Court of Purneah, dated the 27th April 1870, is as follows:—

"This day, while pleading in a case, Mr. R. Cruise used words almost identical with the following: 'The plaintiff wishes us to believe on the evidence of a couple of natives who, as the Court knows, can at any time be bought for two annas,' &c., &c.

"On this Baboo Parbutty Churn Dass, his opposing Counsel, got up and objected, and asked what was meant by the expression. Mr. Cruise replied: 'Why; as a general rule, natives are liars.' Mr. Cruise, after some further remarks, disclaimed all intention of personal insult to the Baboo. The first remark made by Mr. Cruise was to the Court. 'Is not this our private opinion; is it not notorious?'

"Mr. Cruise remarks (and the Baboo does not object to the remark) that the Baboo's question was, 'Why do you say natives?'

"Mr. Cruise and the Baboo admit this to be a correct representation of what actually took place."

Memorandum B, proceedings of the Purneah Civil Court, dated the 28th April 1870, is as follows:—

"Yesterday, while I was hearing the arguments of Mr. R. Cruise in the case of Luchmeeput Singh, appellant, *versus* Sheikh Mowla Buksh, a scene took place in my Court, some particulars of which will be found noted in the paper marked A attached to this. I recorded the words used on the spot, so as to prevent any future question as to what they actually were. I read it over word for word before both pleaders, and Mr. Cruise objecting to the word "all," I erased it. He also proposed an addition which I have put in red ink, and which I think correctly represents the words used by Baboo Parbutty Churn Dass.

"*2nd.*—In cases of this kind much depends on the manner and tone in which words of general meaning are used. I must, therefore, add that the words "a couple of natives" irresistibly conveyed the idea that the term 'native' was used to signify a native of India, an antithesis to an European. The tone used and the words must have been extremely offensive to any native (of whatever grade) who may have understood them, and Baboo Parbutty Churn had, in my opinion, every right to ask the question, 'Why do you say natives?' The words of Mr. Cruise's reply speak for themselves, and I can only say that such words spoken in the tone used, and to a man of the nation attacked, whether in Court or out of Court, would be as great an insult as I can conceive. I need, perhaps, scarcely add that I have never seen or heard of any Court in which a general charge of this kind would remain unchecked by the presiding Judge.

"*3rd.*—Mr. Cruise, far from recalling the words on my interference, attempted to justify them in the most offensive manner. I do not think the Bench has ever been more bitterly insulted than it was when I was asked, "Is not this our private opinion; is it not notorious?" If a pleader so far forgets himself and his case as to insult an inoffensive colleague by a general allegation irrelevant to the case, he should at least have sufficient respect for the Court to make him refrain from asking the Court to endorse his insult. Mr. Cruise, however, did ask me the question noted above, and after some parley told the Baboo that he meant "no personal insult" to him. He qualified this apology, however, by reiterating the general truth and applicability of his remark, adding then, and not till then, that he mainly referred to the lower class of natives.

"*4th.*—Now, granting for the sake of argument that untruthfulness be a national fail-

ing, and that the question immediately before the Court had been one involving a consideration of the national character, even on such a strained hypothesis I hold that the word 'liar' should not have been used. The law of England itself, as set forth by Blackstone, recognizes the offensiveness and provoking nature of that specific term, and there are many ways of conveying the idea of untruthfulness without its use. Leaving alone the ordinary courtesy due to all persons, respect for the Court should have prevented its use where almost all persons present and concerned were of the attacked nationality.

"*5th.*—But to show how utterly wanton and gratuitous the insult was, and how entirely irrelevant to the case Mr. Cruise was pleading at the time, I must give a few of the circumstances connected with the scene. I was hearing an appeal against the reversal of a sale of real property held by a Revenue Court under Section 109 of Act X. of 1859. The ground alleged for reversal was that the plaintiff, who had been a judgment-debtor in the Revenue Court, had had ample personal or moveable property; that the Section quoted barred the decree from execution by sale of the realty, until there was reason to suppose that it could not be satisfied by the seizure of his person and personalty.

"Two witnesses (one a mohurrir of the Kissengunge Court, and the other a relation of the judgment-debtor) were brought into the Original Court, and swore to the fact that the judgment-debtor (plaintiff in this case) had had a great deal of personal property. On the part of the defendant, Mr. Cruise (why, he alone can tell) had several times referred to these men as being brought to prove jurisdiction; and a considerable time before the occurrence of the scene now reviewed, he had said that the jurisdiction of this Court was not to be proved by a 'couple of blackguards' whose evidence could be purchased for a few annas. Now, the jurisdiction of the Civil Court was a question purely of law. It arose out of the non-jurisdiction of the Revenue Court, and the facts to which the two witnesses deposed were actually admitted by the defendant (Mr. Cruise's client) in the pleadings. The evidence of these witnesses was not necessary, for, as a matter of fact, the truth of the facts to which they deposed was alleged and admitted on all hands.

"*6th.*—I have this day asked Mr. Cruise if, after reflection, he is willing to apologize to the Court; he has replied that he has apologized to the Court, but that he considers that he was justified, as a pleader, in saying what he did—that he holds to it still. I consider this to be no apology. I must insist on an apology to the effect that Mr. Cruise's conduct was unjustified and unjustifiable; that his remark was totally uncalled for and totally irrelevant to the pleadings.

"*7th.*—Mr. Cruise has this day persisted in bringing up the subject before the Court for verbal discussion, and, in connection with it and with my signed and concluded judgment in the civil suit referred to above, has made some remarks which I consider beyond his province, *e. g.*, calling my judgment or a portion of it very improper, 'grossly improper.' I must, therefore, add that when I have signed a proceeding of this kind, I will not allow it to be verbally commented on in my presence in this way. I am responsible for every word which I write; and, if it be determined by appellate authority that I am wrong in any respect, I shall accept that decision; and, if I have wronged Mr. Cruise, I will apologize to him most heartily, but I cannot allow angry discussion in my Court; and when Mr. Cruise asserts his right to criticize my remarks by such phrases: 'I am a most able pleader, and I tell you that, not as coming from myself, but as that which others say of me:' 'I am old enough to be your father, Sir:' 'I am your equal in birth, education, and position:' 'I am inferior to you in no respect,' I must remind him that none of these allegations are in point. I have never denied them. I hereby distinctly declare that I will not verbally discuss this question again; any reply, whether apologetic or analytic, must be written."

Certain of these proceedings were forwarded to this Court, and were submitted to the Judges who form what is called the English Committee. But the Judge of Purneah was instructed that he had it within his power to take proceedings against the pleader, and the papers were, therefore, returned to him. He then drew up those certain charges against Mr. Cruise, which I have quoted above. But, before framing those charges, the Judge called upon Mr. Cruise to make his statement in the matter of the proceedings which I have just quoted, and accordingly, on the 11th May 1870, Mr. Cruise submitted his remarks. Mr.

Cruise's reply will be found in the printed paper-book at pp. 4 to 11. After framing the charges, copies of them were submitted to Mr. Cruise, and he, on the 15th August 1870, made an affidavit in answer to the charges before the Magistrate of Purneah. I do not propose to read the affidavit at present, but it forms part of the record of this case. I shall only now refer to the 16th paragraph of Mr. Cruise's reply of the 11th May 1870, because it is in that paragraph that the words are contained by which, as I understand the Judge, he construes that statement to be contrary to fact on a very material point, and on which he founds his fourth charge. Mr. Cruise states as follows (and this has reference to what took place in Court in the matter of what he said about the natives, whether he meant certain native witnesses particularly, or the natives in general). The 16th paragraph is as follows:—

"The fact is, however, that the answer which I gave was not exactly what the Judge has recorded. I did not perceive the difference at the time, and, not wishing to split staves with the Judge, I admitted his record to be substantially correct, and made a note to the same effect upon my own written pleading. I perfectly well remember, however, that the exact words I made use of were: 'Because, Baboo, as a general rule, they are liars,' meaning the native witnesses of whom I had been speaking. To the best of my belief those were the exact words which I made use of; but, as I have admitted the words recorded by the Judge to be correct, and noted the same in my pleading, I shall not press this correction on his attention. That he did not exactly record the sentence at which Baboo Purbutty took offence, will be seen at once by comparing it with the manuscript from which I read my argument word for word—a precaution which I told the Judge I had been forced to adopt in self-defence against any officer on the Bench who should accuse me, as he had done, of wasting the time of the Court by vain repetition and irrelevant argument, and who should make that a pretence for refusing to hear me. I trust the Judge will admit that out of that written argument I did not alter a word, except to reply to and protest against his unceasing interruptions and accusations that I was repeating the same thing over and over, and wasting the time of the Court by irrelevant arguments."

On the 15th August 1870, the Judge, after giving a detail of certain facts which it is unnecessary for me here to repeat, delivers the judgment in the following terms:—

"I have this day received Mr. Cruise's answer to the charge detailed in my proceeding, marked C, and I now go on to consider it.

"On the two first heads of the charge I have but little to say. Mr. Cruise acknowledges having used the words imputed to him; he only differs as to the circumstances under, and the time at, which they were spoken. Taking him on his own statement, I consider that they were grossly improper; but I reiterate that they were spoken with reference to a remark which will be found in the decision of the case of Luchmeeput *versus* Mowla Buksh.

"Whenever I differ in argument from my equals, I do so without arrogation of superiority; but, whenever I comment upon the acts or opinions of constituted superior authorities, I invariably record a *pro-forma* disclaimer of the right or intention to criticize. If this seems to Mr. Cruise a very emasculated and cringing form of procedure, I can only say that it does not to me.

"On the 3rd head of the charge, I decide that Mr. Cruise did use the identical words recorded in my Memo. A. I decide this on my own recollection, backed by Baboo Parbutty Churn Dass's evidence and by my record made at the time (*viz.*, the said Memo. A). That the word 'natives' was used, is also shown by the record of Mr. Cruise's objection. It was a frivolous objection, but Mr. Cruise was then taking up every word that I said; and, when I read out my record, he called out, 'The Baboo said, Why do you say natives?' I at once recorded the objection. Now, the question as to whether the words 'native witnesses' were used was all-important, as in that case only a class would have been attacked. I assert again most distinctly that, as a matter of fact, the whole nation was attacked. That Mr. Cruise was aware of the importance of the difference referred to I am quite sure, as he made an attempt to introduce the word "witnesses" some time afterwards when he had subsided to some extent. The whole of his recent argument, however, had been so opposed to the supposition that he had merely referred to a class that he at

once gave it up. I remember well asking him whether he would not feel insulted if some one were to say that, as a rule, Englishmen were liars, and his answering, 'Yes, because Englishmen are not liars: natives are.'

"The use of such language I hold to be grossly improper. Had it passed between men of equal physique and of ordinary temper, an assault *must* have resulted. I would not like to predict the fate of an English barrister who should say in a Dublin Court that, as a rule, all Irishmen were liars, even if his object was only to discredit two Irish witnesses. In the present case, I have already shown that there was no object in discrediting the evidence of the witnesses concerned.

"On the 4th head of the charge, I decide that Mr. Cruise has been guilty of a very disingenuous distortion of facts."

Then follows the finding of the Court, dated the 15th August 1870, in these words:—

"I have now to consider the extent of the punishment to which, in my opinion, Mr. Cruise has fairly rendered himself liable by the conduct referred to above.

"*2nd.*—There is a vulgarity about the language which forms the subject of the first two heads of the charge, which destroys its mischievousness, so that I need say no more about them.

"*3rd.*—But I hold the offence declared in the third and fourth heads to be very grave. Mr. Cruise used grossly insolent language; it was recorded at once, and the record had his full approval. More than a week afterwards, he substituted absolutely innocent language, declared that to have been the language used, and said that I had misrepresented him. If this conduct be declared legitimate, no Court is safe.

"*4th.*—I consider him guilty of gross disrespect and gross dishonesty; and, looking at the fact that he has backed his defence by the most notorious falsehoods, I cannot otherwise than recommend his dismissal."

The words of the law are these (Section 15, Act XX. of 1865):—

"The High Court may also, after such enquiry as it may deem proper, suspend or dismiss any pleader or mooktear enrolled as aforesaid, who shall be guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or for any other reasonable cause."

Then Section 16:—

"If any such pleader or mooktear practising in any Court subordinate to the High Court shall be charged in such Subordinate Court with any such conduct as aforesaid, the Judge or Magistrate of the Court, as the case may be, shall send him a copy of the charge, and also a notice that, on a day to be therein appointed, such charge will be taken into consideration. Such copy and notice shall be served upon the pleader or mooktear at least ten days before the day so appointed, and on such day or any subsequent day to which the enquiry may be adjourned, the Court shall receive all evidence properly tendered by, or on behalf of, the party bringing the charge, or by the pleader or mooktear, and shall proceed to adjudicate on the charge. If the Judge or Magistrate shall find the charge established, and consider that the pleader or mooktear should be suspended or dismissed in consequence, he shall record his finding and the grounds thereof, and shall report the same to the High Court, and the High Court shall proceed to acquit, suspend, or dismiss the pleader or mooktear * * *."

It is under these circumstances that the case comes up before us.

Mr. Cruise objects in the first place, as I understand him, that it is a question as to whether there could be any such investigation before the Subordinate Court, not because he had not any proper opportunity for defending himself, but because he could not, as I understand him, appear properly before a Judge who was at once, as Mr. Cruise puts it, the prosecutor, the witness, and the Judge of the charges. I do not think that it is at all necessary for us to come to any opinion on this point. But, if it were, we should still think the words of the law distinctly contemplate such cases as the one before us. They provide for a charge being made; they provide for the time within which that charge should be answered and the evidence should be tendered; and they also provide for a finding upon that charge; and we think that all these proceedings with more or

less regularity were carried out in this matter. Therefore, we may take it that the finding of the Court below is a good finding so far as regards jurisdiction to investigate into the matter which is before us. But the question is, what action we should take upon that finding?

Before we came into the Court, and indeed I may say that for the last fortnight, Mr. Justice Loch and I have been going very carefully over the papers of this case, and we had made up our mind not to call upon Mr. Cruise for any statement at all, or in fact any explanation at all, so far as regards the charges, and whether they are good under the Act. In the matter of the first two charges it will be remarked that the Judge himself substantially acquits Mr. Cruise. It is in the matter of the last two, charges only that the Judge finds that Mr. Cruise has been guilty of gross disrespect and gross dishonesty, and he recommends that Mr. Cruise should be dismissed.

We are unable to say that there is any sufficient ground for this finding. Taking it to be that Mr. Cruise has used the exact words which he is stated to have used in the memorandum of the 27th April 1870, we think he was entitled to say that he was not speaking of natives generally, but that he was speaking of native witnesses, and applying his remark to the particular native witnesses whose evidence was, at any rate, on the record, if it was not in question before the Judge. What Mr. Cruise said was this: "The plaintiff wishes us to believe in the evidence of a couple of natives." Now, it is quite clear in the very face of these words that Mr. Cruise was speaking of the evidence of certain native witnesses, and therefore he was speaking of them particularly, and not of natives generally. And then, when the pleader for the opposite side objected to the words used by Mr. Cruise, Mr. Cruise replied: "Why; as a general "rule, natives were liars." There cannot, of course, be any doubt but that the use of the word "liar" by Mr. Cruise before a Court of Justice was most improper, and if I had been the Judge, and if any such expression had been used before me, I should certainly have called upon the pleader to withdraw from such expression. But I cannot say that the use of the word in the course and in the heat and excitement of the argument is such an offence as to require us to dismiss a person from his office as a pleader. It might have been an occasion for calling the pleader to order, but it certainly is not a sufficient ground for dismissing the pleader from his office. However, the words are there, and the question is whether we may not believe Mr. Cruise when he says that he did not mean to apply those words to natives generally, but to certain native witnesses. It seems to me that, coupling the words of the first sentence, which I have read, with the words of the second sentence, we may say, and we ought to say, that Mr. Cruise was, as he says, referring to particular natives who had given evidence in a particular case, and not to natives generally. Therefore, taking the Judge's statement of what took place as accurate, and reading that statement with that of Mr. Cruise, it seems to me that we cannot say that Mr Cruise is guilty of that of which the Judge finds him guilty, *viz.*, that he has made a statement which is contrary to fact on a very material point; neither, as I have said before, do I think that the statement is one which requires us to dismiss Mr. Cruise from his office.

In the case of Kessub Lall Doss, a pleader in the District of Sarun, tried by Mr. L. Jackson and myself, in which the Judge charged the pleader with the offence of using very much stronger language, and where the offence proved was of a much graver nature than any which has been committed here—if, indeed, any offence has been at all committed here—even in that case we did not go beyond suspending the pleader for a short time. So I think that the case before us was one in which the Judge might have called Mr. Cruise, who was then the pleader before him, to order, or to apologize, and is certainly not a case in which we ought to visit Mr. Cruise with the severest penalty of the law, and strike his name off the roll of pleaders.

Mr. Cruise reminds us that he did apologize, and, this being so, the Judge might better, we think, have let the matter drop, and certainly should not have asked us to visit Mr. Cruise with the severest penalty of the law.

We are, however, bound further to state in regard to the matter of the first two charges, now that this matter has been brought to our notice, and that Mr. Cruise has admitted the use of the words attributed to him, that certainly in those two charges there were some expressions of a highly improper nature. This being our opinion, as, indeed, it could not but, we think, be the

opinion of any one who simply read the expressions made use of, we gave Mr. Cruise this day the opportunity of explaining away or of expressing his regret for the use of the expression in question. Mr. Cruise has not only not availed himself of this opportunity, but has stated that he is prepared to justify the use of the expressions. Mr. Cruise explained that the expressions contained in the first charge were made use of at a time when no regular argument was being carried on before the Court, but on an occasion of a kind of conversation carried on between the Bench on the one side, and himself and other members of the Bar on the other side; and he says that he would not have used words of that description in the course of pleading in any cause. The expressions made use of as by the second charge was, we understand Mr. Cruise, made use of in the course of pleading. We cannot say that this explanation is satisfactory. Mr. Cruise then said that he wished us to observe that the remarks were made in good faith. We do not say that they might not have been so, but what we say is this—that they were expressions which should not have been used at all, by any pleader of any Court subordinate to the High Court, in public, and addressed from the Bar to the Bench. The words used are these in the first charge: "I have no opinion of the Judges of the High Court, with the exception of Sir Barnes Peacock. I could show you a decision in this Court which has been *burked*, but which, if published in England, would have cost the Judges their seat." We say that, on the face of it, that is not a proper expression to have been made use of with reference to Judges of the High Court before any Court in this country subordinate to the High Court.

And again in the second charge the words made use of are these: "What have we then? A decision of Mr. Justice Phear *servilely* followed by a few other Judges." It is impossible to explain away the word 'servilely.' Its meaning is too obvious to need any reference to a dictionary; and without any desire to lay too much stress on the expression, and making every allowance for words used in the heat of excitement, still the expression should not have been used in open Court by a pleader addressing from the Bar the Judge sitting on his Bench. We feel ourselves bound to say that Mr. Cruise ought not to have made use of these expressions; but it was for the Judge at the time, we think, to have called Mr. Cruise to order for them; and, as we have said before, we think that neither do those expressions nor the contents of the graver charges make out against him a case on which we can support the finding of the Judge. We direct, therefore, that that finding be set aside, and, in the words of the law, we acquit Mr. Cruise of the charges found against him.

The 20th September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Procedure—Trial by Jury—Finding by Jury—Chapters XXIII. and XXV., Code of Criminal Procedure.

Criminal Appellate Jurisdiction.

The Queen *versus* Hurry Prosad Gangooly and others.

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge framed under Sections 330 and 348, Indian Penal Code.

Messrs. T. A. Ansley and *Mun Mohun Ghose* and *Baboos Jadub Chunder Seal* and *Ashootosh Chatterjee* for the Prisoners.

When the proceedings upon a trial by Jury in the mofussil are consistent with a reasonable construction of that part of the Procedure Code (Chapters XXIII. and XXV.) where such trial is provided for, the proceedings are good in the absence of any distinct ruling to the contrary, and ought not to be examined by the light of English rules of procedure.

The law does not prescribe any specific form in which the Jury are to return their finding, and they are at liberty to deliver it in any form which they think fit. If that finding is not exhaustive as to the facts in issue which go to make up the charge or charges, it is competent to the Judge, and is indeed his duty, to put such questions to them as shall elicit a complete finding.

Jackson, J.—THE prisoners were tried before the Court of Session, Zillah Nuddea, on charges framed under Sections 330 and 348, Indian Penal Code.

They pleaded not guilty, and the trial was by Jury.

From the record of the Court of Session, it appears that the Jury, by their unanimous verdict, found one of the accused persons tried on that occasion not guilty on both heads of charge, also found the prisoners, appellants, not guilty on one head of charge,

viz., that under Section 348, Indian Penal Code, but found them severally guilty on the other head of charge, under Section 330.

A motion was made before us to set aside the verdict, supported by an affidavit, to the following effect :—

"That I am the brother of Hurry Prosad "Gangooly, and that I conducted the crimi-"nal case of the Queen *versus* Hurry Prosad "Gangooly and others in the Sessions Court "of Nuddea.

"That the Jury, when they came to Court, "after retiring, to return their verdict, in-"formed the Judge that they do not believe "the lifting up or the using of the sword "at all, lowering into a well, or pricking "with babla kanta (thorns), and illegal con-"finement, but they only believed that "*shamanya churta chaporta mara haya-"chilo* (সামান্য চড়টা চাপড়টা মারা হইয়াছিল), "that ordinary slaps were given. But the "Judge, instead of applying the law him-"self in the matter, asked the Jury whether "the case falls under Section 330 of the "Indian Penal Code. The Foreman, without "further retiring with his companions to "consult, returned an answer in the affirma-"tive, although no copy of the Penal Code "was before them, neither did the Judge "point out and explain to them the Section "in question."

The contention was that the record did not truly represent what had happened; that the Jury had by their finding negatived the principal circumstances of the charge; that they had, in fact, given a special verdict which was tantamount to a verdict of not guilty, and which the Judge was bound to receive and record; and that the Judge, in asking the Jury whether they found the prisoners guilty under Section 330, had, in fact, put to them a question of law, and had thus committed an irregularity which was fatal to the conviction.

Copies of the affidavit and petition accompanying were sent by our direction to the Court of Session, and the Judge was directed to transmit the proceedings with any observations on the matter stated which he might have to offer; and, as it was within our knowledge that the Judge before whom the trial was held had left the district, it was suggested that the present Judge should take down the statements of the officers of his Court who had been present at the trial.

The Officiating Judge sent up what appeared to us a very meagre return, but it contained a statement of the person who had acted as Foreman of the Jury on the trial, which was in the following words:—

"I was Foreman of the Jury that tried "Hurry Prosad Gangooly. We said to the "Judge that we did not believe the evidence "as to letting down a well or as to pricking "with thorns. The Judge then asked us "whether we convicted on either head, or, "if so, which head. We said we be-"lieved the prisoner had beaten the girl, "and that we convicted under 330. I can-"not at all be certain whether I or any of "us used the word '*shamanya.*' I certainly "said, '*Chur, chapor.*'"

This statement, it will be seen, does not agree precisely with the allegations of the affidavit and petition, but it undoubtedly shows that a communication took place between the Judge and the Jury, which has not been made to appear on the record.

Baboo Ashootosh Chatterjee, a vakeel of this Court, who was then at Kishnaghur, and was retained for the defence of the petitioners, has since furnished us with a memorandum of his recollection of the circumstances.

He differs on only one particular of any importance from the Foreman of the Jury, in that he represents the Judge as having asked the Jury whether they considered the case to fall under Section 330, Indian Penal Code, while the Foreman's account of it is that the Judge asked whether they intended to convict under either head of charge, and, if so, under which.

The Foreman's account appears to us the more probable. It was committed to writing three weeks earlier than that of the pleader; and, besides, the Foreman, as being the person to whom the question was addressed, is perhaps the most likely to remember it accurately.

The affidavit, indeed, contains a similar statement as to the Judge's question relating exclusively to Section 330, but the affidavit is that of the brother of the chief accused, and consequently that of an interested party; and, moreover, it is to be observed that it was the Judge's business to arrive at the finding of the Jury on the second head of charge as well as on the first; and, in point of fact, there is a verdict of not guilty

recorded on the second, as there is one of guilty under the first head of charge; and we, therefore, think the Judge must have put the question as to both.

The matter, indeed, is only of importance as bearing on the possibility of the Jury's answer being brought about by a sort of suggestion from the Judge that they should give a verdict of guilty under Section 330.

On these materials we have to determine—

1st.—Whether the proceedings are defective and void in law.

2nd.—Whether the conviction is in accordance with the real intention of the Jury.

The points taken by the learned Counsel for the prisoners (Mr. Anstey and Mr. Ghose) were these:—

That the prisoners were entitled to their discharge by reason of the omission of the Court below to record the special verdict which, in truth, the Jury returned, and which the Court was bound to receive.

That the Jury certainly meant a verdict under one of the general exceptions—that contained in Section 95, Indian Penal Code; being, in other words, a verdict of acquittal.

That the Judge was not competent to put to the Jury a question of law, and that the enquiry as to Section 330 was such a question.

That the first verdict of the Jury, which was their real verdict, was one of not guilty, as the prisoners were not on their trial for assault, which was the only offence of which the Jury found them guilty.

That the Jury were not absolutely bound to find one way or the other.

That the Jury were not competent to find the prisoners guilty under a particular Section of the Penal Code; and

That as the Jury had acquitted the prisoners, there could be no new trial.

It was also objected that the Judge had not properly summed up the evidence; and, lastly, supposing the verdict and conviction to be supportable, the sentence was excessive and cruel.

The arguments addressed to us were chiefly based on the assumption that the "trial by Jury" spoken of in Section 322 of the Code of Criminal Procedure is the system of trial by Jury prevalent in England, except where and in so far as it is expressly modified by the provisions of the Code; and, accordingly, a number of English cases were cited and English law-books were referred to (Hale—Hawkins—Bacon's Abridgment, &c.).

We have not thought it necessary to examine those cases, partly because we consider the assumption quite unfounded, and partly because they generally did not touch the point under consideration, but related to the powers of a Court about to vary or add to a verdict once recorded.

The trial by Jury spoken of in Section 322, Code of Criminal Procedure, is, we have no doubt whatever, the mode of trial described in the 23rd and 25th Chapters of that Code, and nothing else. It was observed that the word "Juror" was not defined in the Code, and from this the inference was said to follow that we must resort to the English definition of Juror as being familiar and well ascertained.

But neither is the term "Assessor" defined, and it will hardly be contended that we shall derive any information as to the meaning of this term from the English Criminal Law.

The fact is, as most people conversant with the Criminal Law of Bengal are aware, that both notions—that of Juror and that of Assessor—are taken, greatly modified and expanded no doubt, from the Bengal Regulation VI. of 1832, which made, so to say, the first breach in the system of "trial and "punishment under the provisions, of the "Mahomedan Criminal Code."

A reference to Clause 4, Section 3 of that Regulation, will show with what sort of functions the Legislature of that day clothed persons who were called Jurors.

Under the Code, no doubt, in the places, and in respect of the class of offences, and for such period of time as the Executive Government directs, the Jury of British India decides upon the facts in criminal trials. But Jurors who are not *jurati* at all, who may determine by a prescribed majority, and whose functions may cease at any time on the publication of an order in the

Gazette, are clearly not the Jurors, nor is the system of trial in such circumstances the system of England.

We are of opinion that, when the proceedings upon a trial by Jury in the mofussil are consistent with a reasonable construction of that part of the Procedure Code where such trial is provided for, the proceedings are good in the absence of any distinct ruling to the contrary, and ought not to be examined by the light of English rules of procedure.

By Section 379, Code of Criminal Procedure, it is provided that, after the Judge's summing up, "the Jury shall deliver their "finding upon the charge." Now, the charge must certainly mean the whole charge; and in respect of offences under the Indian Penal Code, the Section which relates to the offence is an essential portion of the charge.

Section 234 is in these words: "The charge shall describe the imputed offence * * * *, and shall refer to the Section under which such offence is punishable."

The Jury are thus apprised that the heads of charge fall respectively under particular Sections of the Penal Code, and the Judge's direction to the Jury in the case before us opens with the statement that the accused are charged with such and such offences under the Sections specified.

The law does not prescribe any specific form in which the Jury are to return their finding, and we are of opinion that they are at liberty to deliver it in any form which they think fit; and if that finding is not exhaustive as to the facts in issue which go to make up the charge or charges, we have no doubt whatever that it is competent to the Judge, and is, indeed, his duty, to put such questions to them as shall elicit a complete finding.

We also think, with advertence to the observations already made, that a question whether they find the accused guilty of the charge under one of the Sections named, and, if so, under which is it unobjectionable, when it is clear that the Jury have the distinction between such Sections present to their minds, and that putting such a question is not putting to them a question of law.

It is merely a short way of stating something quite familiar for the moment to the questioner and the person questioned, and it is inconsistent with common sense to require that a question so put should contain every word of the Section referred to, which would be needful if this objection were good for anything.

It cannot be doubted, indeed, that the record should contain an accurate statement of every communication between the Judge and the Jury, and it appears certain that in this respect the record of the case before us is defective; but it is also manifest that the accused have not been prejudiced by the omission, and, that being so, the 439th Section precludes every interference with the conviction on this ground.

We, therefore, think the trial is not vitiated in point of form by anything which took place, and we also think that the Judge sufficiently complied with the requirements of the law that he should sum up the evidence. The summing is not perhaps very masterly, nor such as to satisfy criticism, but that, we apprehend, is given to few Judges in the Courts of Session, nor is it an invariable accomplishment of Judges elsewhere; but the Judge in this case has recapitulated what the witnesses said, has pointed out how it bears upon the charges, has drawn attention to what he considered its weakest parts, and given what appears to us very sensible suggestions to the Jury in respect of the conclusions to be drawn from the evidence. We cannot, therefore, say that there has been any failure in this head either. The question remains whether the verdict recorded is any other than what the Jury really intended, and we think there is, in truth, no pretence for saying so. Much stress has been laid on the fact that the Jury expressly negatived the specific acts of violence alleged; such as the use of a sword, the pricking with thorns, lowering into a well, and so forth; and in the use which may perhaps be conceded to have taken place of the word "shamanya," as qualifying the beating which they found to have been committed.

It has been supposed that the Bengalee word in question means slight, and that the Jurors meant by this a beating so slight as to bring the case within the meaning of the 95th Section of the Indian Penal Code, although the improbability of the Jury having meant to find any such thing, which was not even suggested in the prisoner's behalf in the cause of the trial, is obvious enough.

Upon such a point the opinion of this Bench may perhaps be entitled to some

weight, and we think that more probably the word was used in its proper acceptation of "ordinary," or "common," so as to mean a beating with a man's natural weapon of offence, to wit, his hands and feet; and this opinion, we consider, is borne out by the almost concluding words of the Judge's direction, in which he refers to the other acts charged as probably circumstances of exaggeration. Those acts, if proved, would, no doubt, have greatly aggravated the offence, but they are not essential to the crime of causing "hurt," for striking with the hands, even with the open hand, might very well, and probably did, cause "hurt," that is, bodily pain, to a child of tender years; and when, as above intimated, the Jury, in our opinion, knew very well what they were doing when they brought in a finding of guilty under Section 330, that makes their meaning unmistakable both as to the hurt and as to the intent.

We, therefore, think the finding and conviction on all points unimpeachable. We have only further to consider the sentence passed; and here we think the Judge has not given effect to the finding of the Jury which expressly negatives all the circumstances beyond a beating and slapping for the purpose stated; and then the relationship between the parties must not be lost sight of, for, although it does not appear that the accused was in any position of authority over the girl, yet the chief accused is undoubtedly a near relation; and on these findings the sentence passed, six months' rigorous imprisonment with added fine, is, in our opinion, much too severe.

Rigorous imprisonment, in particular, we think, ought not to have been inflicted. Considering, therefore, that the accused underwent imprisonment of that description for nearly three months, we think they ought not to return to jail, but ought to be discharged on payment of the fines imposed.

The sentence passed by the Court of Session is, therefore, altered to one of imprisonment for two months and a half, which the accused have already suffered; and they are, therefore, to be discharged on payment of the fine; and, in default, they will be further imprisoned, but not rigorously, for the space of two months each.

The 12th September 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Procedure—Warrant—Discharge—Sections 180 and 244, and Chapter XIV., Code of Criminal Procedure—Act VIII. of 1869.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge, in the case of Niamutulla versus *Gopal Shaha and others.*

Baboo Bama Churn Banerjee for Niamutulla.

In a case in respect of which a warrant might issue, and which is triable under Chapter XIV. of the Code of Criminal Procedure, a Magistrate ought, under Section 180 of that Code, by virtue of Section 244, as amended by Act VIII. of 1869, to order the discharge of the accused persons, although they are in attendance, if he thinks that there is no case of a criminal character made out against them.

Jackson, J.—In this case a complaint was laid before the Deputy Magistrate of Shahbazpore, in which it was alleged that the persons accused had committed an offence under Section 431 of the Indian Penal Code, by doing an act which had rendered a certain navigable channel impassable for travelling or conveying property. It was also alleged that by this act the accused persons have deprived the complainant himself of cultivating the land lying in the neighbourhood, and which would otherwise have received water from the said channel; and the Magistrate was asked to take cognizance of the offence under the Section mentioned above, and also to deal with the case under the provisions of the 308th Section of the Code of Criminal Procedure.

The Deputy Magistrate summoned some of the accused persons. He directed an enquiry also by the police, and one of the accused persons attended. The Magistrate had also examined at considerable length the complainant, who was a person named

Niamutulla, describing himself as a Mirdha under certain zemindars.

After taking these several proceedings, and placing one of the accused persons upon bail, the Deputy Magistrate, although witnesses cited by the complainant were in attendance, refused to examine them, and declared that he could come to no conclusion without having first made a local enquiry; and, for that or for some other reason, the case remained pending before this officer for the space of three or four months, the accused persons being all the time in attendance upon bail.

The Magistrate of the District having come to know of this, and observing that the case had been a long time before his Deputy, called for the proceedings, and, having looked at the statement of the complainant, considered that there seemed to be no cause for the interference of the Criminal Courts, and ordered the accused to be discharged.

The complainant, dissatisfied because of this order, came before the Sessions Judge, who has referred the case to us under the 434th Section of the Code of Criminal Procedure, with a recommendation that the Magistrate's order must be set aside.

This recommendation is based upon several grounds, one of them being that, two of the accused being present under a criminal charge, and bail having been taken from them, the Magistrate was not competent to discharge the accused without hearing the evidence against them. The Magistrate, it seems, added words implying an acquittal of the accused persons, which he could not properly do unless he had tried the case.

Another ground is that the Magistrate was wrong in coming to the conclusion that there was no *primâ-facie* criminal case made out.

Upon the first of these points, it appears to me that, if we assume the Magistrate to have come to a correct conclusion that there was no case of a criminal character made out against the accused, he was not only competent, but was bound to order the discharge of the accused. By Section 244 of the Code of Criminal Procedure, amended by Act VIII. of 1869, the provisions of Section 180 are made applicable to cases tried under the 14th Chapter of the Code; and this offence, being one in respect of which a warrant may issue, is triable under that Chapter, and, consequently, I think the words in the concluding part of Section 180, "nothing "contained in this Section shall prevent the "Magistrate from at once dismissing the "complaint if in his judgment there be no "sufficient ground for proceeding with it," will amply warrant the Magistrate in dismissing the case, although the accused persons were really in attendance; and it seems to me that the circumstance of the accused persons having been detained for so long a period as they were, from what I must consider the unjustifiable dilatoriness on the part of the Deputy Magistrate, furnished only an additional ground for the Magistrate acting upon the view which he had taken.

But the question remains whether the Magistrate was right in considering whether there was no case at all for the interference of the Criminal Court under Section 308.

On this point, I feel bound to say that, so far as the case has gone, I differ from the Magistrate of the District, and concur with the Sessions Judge. Whether the evidence, when taken, would make out the charge, or make out any of the matters alleged by the complainant, is another question; but it seems to me that the complainant in his examination did clearly allege the commission of an act which amounts to an offence under the 431st Section of the Penal Code. The case referred to by the Magistrate of the cutting of a bund in the Hooghly district, which was the subject of a civil suit, and was appealed to this Court, differs very much from this case. The khal in this case was alleged to be a navigable channel used by the public for purposes of conveyance and traffic; and if any person erected a bund across that khal so as to render it impassable, that would appear to be an act punishable under Section 431.

Then the Magistrate observes that the complainant in the same breath spoke of the case as one cognizable under Section 308 of the Code of Criminal Procedure. It seems to me there is nothing inconsistent in that. It might very well be that the act done by the accused, if brought home to them, might be an act which would affect the public in the way of stopping up a public and navigable channel, and it might also constitute an unlawful obstruction, or it might be a case to be dealt with under the 22nd Chapter of the Criminal Procedure Code. Section 320 declares that, "if a dispute arise

"concerning the right of use of any land or "water, the Magistrate or other officer as "aforesaid, within whose jurisdiction the "subject of dispute lies, may enquire into "the matter; and, if it shall appear to him "that the subject of dispute is open to the "use of the public, or of any person, or of "any class of persons, the Magistrate or other "officer may order that possession thereof "shall not be taken or retained by any party "to the exclusion of the public, or of such "person, or of such class of persons, as the "case may be, until the party claiming such "possession shall obtain the decision of a "competent Court adjudging him to be en-"titled to such exclusive possession."

It might be that the accused persons, by putting up this bund, were asserting a right to the exclusive use of this water, and preventing the public or the complainant from having lawful enjoyment thereof; but whether the case came under the 308th Section or the 22nd Chapter of the Code of Criminal Procedure, that would not justify the Magistrate from refusing to enquire into the charge under Section 437 of the Penal Code.

I think, therefore, that we must set aside the order of the Magistrate of the District, and direct that the case be enquired into, the evidence of the complainant's witnesses taken, and an order passed according to law.

The 4th November 1870.

Present:

The Hon'ble G. Loch and W. Markby, *Judges.*

Procedure—Private prosecutor—Discharge—Magistrate of a District—Sections 68 and 435, Code of Criminal Procedure.

In the Matter of the Petition of Ramjoy Mozoomdar.

Mr. C. Piffard and *Baboo Chunder Madhub Ghose* for Petitioner.

A Magistrate of a District has power, under Section 68 of the Code of Criminal Procedure, whether there be a private prosecutor or not, to order the arrest of a person who had been previously under trial by a Subordinate Magistrate, and who had been discharged under Section 225 of that Code.

The powers given under Sections 435 and 68 of the Code are distinct and independent powers—the former providing for the revision of proceedings which have been already commenced, and the latter for the institution of proceedings *de novo*.

Loch, J.—THE question we are asked to determine is, whether the proceedings held by the Magistrate in this matter on the 28th September 1870 were without jurisdiction. The order which he made on that date was under the provision of Section 68 of the Code of Criminal Procedure.

The case, divested of all extraneous matter, is simply this. The party for whose arrest the Magistrate has now issued a warrant was formerly under trial before the Deputy Magistrate in charge of a sub-division of the district, and he was discharged under Section 225 of the Criminal Procedure Code. The Magistrate now, as the Magistrate of the District, has taken up the case under the provisions of Section 68 of the Criminal Procedure Code, and has ordered his arrest, considering that from his own knowledge the party has committed an offence triable under the provisions of the Indian Penal Code.

It is urged that the Magistrate has no jurisdiction to act according to that Section; that the Deputy Magistrate, who tried the case and discharged the petitioner, could alone act in this case; and, therefore, the proceedings of the Magistrate should be set aside.

The application to this Court is made under the provisions of Section 404 of the Criminal Procedure Code, in order that the order passed by the Magistrate may be quashed. It has also been pointed out to us that the Magistrate might have proceeded under the provisions of Section 435 of the Criminal Procedure Code, but that Section is not applicable; because, in this case, the Subordinate Magistrate had made an enquiry, and was not satisfied with the result of that enquiry; whereas that Section gives authority to the Magistrate to interfere only when an accused person is discharged, or the complaint is dismissed without enquiry. When the Magistrate of the District passed this order, there was no complainant before him, and, as he states in his proceedings, he acted upon his own knowledge. The mere fact that there had been a proceeding held before a Deputy Magistrate previously, under which

the petitioner had been discharged, does not, in my opinion, prevent the Magistrate of the District from taking up this case under the provisions of Section 68.

I think, therefore, that the present application must be rejected.

Markby, J.—I also think that we cannot grant the application. The order complained against is legal. The history of the case is certainly involved in some confusion; but I entirely agree with Mr. Justice Loch that we ought to treat this case as he has treated it in his judgment, that is to say, as simply one in which a complaint had been made before a Magistrate in charge of a subdivision, and that complaint was dismissed: then, subsequent to that, the Magistrate of the District resolved to take up the case under Section 68, no person at that time appearing to prosecute; and the question we have to decide is, whether that course could lawfully be taken.

Now, the first objection which Mr. Piffard advanced in this case was a very broad one: it was that the powers conferred by Section 68 can only be exercised in cases where there has been no complaint by any person before a Magistrate. But I think that that objection is disposed of by the decision upon which I rely for my judgment in this case, reported in 8 Weekly Reporter, p. 61, Criminal Rulings. It was there held that the discharge of a person accused of an offence triable by a Court of Session was no bar to his being apprehended and brought before a Magistrate under Section 68 with a view to commitment; and I think that that case proceeds upon a right principle, namely, that the mere discharge of a person upon a preliminary enquiry before a Magistrate in no way affects the legality of fresh proceedings against him, whether those proceedings be taken at the instance of a private prosecutor, or they be taken under Section 68 at the instance of the Magistrate himself.

It was then argued that, at any rate, the Magistrate of the District could not proceed under Section 68 in any case in which the more special provisions of Section 435 for revising cases in which a discharge has been given by an inferior Magistrate apply. It seems to me that the same argument was used in the case to which I have referred; and I entirely concur in the opinion which was there expressed by Mr. Justice Jackson, that the powers given by Section 435 and the powers given by Section 68 are distinct and independent powers. Therefore, it seems to me in this case quite unnecessary to enquire into the question whether or not this is a case to which the provisions of Section 435 apply. Whether they do apply or whether they do not, I think the power under Section 68 remains the same. Section 435 provides for the revision of proceedings which have already been commenced. Section 68 provides for the institution of proceedings *de novo*.

I think it has not been shown to us that the Magistrate's proceedings were illegal. That is the only point which we have to consider; and I think, therefore, that we should not set them aside.

The 7th November 1870.

Present:

The Hon'ble G. Loch and W. Markby, *Judges.*

Procedure—Summing up—Jury—Irregularity—Sections 379 and 439, Code of Criminal Procedure.

The Queen *versus* Sitwa alias Sitaram Putwah.

Committed by the Assistant Magistrate of Barh, and tried by the Sessions Judge of Patna, on a charge of grievous hurt.

Under Section 379 of the Code of Criminal Procedure, a Judge should sum up the evidence on both sides before requiring the Jury to deliver their verdict. Under Section 439, however, the High Court thought it unnecessary to set aside a conviction in a case in which this was not done.

Markby, J.—SECTION 379 of the Procedure Code requires the Judge to sum up the evidence on both sides, and we think that there is an irregularity in accepting the verdict of the Jury without this having been done. But, acting upon Section 439, we do not think it necessary to set aside the conviction on this ground.

The 14th November 1870.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Slaughtering cattle—Owner of Slaughter-house—Section 7, Act VII. (B.C.) of 1865.

(Criminal Motion.)

The Municipal Commissioners for the Suburbs of Calcutta, *Petitioners.*

Baboo Onookool Chunder Mookerjee for the Petitioners.

HELD by *L. S. Jackson, J.* (*Mitter, J., dissenting*). —The owner of a slaughter-house, by giving it in lease to another, parts with his interest in it, and ceases to have any power to allow or disallow the slaughtering of cattle therein, and, therefore, does not bring himself within the terms of Section 7, Act VII. (B.C.) of 1865, which describes no offence, but is merely a Section for the levying of penalties.

Mitter, J.—I AM of opinion that the record of this case ought to be sent for, and that the defendant, Ruhomotollah, should be called upon to show cause why the Judge should not be directed to re-try this case.

It is not disputed that the defendant, Ruhomotollah, is the owner of the slaughter-house in question; nor is it disputed that, at the time when Ruhomotollah gave a lease of that house to Abbas Ali, the license to use it as a slaughter-house had been revoked by the Municipal Commissioners under the provisions of Act VII. of 1865 of the Bengal Council.

If, then, the Judge has found, as I think he has, that the lease was given by Ruhomotollah for a consideration reserved with the avowed object of enabling the lessee to use the house as a slaughter-house, he, Ruhomotollah, was clearly guilty of the offence described in the 7th Section of the Act.

It is quite clear that the defendant, Ruhomotollah, had the control of the house at the time when he gave the lease to Abbas Ali; and it is admitted that that lease was given for the express purpose of evading the provisions of the law. This being so, I think the case falls within the express words of the Section, "or allows cattle to be slaughtered in the slaughter-house to which such license relates;" and the defendant, Ruhomotollah, ought to have been, therefore, convicted under the provisions of that Section.

Jackson, J.—I am sorry to be unable to concur with my learned colleague in this matter, because I understand the Judge to have quite clearly come to the conclusion that the defendant, Ruhomotollah, by giving the premises in lease to Abbas Ali, has parted with his interest in the slaughter-house, and has ceased to have any power to allow or disallow the slaughtering of cattle on those premises. That being so, I think it cannot be said that, under the terms of Section 7 of the Act cited, Ruhomotollah has slaughtered cattle, or allowed cattle to be slaughtered, in that slaughter-house. I understand the Judge to mean that, if Ruhomotollah, by giving a lease of the premises with the intention that cattle should be slaughtered therein, and also reserving to himself a profit upon the premises to be so used, could be made liable under the Section, then he had brought himself within its terms. I concur with the Judge in both these views.

Section 7 is a Section for the levying of penalties. It does not describe an offence, nor does it relate to the conviction for an offence, and, so far as that Section merely is concerned, a person who was willing to

pay the penalties provided by the Section, and whose business was sufficiently profitable to enable him to do so, might probably continue the business of slaughtering cattle upon his premises, subject only to the payment of the penalties. It is quite another question whether, if the act of slaughtering cattle, or allowing cattle to be slaughtered, in an unlicensed slaughter-house, or a slaughter-house of which the license has been revoked or suspended, is in itself an offence irrespective of the penalties provided in Section 7, and whether the person who lets those premises for the purpose of being employed as a slaughter-house is liable to be dealt with as an abettor.

The only question in this case is whether Ruhomotollah was liable to the penalties under that Section. The Deputy Magistrate, it is true, had found that Ruhomotollah, in fact, had an interest in the slaughter-house, that the lease was a merely colorable and ostensible transaction, and that, although the name of Abbas Ali had been used, Ruhomotollah was the proprietor; but it is quite manifest from the words used by the Judge that he was not of the same opinion, but that, so far as this Section is concerned, he thought that Ruhomotollah had protected himself from liability to penalty, and had in that way evaded the law. Whether or not it may be possible to take other proceedings against Ruhomotollah, is a question which we need not enter into now.

I am of opinion that the Judge meant to find that Ruhomotollah was not, within the terms of that Act, a person who slaughtered cattle, or allowed cattle to be slaughtered, on his premises, and, consequently, was not liable to the penalty; and, therefore, I think there is no ground for interfering in this case.

The 14th November 1870.

Present:

The Hon'ble F. B. Kemp,
Judge.

Right of private defence—Sections 99 and 103, Penal Code.

The Queen *versus* Dhununjai Poly and others.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of murder.

The right of private defence under Section 103 of the Penal Code is restricted by Section 99 of that Code, and does not extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

I REJECT this appeal. The petitioners refer to Section 103 of the Indian Penal Code in their petition of appeal, and seek to justify their acts by stating that, under the above Section, they caused the death of the deceased whilst he was attempting to commit house-breaking by night; but the petitioners have omitted to consider that the right of private defence of property is subject to the restrictions mentioned in Section 99 of the Code. That right in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

The prisoners strangled the deceased, and subjected him to gross maltreatment when he was fully in their power and helpless.

The 19th November 1870.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Procedure—Nuisance—Arbitrators—Section 310, Code of Criminal Procedure.

In the Matter of

Shama Kant Bundopadhya, *Petitioner.*

Baboo Khettur Nath Bose for Petitioner.

In referring a case regarding a nuisance to arbitrators under Section 310, Code of Criminal Procedure, a Magistrate should fix a time within which the arbitrators are to send in their award; and this must be done whenever from any cause the constitution of the Jurors is changed and a fresh Juror is appointed. Where this is not done, a Magistrate cannot carry out his original order if there is any delay in the submission of the award by the arbitrators.

Glover, J.—THIS case was sent for by a Division Bench of this Court in order to see whether the Magistrate ought not to have fixed a time within which the arbitrators were to submit their award. The case was one coming within Section 310 of the Code of Criminal Procedure, and it appears that under that Section Jurors were first appointed by the Deputy Magistrate on the 28th of April 1870, and were ordered to report within 20 days from that date. This time was afterwards extended on account of one of the arbitrators having left that part of the country. Another Juror was appointed in his place, and the order then made upon the case on the 28th of May was that the Jurors were to send their report as soon as possible, no special period being fixed. On the 20th of June, the arbitrators sent in a report desiring some more time to be given them, stating generally that they were investigating the matter, but that for certain reasons, and because one of the arbitrators, being a police-officer, was engaged at the time in the investigation of a case at a distance, they would not be able to send in their report immediately. On the day following, that is, on the 21st of June, the Deputy Magistrate took up the case, and, after declaring that the Jurors had not sent in their report as ordered, carried into effect the original order passed by the Magistrate on the terms of the last part of Section 310.

The point raised in appeal is that the Deputy Magistrate had no right to interfere with the function of the Jurors, inasmuch as he had fixed no time within which they were to submit their report. This appears to be the case. When the Jury was first appointed, no doubt a period of 20 days was fixed; but after that, when a fresh Juror was nominated, the arbitrators were merely desired to report as soon as possible. Now, the wording of Section 310 is very explicit. It says that the Magistrate may interfere and carry out his original order, if from any cause the Jurors should not decide and report upon the case within a reasonable time, *which reasonable time is to be fixed by the Magistrate in the order of appointment.* It is quite clear, therefore, that this fixing of time is a condition precedent to the exercise by the Magistrate of the power to decide the case himself. In this case the order of 28th of May ought to have fixed a time within which the arbitrators were to submit their award; and this not having been done, it follows that the Magistrate's order deciding the case himself is invalid and contrary to law. The case will go back for the issue of fresh instructions to the Jurors and the fixing of a reasonable time within which they will send in their report.

The 19th November 1870.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of private defence of property—Section 103, Penal Code.

The Queen *versus* Gooroo Churn Chung and others, *Appellants.*

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of rioting with deadly weapons and causing hurt.

Baboo Juggadanund Mookerjee for the Government.

Baboos Greeja Sunkur Mozoomdar and *Debendro Chunder Ghose* for the Appellants.

HELD on the facts of the case (and following 7 Weekly Reporter, page 113, Criminal Rulings) that the accused, who were in peaceable possession of their property, and were attacked while in such possession, did not exceed the right of private defence of property under Section 103, Penal Code.

Kemp, J.—THIS is an appeal on behalf of Gooroo Churn and others, who have been convicted under Sections 148 and 304 of the Indian Penal Code, and been sentenced to three years' rigorous imprisonment under each of these Sections, or in all to six years' rigorous imprisonment. It is very clear from the evidence of the prosecution that the land in dispute belonged to Gooroo Churn; that he had sown a crop upon it in Falgoon; that the opposite party came in force and proceeded to cut the crop, and on Gooroo Churn and the other prisoners, who were residents of the same village, remonstrating and protesting against the cutting of the crop, the headman of the opposite party directed the lattyals on his side to beat Gooroo Churn. Gooroo Churn and his party, exercising the right of private defence of property, appeared to have hastily armed themselves with sticks and bamboos taken from machâns, and to have opposed the cutting of the crops; and in the riot which took place two men, Massim and Haranoollah on the side of the aggressing party, were wounded. It appears that Massim had a wound in the leg which mortified, and an amputation being found to be necessary, the limb was amputated, and the patient was going on well for some time, when lockjaw set in, and he died.

We think that, looking to the fact, which is supported by the evidence of all the witnesses for the prosecution, that the crop was raised by Gooroo Churn; that the attack on the part of the opposite party was a sudden one, and that Gooroo Churn had no time to have recourse to the police or to the authorities for protection of his property; that he, Gooroo Churn, acting under the right of private defence of property, was justified in resisting a forcible attempt to cut and carry away his crop; and that, in carrying out that right of private defence, and in the riot which ensued, a man on the side of the opposite party was wounded, and subsequently died, as stated above, from the effects of lockjaw. Taking all these circumstances into consideration, and with reference to the ruling to be found in Volume VII. of the Weekly Reporter, page 113, Criminal Rulings, we think that the prisoners were, at the time o fthe riot, in actual peaceable possession of the land in dispute; that the acts of the opposite party in attempting to cut the crops by force were clearly illegal; and that these acts were such acts as the prisoners had a right to resist; and that, although force was used in carrying out that resistance, we do not think that that force or the injuries inflicted upon Massim were such as to exceed the right which the prisoners had the right to exercise in defending their property.

We, therefore, acquit the prisoners, and direct that a warrant be issued for their immediate release.

The 19th November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Income Tax—Fine—Imprisonment—Section 25, Act IX. of 1869.

Revision of proceedings under Section 404 of the Code of Criminal Procedure.

The Queen *versus* Nodia Chand Koondoo and another.

A Magistrate has no power under Section 25, Act IX. of 1869, to sentence to imprisonment in default of the payment of fine imposed for not paying income-tax.

Jackson, J.—IN these two cases Baboo Krishna Chunder Roy, a Deputy Magistrate in Zillah Rajshahye, in passing orders under Section 25, Act IX. of 1869, not only sentenced the defendants to pay a fine of twice the amount of income-tax assessed upon each of them, but in default sentenced each defendant to simple imprisonment for twelve days. The Deputy Magistrate had, under the law, no authority to sentence the defendants to imprisonment in default of fine. So much of his sentence in each case is accordingly set aside.

The 19th November 1870.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Appeal— Fine — Income-tax — Section 25, Act IX. of 1869.

Revision of proceedings under Section 404 of the Code of Criminal Procedure.

The Queen *versus* Mudhoo Dutt.

No appeal lies to a Sessions Judge from the order of a Magistrate fining a defaulter under Section 25 of the Income-tax Act, IX. of 1869.

The Deputy Magistrate passed the following order in this case:—

THE defendant, who is charged with non-payment of the income-tax within the time specified in the notice, pleads guilty, but says that, as he had to pay income-tax at Goddha, he thought himself justified in not paying any tax here. But from the letter of the Assistant Commissioner of that place, it appears that he was assessed there with regard only to his income accruing in that jurisdiction ; and the Assistant Commissioner has written to say that he might be separately assessed by me with regard to his income accruing in this sub-division. The defendant has made no objection to the estimate made of his income accruing in this jurisdiction. As he did not appear till a warrant was issued from this Court, and does not deny service of the notice, the Court sentences him to pay a fine of Rs. 51, being double of his assessment.

The Sessions Judge, on an appeal being preferred against the above order, passed the following judgment:—

It is contended an appeal does not lie to this Court from the order of a Magistrate under Section 25, Act IX. of 1869, though the fine exceed 50 rupees. I think there can be no doubt an appeal does lie from the conviction by a Magistrate under this Section, in the same way as an appeal lies from magisterial convictions under other Acts. There is no express provision barring an appeal to this Court in Act IX. of 1869, and hence Section 444, Act XXV. of 1861, indicates the correct procedure.

The defendant in this case was manifestly under the impression that, as he had paid the income-tax demanded from him by the Deputy Collector of Banka at Goddha, he considered it was unnecessary to pay it again at Banka. There was not any intention to evade the terms of the notice. The defendant considered its provisions had been already virtually carried out, and hence did not act up to the strict letter of its terms.

Under these circumstances, I think the fine may be justly remitted.

Upon this, the Magistrate addressed the following letter to the Sessions Judge :—

I have the honor to request the favor of your forwarding the accompanying papers of this case to the High Court for their perusal and orders, as I respectfully submit the order passed by you appears to me to be an illegal one.

1st.—Because I am not satisfied (I cannot find any ruling on the subject) that an appeal lies to the Judge from an order passed by a Magistrate under Section 25 of Act IX. of 1869.

My grounds for this opinion are these :—

Section 16 of the Act referred to lays down the procedure to be adopted in serving a notice. Sections 19 and 20 show the procedure to be adopted if a person assessed under Section 16 objects to the amount at which he has been assessed. Under Section 21 any person dissatisfied with any order under Section 20 may, within 15 days from the date thereof, on payment of the sum in which he was assessed, present an appeal to the Commissioner of Revenue of the Division, whose decision shall be final.

Section 25 lays down distinctly the penalty on failure to pay the amount of assessment in these words : "If any person served with a notice under Section 16 does not, within the period specified in the said notice, pay the amount required thereby, *he shall*, on conviction before a Magistrate, be fined twice the amount mentioned in such notice : provided that he has not presented a petition under Section 19. If any such person presents a petition under Section 19, and does not, within one week from the passing of the order thereon, pay the amount, if any, required by such order, *he shall*, on conviction before a Magistrate, be fined twice the amount mentioned in such order."

It is my impression that no discretion and no alternative is left to a Magistrate: he *must* fine the defaulter in twice the amount. He has no power to listen to any plea put for-

ward by a defaulter, provided it be proved that the notice under Section 16 was actually served upon the man, and that he neglected to pay the money. Any excuse or objection the man had to urge against the tax ought to have been made to the Collector after receipt of the notice. The fact that the order *fining* the defaulter in twice the amount of his assessment was one of fine above 50 rupees is no ground for an appeal against that order to the Judge.

Again, Section 24 leaves no alternative to a Magistrate. The defaulter *shall*, for *every day* during which such default continues, be fined, on conviction before a Magistrate, ten rupees. There is, however, a proviso to this Section, which says: The Commissioner of the Division shall have power to remit wholly or in part any penalty imposed under this Section. Suppose a man defaulted for 6 days, and the fine inflicted reached 60 rupees, could a Judge hear an appeal against that order, the power to remit the whole or part of the fine being left with the Commissioner?

There is no mention of any appeal throughout the Act except the appeal to the Commissioner, and it appears to me that, if this appeal be allowed, men will take no trouble to appear before Collectors, but will wait to be prosecuted before a Magistrate, and will trust to getting off altogether on appeal to the Judge.

2ndly.—I respectfully submit that, if an appeal lies, the order passed by you is illegal.

As I have above stated, there is no discretion whatever left to a Magistrate. A defaulter having failed to pay attention to a notice properly served upon him for reasons of his own—reasons which were good, and, if properly laid before the Collector, would probably have caused his exemption from taxation—and neglected to take any steps before the Collector according to law, the Collector, in ignorance of his reasons for such neglect, proceeded as by law he was bound to do, and prosecuted him before a Magistrate. The Magistrate was compelled to pass an order fining him in twice the amount of the sum at which he had been assessed. Any appeal against that order of fine, if appeal there be, must, I apprehend, be decided, not upon the equity of the case or what the intentions of the man were, but simply on the fact whether the Magistrate's proceedings were legal and regular. The man by his own conduct in neglecting to lay the facts of the case before the Collector had himself to blame for the consequence of such neglect, and the proceedings of the Magistrate could not have been otherwise than they were.

I must add that the appeal to which I refer was not against any order of mine, but I feel compelled to make this reference, because I think that, if a Judge can reverse a decision of a Magistrate passed under Section 25 on grounds which, as I understand them, a Collector ought to have heard, and would have heard if they had been properly represented to him, the collection of the income-tax will become a work of considerable difficulty.

Should these points be decided against me, I have the honor to request you will inform me whether your order is intended to direct the return of the whole 51 rupees or only 25-8, as 25-8 was income-tax, and 25-8 was fine.

Judgment of the High Court.

Bayley, J.—We think that the Magistrate is right in the view which he has taken of the law, and that the Sessions Judge had no authority to admit any appeal under the Income-tax Act. The Sessions Judge's orders are set aside. The party aggrieved by the order of the Court which inflicted the fine has his remedy under the law.

The 26th November 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Land for public purposes—Right of Government—Right of way—Act VI. of 1857.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of the 24-Pergunnahs, in the case of H. B. Fenwick.

Where land is acquired by Government for public purposes under Act VI. of 1857, the title of Government to the land is absolute, and the public have no right of way over it.

Reference.—I HAVE the honor to submit the papers of a case, in which the Cantonment Magistrate at Barrackpore has declared, under Section 320 of the Criminal Procedure Code, that the public have a right

of way across certain lands included in the Manirampore Water Works, the property of the Calcutta Justices; and has fined the Engineer in charge of the works for disobeying such order, and for refusing to remove the fence by which the way is obstructed.

The facts are set forth in the petition of Mr. Fenwick, the Engineer. It is sufficient to say that within the boundaries of the land acquired by Government under the provisions of Act VI., 1857, and made over to the Justices for the purpose of the Water Works, is a spot on the river bank, known as the Karbala ghât, to which the residents of the neighbourhood were in the habit of resorting for the purposes of bathing. It is not a masonry-built ghât, but it is said in the evidence to be the most convenient spot for bathing in the immediate neighbourhood. The fence which the Justices lately made round the land, and which extends to the river side, excludes the public, and prevents access to the spot in question. It seems that complaints were made to the Magistrate regarding this exclusion, and that after some proceedings (to which it is unnecessary to refer) he tried the case under the provisions of Section 320 of the Criminal Procedure Code, and held that the public had always enjoyed the right of way over the land to the ghât, and that the Justices were not entitled to possession of the land to the exclusion of the public. He seems to have considered that he could not look beyond the evidence which established the previous use of the land, and that the Justices must establish in the Civil Court their right to exclude the public.

Mr. Fenwick, it appears, under the instruction of the Justices, refused compliance with the order; and, consequently, the Magistrate, under Section 188 of the Penal Code, sentenced him to a fine of 51 rupees. From that order he has preferred an appeal to this Court. It is contended that the order of the Magistrate under Section 320 was erroneous and contrary to law, and that the appellant was justified in refusing compliance with it. But there is no legal justification, and the appellant was bound by law to obey the order, and, therefore, he was properly held liable to the penalty of fine.

The Justices have not distinguished an order made without the warrant of law from one which the Magistrate is expressly empowered by the law to pass. It was competent to the Magistrate under Section 320 to find on due enquiry that the public has a right of use, and to declare that the Justices were not entitled to exclude the public; and it is not open to the Justices to resist the order passed on that finding, because, in their opinion, the order was erroneous or improper. They must seek their remedy from a Court competent to set aside the order of the Magistrate; and, so long as the order remains in force, they are bound to obey it.

The appellant contends that, as there is no right of appeal from the order of the Magistrate passed under Section 320, he was justified in resisting it in order that he might have the opportunity of appealing from the order imposing a penalty for disobedience. But, in the first place, it is not competent to this Court to find, that the order legally passed by the Magistrate under Section 320 was based on insufficient evidence, or on an erroneous view of the rights of the parties, or that it was on any other grounds an improper exercise of the power of adjudication in the matter with which he is specially entrusted by the law; and, in the second place, no appeal would have lain to this Court if the fine had not exceeded 50 rupees.

On the intimation of my opinion to the appellant, he preferred the second petition asking for a reference to the High Court in regard to the order passed under Section 320.

I think that the order passed by the Magistrate under Section 320 was erroneous, because the acquisition of the land by the Government under the provisions of Act VI., 1857, divested the public of the right of way. In the case of Nobin Chunder Ghose *versus* The South-Eastern Railway Company, it was held by the High Court that the land acquired under that Act became vested in the Government "absolutely, and free from every right or interest therein, of whatever description, possessed by the former proprietors, or by other persons. All rights before existing, whether of passage or of any other kind, absolutely ceased on the acquisition of the land; and no right of way afterwards arose or was continued, merely because there remained no mode of access to the land on the north otherwise than by crossing the line."—(Weekly Reporter, Volume 3, page 27, May 16th, 1865.) That was a case of much greater hardship than the present one, for the line of rail had cut through the lands of the plaintiff, so that he had no means of access to one-half of his estate, and the Government refused to permit a level-crossing. The ruling will fully

meet this case; and I think, therefore, that the Magistrate, having evidence before him to prove that the land had been acquired under Act VI., 1857, was in error when he held that the public retained a right of way.

Under these circumstances, I submit all the proceedings, and recommend that the order of the Magistrate, dated the 27th September last, under Section 320 of the Criminal Procedure Code, be set aside. And I also recommend, under the circumstances of the case, that the order of the 29th idem, imposing a fine of 51 rupees on the appellant, be quashed, and the fine remitted.

Judgment of the High Court.

Loch, J.—It is clear from the provisions of Section 8, Act VI. of 1857, that the title to the land is absolutely vested in the Government. That Section sets forth that, "when the Collector or other officer has "made an award, or directed a reference to "arbitration, he may take immediate possession of the land, which shall thenceforward "be vested absolutely in the Government, "free from all other estates, rights, titles, "and interests."

We concur, therefore, in the view expressed by the Sessions Judge, and set aside the order passed by the Magistrate on the 27th September last, under Section 320 of the Criminal Procedure Code; and also set aside the order of the 29th idem, imposing a fine under Section 188 of the Indian Penal Code.

The 26th November 1870.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Procedure—Prosecutor also as Judge—Sub-Registrar.

Bharut Chunder Sein, *Petitioner.*

Baboos Kalee Mohun Dass and *Nulleet Chunder Sein* for the Petitioner.

A Sub-Registrar, who is also a Magistrate, cannot investigate a case against one of his subordinates in the Registry Office, and afterwards himself try and convict him.

Kemp, J.—THIS is an application on the part of Bharut Chunder Sein, Head Clerk, in the Sub-Registrar's office of Tipperah.

The point taken by his pleader is that the Magistrate, who is also Sub-Registrar, investigated the case in the first instance, and subsequently tried and convicted his client as Magistrate.

We think that, on the principle that no one should be a Judge in any case in which he is himself interested, as also on the principles laid down in a decision of a Divisional Bench of this Court to be found in Volume V., Bengal Law Reports, page 100,* the Magistrate ought not to have tried this case.

We, therefore, quash his proceedings, and direct that the case be tried by some other official having power to try it.

The fine must be refunded.

The 30th November 1870.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Right of private defence of property—Criminal trespass—Sections 99 and 104, Penal Code.

The Queen *versus* Goburdhun Pari and another, *Appellants.*

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of riot with murder, &c.

Mr. J. S. Rochfort and *Baboo Nobokissen Mookerjee* for the Appellants.

Baboo Juggadanund Mookerjee for the Prosecution.

Where the offence which occasions the right of private defence of property is criminal trespass, the right of defence under Section 104 of the Penal Code only extends (subject to the restrictions of Section 99) to the voluntarily causing to the wrong-doers some harm other than death.

Glover, J.—I INCLINE to think that these prisoners have been properly convicted. Their plea in appeal to this Court is that they were not the aggressors, and that, in resisting the attack of the Pal party, they

* 13 W. R., Criminal Rulings p. 66.

acted in their right of private defence of their master's property.

In one sense, perhaps, they were not the aggressors, for they were on their master's land when the opposite party came up to fish in the disputed tank by force of arms; but it is clear that they also were quite ready for the fight, and, indeed, to some extent, induced it by going to meet their opponents as they approached the place in question. The Sessions Judge and the Assessors were of opinion that the riot was premeditated on both sides, in which case, of course, no right of private defence would accrue.

But, even if it were conceded that these prisoners had a right of private defence of property, it is clear that they exceeded the limit allowed by Section 104 of the Penal Code. The offence which occasioned the exercise of this right was criminal trespass. and the right would, therefore, only extend (subject to the restrictions of Section 99) to the voluntarily causing to the wrongdoers some harm other than death. In this case death was caused, one of the wounded men dying of the injuries he received shortly after the riot was over. It is proved that these injuries were inflicted by the party of the prisoners, all of whom were acting with a common object, and all of whom would be, therefore, equally guilty, although the fatal injuries may not have been inflicted by the particular prisoners before the Court, but by others of their party not yet apprehended. They cannot, therefore, claim the benefit of Sections 96, 97, and 104 of the Penal Code.

But, although their plea of right of defence fails, a difference should, I think, be made between their punishment and that awarded to those of the other party (the Pals) who have been convicted; and I do not agree with the Sessions Judge in holding that one side is as much to blame as the other. The Nugdees were stationed at the tank to defend their master's property from the violence of those who had no right to it; and although they were themselves but too ready for the fray, I can see a great difference between their guilt, and that of those whose improper and illegal interference was the immediate cause of the riot. I think that the sentence on Goburdhun and Dhool Singh should be reduced from 7 years' rigorous imprisonment to 3.

Bayley, J.—I concur.

The 2nd December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Compensation—Section 270, Code of Criminal Procedure—Act VIII. of 1869.

Bhyroo Lall, *Petitioner.*

Moulvie Mahomed Yusooff for Petitioner.

Since the passing of Act VIII. of 1869, a Magistrate may, under Section 270, in a case in which more than one person has been accused, award compensation not exceeding 50 rupees to each person.

Jackson, J.—THIS application proceeds on three grounds. The first is that the Judge dissents from the Magistrate upon the question of the charge preferred by the petitioner having been frivolous and vexatious; but upon this point we are unable to give effect to this finding of fact of the Judge, and, therefore, that ground fails. Secondly, that this was not a case in which compensation could, by law, be imposed under Section 270. It is clear, however, that the charge preferred on this occasion was one of criminal trespass, and that is an offence punishable with three months' imprisonment, and, consequently, falling within Chapter XV. of the Procedure Code. Thirdly, that Section 270 provided only a compensation of 50 rupees, and that it was held in a case reported in VIII. Weekly Reporter, page 54, Criminal Rulings, that the Section admitted of an award of 50 rupees on the whole; but this has been remedied by an addition to that Section by Act VIII. of 1869, which provides that, where more than one person has been accused, the Magistrate may award compensation not exceeding 50 rupees to each person.

The application must be refused.

The 2nd December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Witnesses for the defence—Examination of accused—Chapter XV., Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Gya, in the case of Chedee Koonjra and others.

In a case under Chapter XV., Code of Criminal Procedure, it is incumbent on the accused either to produce their witnesses, or to apply beforehand for a summons to enforce the attendance of any witness who is not likely to appear without a summons; nor is it necessary in such cases to record the examination of the accused with the same formalities as in cases under Chapters XII. and XIV.

Jackson, J.—THE petitioners were tried for a petty assault, and their examination was recorded. No witnesses appear to have been examined on their behalf, and they were convicted and fined respectively 10 rupees and 5 rupees each, commutable to short periods of imprisonment.

The Zillah Judge recommends that these sentences should be quashed, on the ground that it does not appear from the record that the accused were asked whether they desired to call any witnesses; whereas the accused themselves, and their Counsel who appeared before the Judge, assured him that they had not had an opportunity of so doing.

The procedure under which the petitioners were or should have been tried was that laid down in Chapter XV., Code of Criminal Procedure. By Section 266, it is incumbent on the accused persons to produce their witnesses, if they have any, at the time of trial; and, under Section 262, they may apply beforehand to the Magistrate for a summons to enforce the attendance of any witness who is not likely to appear without summons.

It is not stated that the accused had any witnesses in attendance, or had applied for a summons, nor is the statement made before the Judge in any way verified, if even it were sufficient.

Neither does it appear to be necessary in such cases to record the examination of the accused with the same formalities as in cases under Chapters XII. and XIV. We think no case is made out for quashing the convictions.

The 9th December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Murder—Capital punishment—Offence committed before Penal Code became law—Section 4, Act XVII. of 1862.

The Queen *versus* Busti Singh, *Prisoner.*

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge under Regulation II. of 1823, of affray attended with murder, the offence having been committed on the 28th of May 1861, i. e., before the Indian Penal Code came into force.

In a case of affray attended with murder, in which the offence was committed before the Penal Code came into force, a Sessions Judge has himself power under Section 4, Act XVII. of 1862, to pass sentence of death, instead of referring the matter for confirmation to the High Court.

Glover, J.—UNDER Section 4, Act XVII. of 1862, the Sessions Judge had power himself to pass the sentence which he has referred for confirmation to this Court. He was bound to proceed under the Act, and had no option of referring the matter to the High Court.

The case is returned to him, in order that he may pass sentence in accordance with the powers given him by the Section above referred to. He is obviously not bound to pass a sentence which he thinks beyond the requirements of the case.

The 23rd November 1870.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Defence of prisoner—Copies of documents.

Revision of proceedings, under Section 405 of the Code of Criminal Procedure, in the case of Sheeb Pershad Pandah, Petitioner.

Mr. J. W. B. Money and *Baboo Taruck Nath Sein* for the Petitioner.

The High Court, in the exercise of the powers vested in them by Section 405 of the Code of Criminal Procedure, set aside the conviction of a prisoner in a case in which the Magistrate refused to grant him copies of papers which were necessary for his defence. A Magistrate acts contrary to law when he determines on an application by a prisoner for copies of documents required for his defence, whether the documents are necessary or not.

Loch, J.—THE petitioner has been convicted, under Section 116 of the Indian Penal Code, of having offered a bribe to the Sub-Inspector of Police, Mungul Singh, and sentenced to imprisonment for a period of nine months by the Magistrate of Balasore; and this finding and sentence has been confirmed by the Judge of Cuttack on appeal.

The case comes before us under the provisions of Section 405 of the Criminal Procedure Code, and the point of law urged before us by Mr. Money for the prisoner is that the prisoner was prevented from making use of certain records or documents which were necessary for his defence; and, therefore, the conviction should be set aside.

It appears that, after the prisoner's examination by the Magistrate, the case was postponed till the 5th August to enable the prisoner to produce evidence for the defence. Before that date arrived, he applied to the Magistrate for copies of ten papers consisting of proceedings of Court and petitions. The Magistrate, it is alleged, sent only for six of these documents; at any rate, only six were before him on the trial. Two subsequent petitions were put in on the part of the prisoner before the day of trial, praying that the other four documents might be sent for; but the Magistrate refused to comply with the prayer of the prisoner, and, after reading a petition put in by him on the 5th August as a written defence, pointing out certain reasons for concluding the charge to have been falsely got up, the Magistrate, for reasons stated in his proceeding of the 5th August, convicted the prisoner under the provisions of Section 116 of the Indian Penal Code.

The prisoner preferred an appeal, and in his petition stated that he had asked to be supplied with copies of certain documents necessary for his defence, which the Magistrate refused to grant him. The Sessions Judge called for the record, and directed the Magistrate to supply the copies required by the prisoner, adding, however, to his order that, should there be any objection to the copies being granted, the Magistrate should submit an explanation. The explanation submitted by the Magistrate was to the effect that copies of the documents were unnecessary, as they had nothing to do with the case. The Judge then disposed of the appeal, and confirmed the sentence passed by the Magistrate on the prisoner.

We think the Magistrate acted contrary to law when he determined whether the documents, of which copies were required by the prisoner, were necessary or not. A prisoner is entitled to have copies of all documents for which he asks, and which he thinks necessary for his defence; and it is for the authority trying the case, whether Magistrate or Judge, to determine at the hearing whether the documents filed by a prisoner are or are not admissible as evidence. We think also that the Judge was wrong in being satisfied with the so-called explanation given by the Magistrate.

On referring to the documents, of which copies were required by the prisoner, we find that six were before the Court. These were: *1st*, a judgment of 21st March 1870, in which the prisoner's son had been fined, on the report of the Sub-Inspector Mungul Singh, for obstructing an enquiry into a case of abortion.

2, 3, and 4 were judgments of the Joint Magistrate and Sessions Judge, dismissing charges of bribery brought against certain parties by the Sub-Inspector, Mungul Singh.

5th.—The result of an inquiry made into the character of one Gudda Dass, a notorious bad character, on the representation of the prisoner and other persons, the result of the inquiry being that Gudda Dass was bound down to be of good behaviour for three years.

6th.—A judgment dismissing a charge brought against the prisoner for theft of paddy at the instigation of the said Gudda Dass.

The four documents not before the Court were:—

7th.—Copy of a petition sent to the Commissioner by the prisoner and others, praying for an investigation into the characters of Gudda Dass and others, and denouncing them as bad characters.

8th.—Copy of a petition of 24th July 1870, presented by Gudda Dass to the Magistrate in this case, to the effect that the prisoner had offered the Sub-Inspector Rupees 100 to let off Burno Naik, Sonatun Oottur, and Durshan Satputtya, apprehended in a case of robbery, and to have him, Gudda Dass, substituted in his stead.

9th.—A petition to the Magistrate against the Sub-Inspector Mungul Singh for having illegally confined the prisoner's son and gomashta in a case of abortion.

10th.—Deposition of Sonatun Oottur given in the charge of theft brought against the prisoner at the instigation of Gudda Dass.

The object of filing documents 1 and 9 was to show that there existed an ill-feeling between the prisoner and the Sub-Inspector Mungul Singh. Documents 2, 3, and 4, were required to show that Mungul Singh was in the habit of getting up charges of bribery against zemindars and other respectable people, and had failed. Documents 5 and 7 were to show that one Gudda Dass was a notorious robber and bad character, and that Sonatun Oottur, one of the parties arrested by the Sub-Inspector, and for whose release it was said the prisoner had offered the bribe of Rs. 100, had also been denounced by the prisoner, and that, consequently, it was very unlikely he would pay his own money or enter upon terms to have him released, particularly as the said Sonatun Oottur had also given evidence against him in the paddy-theft case, as shown by documents 6 and 10.

Now, there can be no doubt that the prisoner has been prejudiced from the want of the documents 7 and 10, which might have been of material assistance to him in his defence. He was charged with offering a bribe to Mungul Singh, Sub-Inspector, to obtain the release of three persons then arrested on a charge of robbery, one of whom was Sonatun Oottur, and he urges in his defence the improbability of his taking such a step when he had, with other respectable people, denounced in a petition to the Commissioner this very Sonatun as a pest to society, and a follower of the notorious bad character Gudda Dass, and who, in collusion with Gudda Dass, had given false evidence against him, charging him with the theft or forcible removal of certain paddy-crops; and we think this plea was deserving of consideration of both the Lower Courts. We think that it is unnecessary to return the record to the Judge for a consideration of these documents, for, after reading the evidence in the case, we think that little reliance can be placed on it, the complainant, Mungul Singh, as apparent from the copies of proceedings 2, 3, and 4, filed by the prisoner, being very much in the habit of getting up cases of bribery against respectable persons; and the judgment of the Magistrate in this case appears to be based on his general knowledge of the character of the prisoner, whom he describes as an intriguing man.

The sentence and order passed by the Lower Court are set aside, and the prisoner will be released.

Miller, J.—I am of the same opinion. I think the Magistrate was wrong in refusing to grant to the petitioner copies of the papers referred to in the petition. Three of those papers at least would have been of considerable use to the petitioner in establishing his defence, and I am, therefore, of opinion that he has been seriously prejudiced by the refusal of the Magistrate to grant him copies

thereof. I would accordingly set aside the decisions of both the Lower Courts, and direct the immediate release of the petitioner. I have gone through the whole evidence on the record, and I am clearly of opinion that it is utterly unworthy of credit.

The 9th December 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Justice of the Peace—High Court—Sections 404, 410, and 434, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Howrah, in the case of Kally Prosonno Chatterjee, on behalf of the Oriental Gas Company versus *O. A. Guise.*

The High Court cannot interfere under Section 434 of the Code of Criminal Procedure—(*Quære*—Can it interfere under Section 404 of that Code ?)—in the case of a conviction before a Justice of the Peace under the 53 Geo. III., C. 155, S. 105. Such a case falls under Section 410 of the Code of Criminal Procedure.

Reference.—THE complainant charged the defendant with criminal trespass, stating in his deposition before the Deputy Magistrate that defendant, alleging he had lost a cock, entered the Gas premises in spite of the durwan's prohibition, and, even when told to go out, would not do so, but spoke insultingly to Mr. Blanchett, the Manager of the Gas Company.

The defendant in his examination admitted that he entered the Gas premises to look for a cock. He also said that four of his servants accompanied him. He admits that the durwan tried to stop him, but he nevertheless entered the premises, as he thought his cock was in the Gas Company's compound; as soon as he got in, Mr. Blanchett spoke to him most uncivilly, whereupon the defendant retorted.

The above is the whole evidence on record in the case, as no witness was summoned for the prosecution, and on this evidence the Deputy Magistrate found the defendant guilty of criminal trespass, and fined him 5 rupees.

The evidence does not appear to establish a charge of criminal trespass as defined in the Penal Code, as there is nothing whatever to show that the defendant entered the Gas premises with intent to commit an offence, or even to intimidate or annoy any one.

The Deputy Magistrate's explanation is with the record. He appears to lay stress on the fact that defendant took four servants with him; but, had the defendant been questioned, he could probably have explained why he did so. As for the durwan's efforts to prevent the defendant from entering the premises, it does not appear in evidence that he gave more than a verbal prohibition; and although defendant admits having spoken uncivilly to the complainant on the premises, there is no reason to believe that he had any intention of doing so before he entered those premises. The defendant simply admits that he retorted after the complainant had spoken first uncivilly to him.

I may add that the portion of the premises trespassed upon was the Gas Company's compound only.

Judgments of the High Court.

Jackson, J.—THE conviction in this case was before Mr. Godfrey as a Justice of the Peace, under the 53 Geo. III., Cap. 155, Section 105, and the 434th Section, Code of Criminal Procedure, does not seem to apply.

And it seems very doubtful whether Section 404 applies to either.

By Section 410, the petitioner had his remedy either by appeal to the Sessions Judge (it would seem that the limitation in Section 411 does not apply), or by writ of certiorari under Statute.

Glover, J.—I concur. The case comes within the purview of Section 410 of the Criminal Procedure Code. The defendant had an appeal to the Sessions Judge, or the sentence might have been revised under a writ of certiorari. We have no power to interfere under Section 434, Code of Criminal Procedure.

The 12th December 1870.

Present:

The Hon'ble H. V. Bayley and G. C. Paul, *Judges.*

Offence not under Penal Code—Special Law—Breach of Trust—Act XIII. of 1850.

Messrs. Watson & Co., *Petitioners,*

versus

Bykantnath Dass, *Opposite Party.*

Mr. R. T. Allan for the Petitioners.

Baboo Doorga Dass Dutt for the Opposite Party.

Where there is no provision in the Penal Code, and any other law (such as the Breach of Trust Law, Act XIII. of 1850) provides punishment for an offence, any person committing such offence may be tried under that law.

Paul, J.—IN this case Mr. Allan applies that the Magistrate should be ordered to investigate the charge of criminal breach of trust preferred by his clients, Messrs. Watson & Co., against Bykantnath Dass, and we think that the charge should be investigated. Under Section 2, Chapter I. of the Indian Penal Code, "every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty within the territories vested in Her Majesty by Statute 21 and 22 Vic., Chap. 106;" and it appears to us that, where there is no provision in the Penal Code, and any other law provides punishment for an offence, any person committing such offence may be tried under that law. Now, Act XIII. of 1850, the Breach of Trust Law, in the last Section provides for the punishment of persons furnishing false accounts. The complainants may, therefore, have Bykantnath tried under the charges of criminal breach of trust as well as of furnishing false accounts, if so advised.

We may observe that the accused, Bykantnath, who had been served with a notice by order of this Court, has appeared before us by his vakeel, Baboo Doorga Dass Dutt, who says he will not oppose the order for trial.

We, therefore, reverse the order of the Deputy Magistrate, and desire him to try the charge against Bykantnath.

h

The 19th December 1870.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Procedure— Warning accused — Lithographed stamp of signature.

The Queen *versus* Dedai Nushyo, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of rape.

In warning an accused person before taking down his statements, a Magistrate should state how the accused was warned.

A Magistrate ought not to use a lithographed stamp of his signature.

Bayley, J.—THE Judge and the Assessors concur in convicting the prisoner Dedar Nushyo of rape. There is the statement of the prisoner to the Magistrate admitting his guilt, and direct evidence of it. There is no evidence adduced by prisoner to rebut this, nor does he allege his statements to the Magistrate were otherwise than voluntary. He urges no grounds in his petition of appeal. We affirm the conviction and sentence, and reject the appeal.

We observe that the Magistrate uses the words "being warned" only, but he should state how the prisoner was warned before he made his statement. The signature of the Magistrate, Mr. * * *, is a lithographed stamp on some papers, and his own handwriting on others. He should use the latter only.

The 22nd December 1870.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Witnesses for defence—Hurt—Section 323, Penal Code—Chapter XIV., Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Patna in the case of Boolakee and others.

In a case of an offence (such as hurt under Section 323, Penal Code) punishable with imprisonment exceeding 6 months, and therefore falling under Chapter XIV. of the Code of Criminal Procedure, a Magistrate is bound to summon all the witnesses required by the accused.

Reference.—THE prisoners were convicted under Section 323, Penal Code.

The Deputy Magistrate's order is illegal, because he refused to summon the witnesses

for the defence, the case being triable under Chapter XIV., and he having dealt with it under Chapter XV., inasmuch as he considered that the prisoners were bound to bring their own witnesses.

I have not called upon the Deputy Magistrate for an explanation, as the error is patent on his decision.

Judgment of the High Court.

Glover, J.—The Deputy Magistrate was wrong in supposing that the defendants ought to have brought their own witnesses.

The charge was one of hurt under Section 323, Penal Code, and this, being an offence punishable by imprisonment for a period exceeding 6 months, came, as shown by the Zillah Judge, under Chapter XIV. of the Criminal Procedure Code, and not, as the Deputy Magistrate appears to have supposed, under Chapter XV.

Section 253, Chapter XIV. of the Procedure Code, says that the Magistrate shall summon any witnesses that may be asked for by the accused person; and the Deputy Magistrate ought to have summoned the defendant's witnesses in this case, as prayed for.

His order was illegal, and must be quashed. The fines, which appear to have been levied, must be returned to the defendants.

CIVIL CIRCULAR ORDERS OF THE HIGH COURT.

Directs that all future applications for printed or lithographed forms be made to the Superintendent of Stationery.

CIVIL CIRCULAR ORDER No. 16.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges and Judicial Commissioners, dated Calcutta, the 17th June 1870.

(Civil Side.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch and L. S. Jackson, *Judges.*

THE Court direct that all future applications for printed or lithographed forms required by the Judges of various grades be made to the Superintendent of Stationery, who has received instructions to supply only such forms as have been approved by the High Court.

2. The Superintendent of Government Printing has also been instructed to receive no applications except from the Superintendent of Stationery.

3. Indents from Subordinate Judges and Moonsiffs are to be submitted through their superiors.

4. Any Judge who desires to propose any form not in general use for adoption in the Civil Courts will be at liberty to address the Court upon the subject.

Directs that no copies of decisions of the Courts in cases of certificates under Acts XXVII. of 1860 and XL. of 1858 be granted unless the certificate has been previously issued.

CIVIL CIRCULAR ORDER No. 17.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges and Judicial Commissioners, dated Calcutta, the 23rd June 1870.

(Civil Side.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and J. B. Phear, *Judges.*

As there is reason to believe that it is becoming a practice for applicants for certificates under Act XXVII. of 1860 and Act XL. of 1858 to refrain from taking out the certificates after the Courts have passed orders for the issue of such, and to take out instead only certified copies of the said orders, thereby occasioning a loss of stamp revenue, the Court direct that no copies of the judgment or decision of the Courts in certificate cases be granted unless the certificate has been previously issued.

Enjoins rules, in supersession of Circular No. 7, dated the 16th July 1869,* for furnishing applicants with information or with unauthenticated copies of papers from records.

CIVIL CIRCULAR ORDER No. 18.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges and Judicial Commissioners, dated Calcutta, the 23rd June 1870.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

THE following rules are issued in supersession of those prescribed by Circular Order No. 7, dated 16th July 1869,* which is hereby cancelled :—

I.—All applications for information, or for unauthenticated copies of papers or documents, shall be made at a place and to the officer designated by the Zillah Judge for that purpose between the hours of 12 and 2.

II.—The officer to be so designated shall be either the Record-keeper or such other paid ministerial officer of the Judge's Court as can be spared ; the officer taking the duty on each day shall be noted by the sherishtadar in the office diary.

III.—The applications shall be on a printed Form A in duplicate, to be obtained from the Nazir at the price of 1 pice or ¼ anna per sheet. The applicant is to present it with the duplicate spaces reserved for the date, his name and residence, and the particulars of the information required filled up. The officer receiving such application is to enter in duplicate in the first column the consecutive number, and in the fifth column his signature. If he can furnish the information at once, he will note the same on the upper portion of the form in the column for remarks, and make that part over to the applicant, taking the latter's receipt in the column for remarks in the lower portion, which will be retained and recorded in the office. If he cannot furnish the information at once, he will enter in duplicate in the fourth column of the form the date by which the information can be furnished. The upper and lower portions of the form with columns 1, 2, 3, 4, and 5, thus filled up, will then be separated. The lower part will be made over to the applicant with a direction to return with it at the time fixed. The upper portion will be passed on to the amlah to whose department it pertains, who will enter in the column for remarks the necessary information, and return it to the Receiving Officer before the time prescribed. On the applicant's re-appearance, this upper portion bearing the information will be made over to him, and the lower portion bearing his dated receipt in the column for remarks will be taken from him, and recorded in the office.

IV.—Applications for copies of any papers or documents shall be in like manner received by the same officer, and shall be in the Form B, which will be obtainable in loose sheets * in the same way and at the same cost as Form A. Every such application shall be numbered consecutively as received, and the body or main portion of the form shall be passed on into the office with a memorandum, stating the date and hour by which the copy is to be ready, and a corresponding note shall be invariably made on the counterfoil, which is to be returned to the applicant.

V.—Care will be taken to have the copy ready in each case by the time fixed, before which it will, with the body of Form B attached to it, be handed back to the Record-keeper or other officer, who, on the original applicant's appearance with the counterfoil, will make over the copy to him, taking his receipt for the same in the last column of the form for remarks, in which the date of such receipt will also be noted. These forms will then be recorded in the office, filed in the order of their admission in a separate series for each month. At the

* *Note.*—The books of these forms supplied under the superseded Circular should be unbound and opened, and the separate sheets should be made over to the Nazir for sale.

* 12 W. R., Civil Circulars, p. 3.

close of each quarter they will be examined by the Sherishtadar, who will bring to notice any irregularity or unpunctuality that may be apparent in the department. At the end of the year the Judge, after satisfying himself as to the working of the office by an inspection of the forms recorded during the year, may order their sale as waste paper or direct their destruction.

VI.—The Judge is to license as many copyists, to be selected as far as practicable from the apprentices in his office—regard of course being had to their efficiency—as may be required for the purpose of supplying all applicants with copies without inconvenient delay; and no one but a licensed copyist is to be employed in the preparation of copies. Copies are to be paid for at the rate of 1 anna for every hundred words in the Vernacular, and of 2 annas for every hundred words in English, four figures counting as one word. On each copy the amount of the fee received is to be noted as follows:—

Number of words

(English or Vernacular)

in the copy at

anna per 100 words is ... Rs. 0 0 0

Received payment,

(Sd.) A. B.,

Licensed Copyist.

VII.—Copies of maps and plans cannot be supplied from the Judge's office; but application should be made to the offices where the original maps are deposited. No copy of a copy shall be supplied without express sanction of the Judge.

VIII.—The number of copyists licensed should not be greater than will admit, under ordinary circumstances, of each Vernacular copyist earning at least Rs. 12, and of each English copyist earning at least Rs. 20 per month. Each copyist is to keep a register showing his receipts, which he is to submit once a month to the Judge, who will thus be enabled to regulate the establishment of copyists and to reduce the number, if required, with reference to the provisions of the preceding rule. The Judge may, under pressure of work, depute to his Sherishtadar the duty of examining these registers; but he is under no circumstance to omit doing so himself at least once a quarter, and a certificate of his inspection of these books is always to be inserted in the annual Report.

IX.—A fee of 8 annas shall be charged for searching. No fees are to be required or paid for searching or copying papers wanted by public officers for public purposes.

X.—A book is to be kept by the Record-keeper in which all sums received on account of searching are to be entered. These sums are to be handed over daily to the Nazir, and by him paid into the Treasury to the credit of law and justice, under such heading as the Government may direct, once a month, or oftener, if, with regard to the amount received, this should be necessary.

XI.—The record-rooms are not open to the public generally, but public officers of the district (including Sherishtadars) and Pleaders may enter the record-room, and examine the record of any case in the presence of the Record-keeper or one of his assistants. Pleaders before making such examination should pay the fee prescribed by Rule IX.

XII.—Loose sheets of Forms A and B should be indented for on the Superintendent of Government Stationery. Either English or Vernacular forms may be thus indented for, as translations of Forms A and B in Bengali and Urdoo have been sent by the Court to the Superintendent.

These rules are only experimental, and the Court will be glad, therefore, to have a report at the end of the year as to how they have worked, and whether or not the fees and charges fixed required alteration.

A.

FORM of Application for Information.

No. and date.	Name and residence of applicant.	Nature of the information required.	Date on which the information is to be ready.	Signature of Officer receiving the application.	REMARKS.

No. and date.	Name and residence of applicant.	Nature of the information required.	Date on which the information is to be ready.	Signature of Officer receiving the application.	REMARKS.

NOTE ON BACK.

These forms may be procured from the Nazir of the Court at one pice per single form, or 100 for a rupee.

The person applying for information is to fill up columns 1 (except the No.) 2, and 3, and present it to the Officer appointed to receive such applications, who, if the information required cannot be immediately supplied, will fill up, tear off, and return the bottom part of the form to the applicant.

B. (COUNTERFOIL.)

Name of applicant.

Date of receipt of application.

The time by which the copy required is to be ready.

B

FORM of Application for copies.

No. and date of application.	Name, residence, and description of applicant.	Specification of paper of which the copy is required.	Case or proceeding in which such paper is to be found or was filed.	Name of Office or Department where the paper in question is to be found.	Time when copy will be ready.	Name of Copyist.	Name of Officer receiving application who files up the three preceding columns.	REMARKS.

Copy required will be furnished by on the at

Signature.

NOTE ON BACK.

These forms may be procured from the Nazir of the Court at one pice per single form, or 100 for a rupee.

The person applying for a copy is to fill up Columns 1 (except the No.), 2, and 3, and present it to the Officer appointed to receive such applications, who will pass it on to the proper Officer.

Circulates names of 12 Chiefs and Landholders in Chota Nagpore, who have been exempted by the Government of Bengal from attendance in Civil Courts.

CIVIL CIRCULAR MEMO. No. 4.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Authorities in the Lower Provinces, dated Calcutta, the 12th July 1870.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge.*

THE Government of Bengal having been pleased to exempt the 12 Chiefs and Landholders of the Chota Nagpore Division mentioned in the marginal statement from personal attendance in the Civil Courts, the High Court direct that their names be included in the list prepared under the provisions of Section 22, Act VIII. of 1859.

DISTRICT.	Names of Chiefs exempted from personal appearance.
LOHARDUGGAH ...	Lall Opendro Nath Sahee Deo, nephew of the late Maharajah of Chota Nagpore.
	Lall Mokund Nath Sahee Deo, nephew of the late Maharajah of Chota Nagpore.
	Thakoor Inder Nath Sahee Deo, of Govindpore, cousin of the late Maharajah.
MAUNBHOOM ...	Rajah Nilmoney Singh Deo of Pachete.
SINGBHOOM ...	Rajah Chukerdhur Singh Bahadoor of Seraikellah.
	Thakoor Rughoonath Sing of Khursowan.
GURJAT OR POLITICAL ESTATES...	Rajah Bendessuree Persad Singh Deo Bahadoor, C.S.I., Rajah of Oodyepore and manager of Sergoojah.
	Lall Mohessuree Persad Singh Deo, his cousin.
	Lall Joypal Singh Deo, his uncle.
	Rajah Protab Narain Singh Bahadoor of Jushpore.
	Rajah Rughoonath Seekhur of Gangpore.
	Tekait Dyanidhi Deo, his son, manager of Bonaie.

States that the Government of Bengal has exempted Rajah Rajendro Narain Deb Bahadoor, of Calcutta, from personal attendance in Civil Courts.

CIVIL CIRCULAR MEMO. No. 5.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Authorities in the Lower Provinces, dated Calcutta, the 23rd July 1870.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge.*

THE Government of Bengal having been pleased to exempt Rajah Rajendro Narain Deb Bahadoor, of Shobha Bazar, Calcutta, from personal attendance in the Civil Courts, the High Court direct that his name be included in the list prepared under the provisions of Section 22, Act VIII. of 1859.

Calls for information with a view to the promotion of Serishtadars from "B Districts" to "A Districts."

CIVIL CIRCULAR No. 20.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to Civil and Sessions Judges, dated Calcutta, the 1st August 1870.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

ALL Judges of A Districts, noted on the margin, are requested to report the occurrence of any vacancy in the office of Serishtadar, with a view to the claims being laid before them of those Serishtadars now in B Districts, who were Serishtadars of Zillah Courts when the rule of classification was introduced, such officers, in the opinion of the Court, which has received the concurrence of His Honor the Lieutenant-Governor, being entitled to priority as candidates for appointment to the Districts to which the larger salary has been attached, and being therefore eligible by preference until the whole class has been exhausted.

24-Pergunnahs.	Sylhet.
Jessore.	Rajshahye.
East Burdwan.	Rungpore.
Hooghly.	Patna.
Cuttack.	Sarun.
Chittagong.	Gya.
Tipperah.	Tirhoot.
Backergunge.	Bhaugulpore.
Dacca.	Purneah.
Mymensingh.	Moorshedabad.

2. The Judges of Districts in Class B, whose Serishtadars held office before the classification was introduced, are requested to return the names of such officers, stating the date of appointment and the Districts in Class A to which, on the occurrence of a vacancy, they would desire to be transferred.

3. On receipt of these Returns, the several Judges of A Districts will be furnished with a roll of the Serishtadars who would be candidates for transfer to their respective Districts on the occurrence of a vacancy.

Cancels Circular No. 15, dated 15th June 1870, requests that the Civil Statements for the 2nd Quarter of 1870 be submitted in the old Forms, and makes certain modifications in the quarterly statements for cases under Act VIII. B. C., of 1869.

CIVIL CIRCULAR ORDER No. 21.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges in districts to which Act VIII., B. C., of 1869, has been extended, dated Calcutta, the 4th August 1870.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

THE Court's Circular Order No. 15, dated 13th June 1870,* is hereby cancelled, as the new forms of returns therein referred to have not yet been completed. The Quarterly Statements of civil business for the 2nd Quarter 1870, are to be submitted in the old Forms.

2. It is, however, necessary that cases under Act VIII., B. C., of 1869 should be shown separately in the civil statements, and the following modifications of the civil statements have to be made for that purpose:—

(1.) A third sub-division of the headings in the first columns of Parts I. and III. of Statement I. must be added, as per margin, as regards both original suits and appeals.

Small Cause Court Class.
Other Cases.
Cases under Act VIII., 1869, B. C.

(2.) In heading 15, Column I. of Statement II., after the words "Act XXIII. of 1861" must be added the words "and Act VIII., B. C., of 1869."

(3.) "Executions of decrees under Act VIII., B.C., of 1869" must be shown in the Return of each officer as the 9th heading in Column 2 of Statement III.

(4.) Finally, in the Table on the first page of Statement I, showing the attendance of parties, the details in respect of cases under Act VIII., B. C., of 1869 will be furnished under a separate heading.

* 13 W. R., Civil Circulars, p. 18.

Cancels Circular Order No. 15, dated 13th June 1870, and requests that the Civil Statements for the 2nd Quarter of 1870 be submitted in the old Forms.

CIVIL CIRCULAR ORDER No. 22.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judicial Commissioners in Districts to which Act VIII., B. C., of 1869 has not been extended, dated Calcutta, the 4th August 1870.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

The Court's Circular Order No. 15, dated 13th June 1870,* is hereby cancelled, as the new forms of returns therein referred to have not yet been completed.

The Quarterly Statements of Civil Business for the 2nd Quarter 1870 are to be submitted in the old Forms.

* 13 W. R., Civil Circulars, p. 18.

Directs that, when police-officers are summoned by Civil Courts to give evidence the summons be sent for service through their superiors.

CIVIL CIRCULAR ORDER No. 23.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, Lower Provinces, dated Calcutta, the 5th August 1870.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

THE Court directs that, when police-officers are summoned by the Civil Courts to give evidence, the summons be sent for service through the superiors of the officers concerned. The Civil Courts are further directed to be very careful to abstain from ordering the production of Police Station Diaries unnecessarily, complaint having been made of the inconvenience caused by such requisitions.

Requests that processes forwarded by the Calcutta Court of Small Causes be served in accordance with the instructions which accompany the processes.

CIVIL CIRCULAR ORDER No. 24.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Criminal Authorities in the Regulation and Extra-Regulation Provinces, dated Calcutta, the 23rd August 1870.

(Civil and Criminal Sides.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

THE attention of the Court has been drawn to the fact that, notwithstanding the full and clear directions which in each case accompany processes forwarded by the Calcutta Court of Small Causes for service under Sections 20 and 30 of Act IX. of 1850, it very frequently happens that the provisions of the law, in respect of such processes, are not carried out by the Courts addressed. The High Court is now directing that more exact attention be given to such cases in future, and feels obliged to point out to the Subordinate Civil and Criminal Courts of all grades that failure to comply with instructions so explicit is quite inexcusable: it can only be explained on the supposition that the Judges or Magistrates concerned have bestowed no personal attention on the matter.

Lays down instructions regarding the ordering of investigations by Commissioners under Act VIII. of 1859.

CIVIL CIRCULAR ORDER No. 25.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Authorities in the Lower Provinces of Bengal, dated Calcutta, the 25th August 1870.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

VERY numerous cases have come before the High Court in which it has appeared that the power, vested by law in the Civil Courts, of directing investigation by Commissioners has been injudiciously exercised in the subjoined particulars, namely:—

1st.—The application for such inquiry has been granted as a matter of course, whether the nature of the case made such desirable or not.

2nd.—The instructions to the Ameen have not been sufficiently precise.

3rd.—A reasonable time has not been defined within which the return is to be made, or the Ameen has been allowed to exceed such time without good reason.

4th.—The Ameens have been permitted to go into matters not referred to them.

5th.—The Ameen's report, or the objections to it, have not been properly dealt with.

The following observations and general rules are, therefore, issued and laid down for the guidance of the Civil Courts subordinate to the High Court:—

The responsibility of ordering an inquiry under Section 180, Code of Civil Procedure, rests entirely with the Court before which the suit is pending, and which may order such inquiry when it deems a local investigation to be necessary or proper for the purpose of elucidating the matters in dispute, or of ascertaining the amount of any mesne-profits or damages.

The Court is therefore to consider, when it is moved to order any such inquiry, whether the nature of the case calls for that particular mode of inquiry; whether the application has been made at a proper stage of the proceedings; whether the importance of the case warrants that expense being imposed upon the parties; and whether such inquiry may not be attended with a delay which will counterbalance the advantage to be derived from it.

If the inquiry be ordered, it is necessary to define the points on which the report of the Ameen is required, and upon which it is to be evidence; and points ought usually to be excluded which can conveniently, and ought to, be substantiated by the parties by evidence at the trial.

A time should then be fixed for making the return, and it should be so fixed that the Ameen may reasonably be expected to comply exactly with the order; and for this purpose the Court may ascertain what the Ameen's engagements are, and arrange accordingly; and it is the special duty of the Zillah Judge, by attention to the Weekly Returns* of work submitted by the Ameens, to take care that no improper delay occurs in executing commissions entrusted to them.

* Vide para. 12, C. O., No. 24, dated 6th November 1857.

If the instructions have been precise, and the Ameens understand their business, they will usually keep within the bounds which have been set for them.

It is a very common practice for the Courts to receive, and even to invite, formal exceptions and objections to the report. It will be observed that the 180th Section makes no provision for any such thing—"but it shall be competent to the Court, or to the parties to the suit or any of them, with the permission of the Court, to examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in this report, or the manner in which he may have conducted the investigation."

The practice of encouraging petitions of objections leads to the making of charges, frequently quite unfounded, of partiality or corruption against the Ameens. Vakeels who lend themselves to preferring such charges ought to be made to understand that they will have to prove them; and they should not be entertained unless proof of their correctness is tendered. The report of a Commissioner should be treated, as the Code points out, as evidence in the cause; and should be subject, like the other evidence therein, to oral comment by the pleaders, and, generally speaking, to that only.

In order to a more careful observance of these principles by the Subordinate Civil Courts, the following general rules are now prescribed :—

I. Whenever a Subordinate Civil Court, either of its own motion or on the application of any party, directs a local inquiry or an inquiry into accounts, the order for such inquiry shall be drawn up in the handwriting of the Judge of such Court, and shall contain the following matters :—

1st.—Whether the inquiry is directed by the Court *proprio motû* or upon an application; and, if on an application, from which party.

2nd.—What the point is which requires elucidation or ascertainment in that particular way.

3rd.—Why such matter could not be proved or ascertained in the ordinary way by producing documents at the proper time and witnesses at the trial.

4th.—The instructions given to the Commissioner.

II. Where the Court issuing such commission is subordinate to the Zillah Judge, a copy of such order shall be forthwith submitted to him, and he will note thereon the fact of complete or partial compliance with the foregoing rule.

III. In all orders for investigation by a Commissioner under Section 180, Code of Civil Procedure, the present Circular Order shall be cited as well as the Section of the Code.

IV. The Zillah Judge in his annual report will certify the mode in which the several Subordinate Judges have complied with these rules.

Makes arrangements for the expenses attending the service of processes of the High Court, in cases appealed during the period between the date of the Court Fees Act and the Rules to be issued under that Act.

CIVIL CIRCULAR ORDER No. 26.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges and Judicial Commissioners, dated Calcutta, the 29th August 1870.

(Civil Side).

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

THE Court, after communication with the Government of Bengal,* are pleased to notify that, in order to provide for the expenses attending the service of processes of this Court, in cases that shall have been appealed to the Court during the interval from the date the Court Fees Act came into operation, until the promulgation of the Rules under Chapter V. of that Act, and in order to furnish peons serving processes of the High Court in such cases with ready money to defray expenses on account of boat hire, ferries, and tolls, His Honor the Lieutenant-Governor of Bengal has authorized the Zillah Judges to draw as contingent expenditure the amounts so incurred already, or that may be incurred during the said interval, and until permanent arrangements on the subject are made in connection with the rules under the Court Fees Act hereafter to be promulgated.

* Government letter No. 3815, dated 22nd August 1870.

Circulates rules recently passed by the High Court, regarding the admission of appeals to Her Majesty in Council.

CIVIL CIRCULAR ORDER No. 27.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to District Judges and Judicial Commissioners, dated Calcutta, the 5th September 1870.

(Civil Side).

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble G. Loch., H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

THE Court desire to draw the attention of all Zillah Judges and Judicial Commissioners to the annexed copy of Rules* recently passed by the Court, relating to the admission of appeals to Her Majesty in Council and to the transmission of such appeals to England.

2. The duties devolving on Zillah Judges under these rules are not to be delegated to Subordinate Judges or Moonsiffs under Section 19, Act XVI. of 1868.

* See *infra, Rules,* pp. 1 to 4.

Prohibits the employment of Ticca Ameens as occasional Commissioners for conducting local investigations.

CIVIL CIRCULAR ORDER No. 28.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Authorities in the Lower Provinces of Bengal, dated Calcutta, the 8th September 1870.

(Civil Side).

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

In continuation of Circular Order No. 25,* dated 25th ultimo, the Court desire it to be understood that the commissions for local investigations therein referred to may issue only to persons formally appointed Civil Court Ameens, and therefore having a permanent "status" as Commissioners of the Courts. The employment by Civil Courts of occasional Commissioners, known under the common designation of "Ticca Ameens," is strictly prohibited.

2. If it should appear to the Judge of any district that there should be an increase in the number of authorized Civil Court Ameens available for employment, he may submit a proposal to that effect. But unless sufficient cause can be shown for it, any such proposal to augment the staff will not be entertained.

* *Ante*, p. 11.

Draws attention to a case in which a person passed himself off as another, and practised as a Pleader.

CIVIL CIRCULAR ORDER No. 29.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges and Judicial Commissioners, dated Calcutta, the 13th September 1870.

(Civil Side.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

The Court think it proper to notify, for the information of all District Judges and Judicial Commissioners, that a person whose real name is stated to be Raychurn Ghose, but who has assumed the name of Omer Nath Bose, has been practising as a pleader in the Courts of Zillah Beerbhoom on the strength of a *sunnud* bearing the name of Baboo Omer Nath Bose, a vakeel of this

Court, who has lost his genuine *sunnud*, and has satisfactorily explained the loss.

2. The object of this notification is to prevent the proceeding being repeated in other districts, and the Zillah Judges are to put their subordinates on their guard accordingly.

Empowers Zillah Judges and Judicial Commissioners to extend Circular No. 18, dated 23rd June 1870, regarding furnishing parties with copies of papers, to the Subordinate Courts.

CIVIL CIRCULAR ORDER No. 30.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Judicial Commissioners, dated Calcutta, the 18th September 1870.

(Civil Side.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges.*

THE Court are pleased to authorize Zillah Judges and Judicial Commissioners generally to extend to the subordinate Civil Courts under their control the provisions of the Circular Order No. 18,* dated 23rd June 1870, or so many of the rules therein contained as may be considered applicable, and the Zillah Judges and Judicial Commissioners are requested to report respectively to what extent they act upon this Circular Order.

Lays down new Forms of Quarterly Returns of Civil and Criminal business, and prescribes rules for their preparation.

CIRCULAR ORDER No. 31.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Criminal Authorities, Lower and Extra-Regulation Provinces, dated Calcutta, the 4th November 1870.

(Civil and Criminal Side.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch and L. S. Jackson, *Judges.*

THE Court direct that the Quarterly Returns of Civil and Criminal business be, in future, submitted in the forms annexed.

2. The Quarterly Civil Statements to be submitted by the Judges to the High Court are three in number, marked A, B, and C.

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* *Ante*, p. 2.

3. Statement A will contain the total number of original suits before each of the Civil Courts in the district during the quarter. The first column marked "Class of Courts" will contain the names and official designation of each Judicial Officer in the district. The other columns explain themselves and require no remark. Part II., Statement A, gives a detail of cases of each class which, at the close of the quarter, are pending more than six weeks and three months as regards Small Cause Court cases and Rent-suits; and more than three months and six months as regards "Other cases." An explanation, as at present, should be given with regard to all Small Cause Court and Rent-cases which are pending for more than six weeks; and of all other cases which are pending more than six months. If there is not room on the margin of the Statement for the explanations, they should be written on a separate sheet of foolscap, and each explanation should give the number and year of the case referred to.

4. Statement B will comprise the total number of appeals before each of the Appellate Courts in the district. Column 1, headed "Class of Courts," will comprise the name and official designation of each Officer presiding over each Appellate Court. Explanation must be given of the cause of delay in disposing of appeals in suits, of the Small Cause Court kind, and for rent, entered in Part II., Statement B, pending more than six weeks; and as regards "Other cases" when the delay in disposing of them exceeds six months.

5. Statement C is intended to exhibit all Miscellaneous cases instituted and disposed of by the various Judicial Courts in the district. All business heretofore entered in the Statements under the head of "Other Miscellaneous Proceedings," and which for the most part consists of reports, answers to, or orders upon, proceedings from other Courts, applications from Ministerial Officers, &c., must be carefully excluded, and nothing but *real* cases requiring a judicial finding and order should be entered. Explanation of the delay in disposing of cases pending more than six months must be given. Column 1, headed "Class of Courts," will, as in the other Statements, contain the name and official designation of each Judicial Officer in the district, with the total quantity of miscellaneous work placed opposite his name. Part II., Statement C, comprises appeals in miscellaneous cases, and the above remarks are, *mutatis mutandis*, applicable to the preparation of this Statement.

6. These forms are so simple that the Court believe there will be no difficulty in their preparation, and they have been adopted by the Court with the view of giving as much relief as possible to the English Department of the Judge's Office.

7. Statements D and E are Quarterly Returns to be submitted by the Criminal Courts.

8. Column 1, Statement D, will comprise the name and official designation of all Officers exercising Criminal authority in the district. It will be observed that no column has been assigned for parties committed for trial, for they are still under trial, and on committal should be entered in column 3 of the Statements opposite the name of the Sessions Judge, a note to that effect being made in the column of remarks; and where a prisoner has been convicted of murder, and sentenced to death by the Sessions Judge and the sentence referred to the High Court for confirmation, a note giving the date of such reference should be entered in the column of remarks. This Statement, after being prepared and signed by the Magistrate, will be submitted to the Sessions Judge, who will enter therein the result of trials disposed of by him during the quarter, and forward the Statement to the High Court. Sessions Judges will, however, continue to submit the new Statement No. III., prescribed by Circular Order (Criminal) No. 10, dated 12th July 1870.*

9. Statement E is intended to comprise all appeals preferred either to the Sessions Judge or to the Magistrate, and also references made to the High Court under the provisions of Section 434, Code of Criminal Procedure, either by the Sessions Judge or Magistrate. It will be prepared by the Magistrate who, after entering the total number of appeals before him, will submit it to the Sessions Judge, who will enter therein the number of appeals before him. It will be observed that only the total number of appeals before each appellate authority is to be given.

10. The following Quarterly Statements are discontinued:—

CIVIL.

1. Statement of regular cases instituted and disposed of, &c.

2. Abstract Statement of all the summary suits and miscellaneous business pending, instituted, and disposed of before the Judge and Subordinate Judge.

3. Abstract Statement of all the miscellaneous business pending, instituted, and disposed of by the Courts of Moonsiffs.

4. Statement of appeals under Act X. of 1859, pending, instituted, and disposed of by the Judge.

5. Statement required in paragraph 8 of Court's Circular Order No. 10A, dated 26th April 1864 (Tullubanah Statement).

CRIMINAL.

Magistrates' 1 to 5 Statements showing the number of crimes, &c., committed, and the number of persons under trial, convicted, &c., by the Magisterial authorities.

Whipping Statements A to C.

No. 8, Register of trials in which sentence of solitary confinement has been awarded under Section 73 of Act XLV. of 1860.

Abstract of business before the Court of Session in its appellate jurisdiction.

d

Ante, Criminal Circulars, p. 1.

A.

STATEMENT of Civil Work in the District of for the Quarter of the year 187 .

CLASS OF COURTS.	ORIGINAL SUITS.															REMARKS.
	SMALL CAUSE COURT CLASS.					RENT SUITS.					OTHER CASES.					
	Pending.	Instituted or received by transfer.	Total.	Disposed of by final order or transfer.	Remaining.	Pending.	Instituted or received by transfer.	Total.	Disposed of by final order or transfer.	Remaining.	Pending.	Instituted or received by transfer.	Total.	Disposed of by final order or transfer.	Remaining.	

PART II.

Pending Cases.

CLASS OF COURTS.	SMALL CAUSE COURT CLASS PENDING		RENT SUITS PENDING		OTHER CASES PENDING		REMARKS.
	More than 6 weeks.	More than 3 Months.	More than 6 weeks.	More than 3 months.	More than 3 months.	More than 6 months.	

B.

Appeals.

CLASS OF COURTS.	SMALL CAUSE COURT CLASS.					RENT CASES.					OTHER CASES.					REMARKS.
	Pending.	Instituted or received by transfer.	Total.	Disposed of by final order or transfer.	Remaining.	Pending.	Instituted or received by transfer.	Total.	Disposed of by final order or transfer.	Remaining.	Pending.	Instituted or received by transfer.	Total.	Disposed of by final order or transfer.	Remaining.	

PART II.

Pending.

CLASS OF COURTS.	SMALL CAUSE COURT CLASS PENDING			RENT CASES PENDING			OTHER CASES PENDING			REMARKS.
	More than 6 weeks.	More than 3 months.	More than 6 months.	More than 6 weeks.	More than 3 months.	More than 6 months.	More than 3 months.	More than 6 months.	More than one year.	

C.

Miscellaneous Original Cases.

CLASS OF COURTS.	Original.					Detail of Pending Cases			REMARKS.
	Pending.	Instituted or received by transfer.	Total.	Disposed of by final order or transfer.	Remaining.	More than 6 weeks.	More than 3 months.	More than 6 months.	

PART II.

Miscellaneous Appeals.

CLASS OF COURTS.	Miscellaneous Appeals.					Detail of Pending Cases			REMARKS.
	Pending.	Instituted or received by transfer.	Total.	Disposed of or transferred.	Remaining.	More than 6 weeks.	More than 3 months.	More than 6 months.	

D. (Criminal.)

Statement of Offences reported and of Persons tried, convicted, and acquitted for each Offence in the District of in the Quarter of the year 187 .

DESIGNATION OF OFFICERS. 1	Number of Offences reported during Quarter. 2	Number of Persons under trial during Quarter. 3	Discharged without trial. 4	Acquitted. 5	Convicted. 6	Remaining under trial. 7	REMARKS. 8
							NOTE.—When a prisoner is convicted of murder and sentenced to death, a note to that effect, with date of the reference to the High Court, is to be made in this column.

E. (Criminal.)

Statement showing the result of Appeals and revision in Criminal Cases in the District of during the Quarter of the year 187 .

TRIBUNAL. 1	Number of appellants or persons applying for revision under Section 404, Code of Criminal Procedure. 2	NUMBER OF PERSONS.								REMARKS. 11
		Appeals or applications rejected. 3	Sentences confirmed. 4	Sentences modified. 5	Sentences reversed. 6	Sentences quashed. 7	Further enquiry or evidence ordered. 8	Cases referred for revision to the High Court. 9	Pending. 10	

Prescribes new Annual Statements (Civil and Criminal) with instructions as to their preparation and submission.

CIRCULAR ORDER No. 32.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges, dated Calcutta, the 8th November 1870.

(Civil and Criminal.)

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble G. Loch and L. S. Jackson, *Judges.*

In supersession of previous orders on the subject of Annual Statements, the High Court of Judicature hereby direct that the undermentioned Statements shall be submitted in accordance with the instructions following. Under the orders of Government, the Collectors will furnish the several Zillah Judges with the particulars required to complete those parts of the returns which relate to Revenue Courts and Revenue cases.

* 2. This Statement is to be furnished by the Judge from the information in his own office, and that which he will obtain from the several Courts, Civil, Revenue, and Criminal. From the Returns received from the several districts under the authority of the Court, a collective Statement will be prepared by the Court for transmission to the Government. This is a new Statement and absolute completeness in preparing it is not in the first instance to be expected. Attention is directed to Clauses (*a*) and (*b*) of the Government Resolution given in the margin; and this Return is to be forwarded as soon as it can be prepared without delaying, for this purpose, the other Statements now ordered, which do not differ very widely from those previously in use.

(*a*). All Heads of Departments are to fill up and supply the detailed Tables proposed by the Committee, *only* so far as the entries can be compiled from the materials which have been collected for the more concise Tables which have been hitherto supplied with the Administration Reports or Annual Reports of each Department. No information which is not already in the office is to be sought for.

(*b*). They are to throw into the shape required by the new Statistical Tables all such items and the entries in such columns as can be reliably compiled from the registers and details which have already been kept up, and only these.

† 3. This Statement is likewise to be submitted annually by the Zillah Judge, who will receive it from the Magistrate of the District. It will comprise all cases in whatever Criminal Court they may have been disposed of, one figure showing the cases of each kind which have been before *all the Courts* of the district. Accused persons who have been committed for trial, but whose cases have not been disposed of by the Court of Session, will be entered as "under trial."

‡ 4. This Statement, *Annual,* will be prepared in the Office of the Magistrate of the District on data furnished to him by his subordinates; it will then be forwarded by him to the Zillah Judge, who will add the figures for his own Court, and transmit it to the High Court, where a complete Statement for the whole of the territories under the Court's jurisdiction will be prepared.

§ 5. This Return will be furnished *annually* in the same manner as the last preceding, and will require careful attention.

‖ 6. This Statement will be submitted *annually* by the Zillah Judge, who will first receive from the Magistrate of the District the Return of his own Court.

¶ 7. This will be an Annual Statement. It will be compiled in the Office of the Zillah Judge from the materials furnished to him by the officers presiding in the several Courts (within his district) which are comprised in the Statement.

(*a*). Suits for money distinguishing suits up to Rs. 500, cognizable by Small Cause Courts, from "other cases."
Suits under the Rent Law.
Other suits.

* B. 1.
Annual.
Showing the various judicial tribunals, original and appellate, existing in the province of on the last day of the year 18 .

† B. 2.
Statement of offences reported and of persons tried, convicted, and acquitted for each offence in the district of in the year 18 .

‡ B. 3.
Statement showing the general result of criminal trials in the tribunals of various classes in the district of in the year 18 .

§ B. 4.
Statement showing the punishments inflicted by various criminal tribunals in the district of in the year 18 .

‖ B. 5.
Showing the result of appeal and revision in criminal cases in the district of in the year 18 .

¶ B. 6.
Showing the number and description of civil suits instituted in the Civil and the Revenue Courts of the district of in the year 18 .

The several denominations of cases are to be entered where such cases occur, as given in the accompanying list (*a*) and in that order.

** 8. This Statement will, in like manner, be prepared annually in the Office of the Zillah Judge.

†† 9. This will be an Annual Return.

‡‡ 10. This Statement of appellate business, prepared in the same manner, will be annual.

11. In regard to these two Statements (8 and 9), the Zillah Judge will take care that the proper officer of his Court, as well as the subordinate Courts, collect at convenient intervals the information requisite for completing these Statements at the end of each year, although Quarterly Detailed Statements of a corresponding kind are not now required.

§§ 12. This Statement, which comprehends the execution of decrees in all the Courts of the district, will be completed in the office of the Zillah Judge. The cases to be entered in the 6th column will include those in which the execution-proceedings have been struck "off the file" or have come to an end for the time being, although complete execution has not been obtained.

‖‖ 13. This Statement will be compiled under the direction of the Zillah Judge from the records in his office. It will usually be a blank, except in regard to the Court of Session, and the penultimate column may be filled by reference to the orders of the Local Government in this particular.

14. In publishing these forms, the Court desire to impress it upon the Zillah Judge and other officers concerned in the preparation of them, that returns of this kind, unless they are correct and framed in exact compliance with instructions, are not merely valueless but mischievous. It will be expected, therefore, that pains will be taken to render returns as correct as possible.

15. The Statements mentioned in the accompanying list being no longer necessary, or being superseded by those now directed, may be dispensed with.

** B. 7.

Showing the value of suits disposed of in the Civil and Revenue Courts of the district of in the year 18 .

†† B. 8.

Showing the general result of the trial of civil suits in the Courts of Original Jurisdiction of the district of in the year 18 .

‡‡ B. 9.

Showing the business of the Civil and Revenue Appellate Courts of the district of in the year 18 .

§§ B. 10.

Annual.

Shows the execution of the decrees of the Civil and Revenue Courts of the district of in the year 18 .

‖‖ B. 11.

Showing use of Juries and Assessors in the Civil and Criminal Courts of in the year 18 .

LIST OF STATEMENTS DISCONTINUED.

CIVIL.

1. Statement of regular cases pending, instituted, and disposed of, &c.

2. Abstract Statement of all the summary suits and miscellaneous business pending, instituted, and disposed of before the Judge and Subordinate Judge.

3. Abstract Statement of all the miscellaneous business pending, instituted, and disposed of by the Moonsiffs.

4. Detailed Statement of the different descriptions of original suits instituted before the Judge and Moonsiffs.

5. Statement of appeals from Subordinate Judges and Moonsiffs' decisions.

6 & 6 A. Statement showing the average duration of suits and appeals.

7. Statement of debtors confined in the Civil Jails.

8. Statement of deeds registered.

Statement of applications for execution of decrees.—C. O. No. 43, dated 31st December 1861.

Statements A and B, the former exhibiting the stamp-receipts and also the receipts on account of Ameens' fees, and the latter showing the cost to Government of the Civil Courts of different grades.

d

C. Statement of Peons' Fee Fund.

Statement showing the state of the execution of decree files.

CRIMINAL.

Nos. 1 to 5. Magistrates' Statements.

No. 3. Table showing the number of persons apprehended, &c.

No. 6. Average duration of cases.

„ 7. Register of fines.

„ 8. Register of sentences, if solitary confinement has been awarded.

Whipping Statements A to C.

Statement of cases instituted under Sections 13 and 14 of Act III. of 1857.—C. O. No. 5, dated 9th June 1859.

Statements 1 to 3 of commitments and appeals before the Sessions Court.

Statement 2. Average duration of cases referred to the High Court.

Statement 3. Table showing the number of persons apprehended, &c.

Statement 7. Register of fines.

„ 8. Register of forfeiture of property.

Statement 9. Register of sentences of solitary confinement.

Statement 10. Average duration of cases in the Sessions Court.

Statement of persons sentenced to seven years and upwards.—C. O. No. 12, dated 5th June 1863.

Statement of appeals under the Whipping Act.

Whipping Returns.

Classification of Crimes and Offences.

CLASS 1.

OFFENCES AGAINST THE STATE, THE PUBLIC, AND JUSTICE.

Against the State.

	I. P. CODE.
Waging war against the Queen ...	121.
Collecting arms or concealing attempt to wage war ...	122-123.
War or depredation on allied Powers ...	125 to 127.
Abetment of mutiny ...	131-132.

Relating to Coin, Stamps, Weights, and Measures.

Counterfeiting coin ...	231 to 238.
Diminishing or altering coin ...	246 to 249.
Passing or possessing bad or altered coin ...	239 to 243, and 250 to 254.
Counterfeiting stamps or selling same ...	255 to 259.
Using as genuine counterfeit stamps, or effacing or altering same ...	260 to 263.
Making, using, or possessing false weights or measures ...	264 to 267.

Against Public Justice.

Personating Public Servant or Soldier ...	140, 170-171.
Concealing design to commit offence ...	118 to 120.
Omitting to give information of offence, or giving false information ...	176-177, 181, 182, 202-203.
Causing disappearance of evidence ...	201 to 204.
Resisting, obstructing, or omitting to assist Public Servant ...	183 to 187, 189-190.
Disobedience of lawful order, causing injury ...	188.
Intentional insult or interruption in Judicial proceeding ...	228.
Harbouring an offender ...	212-216.
Taking gift to screen offender ...	213 to 215.
Resistance to lawful apprehension and rescue ...	224-225.
Escape from lawful custody or transportation ...	224-226.
Absconding from, avoiding, or disobeying summons or notice or order to attend or produce, or refusing to answer or sign ...	172-175 and 178 to 180.
Failure to attend as Juror or Assessor ...	C. P., 354.

By Public Servants.

Taking valuable thing by or to influence Public Servant ...	161-165.
Public Servant acting illegally to injure any person ...	166-167.
Public Servant unlawfully trading ...	168-169.
Public Servant fraudulently defeating punishment or forfeiture ...	217-218.

Public Servant wilfully making order or decision contrary to law ... 219, 220.
Public Servant intentionally omitting to apprehend or permitting to escape ... 221-222.
Public Servant negligently suffering escape ... 129, 223.
Breach of Police Act by Police-officers.

False Evidence, False Complaints or Claims and Forgery.

Giving false evidence ... 193 to 196.
Fabricating false evidence ... 193 to 196.
Making, issuing, or using false statement or certificate ... 197 to 200.
False personation in Judicial proceeding ... 205 to 229.
Fraudulent claim to, or concealment of, property, or suffering of decree ... 206 to 208. 421 to 424.
False claim in Court of Justice ... 209-210.
" charge of offence ... 211.
Frivolous or vexatious complaint ... C. P., 170.
Forgery or fraudulently using or possessing forged document ... 465-466, 467-468, 469-471, 473 to 477.
Making or using false trade marks ... 482 to 489.

Public Nuisances.

Public nuisances under Penal Code ... 269 to 294.
Nuisances under Police or Municipal and Local Acts.

Relating to the Public Peace.

Rioting or unlawful assembly ... 143 to 153. 157-158.
Omitting to inform of, or prevent, riot ... 154 to 156.
Affray ... 160.
Offences relating to religion ... 295 to 298.

CLASS II.

OFFENCES AGAINST THE PERSON.

Murder, 302-303.
- By Thugs.
- By Dacoits.
- By Robbers.
- By Poison ... for sake of robbery. / from other motives.
- Other Murders ... from motives connected with women. / from other motives.

Attempt to murder ... 307.
Culpable homicide ... 304-308.
Abetment of suicide ... 305-306.
Attempt to commit suicide ... 309.
Causing miscarriage ... 312-316.
Exposure of infant or concealment of birth ... 317-318.
Grievous hurt ... 325-326.
" on grave and sudden provocation ... 335.
Hurt ... 323-334.
" by dangerous weapons ... 324.
Administering stupefying drugs ... 328.
Causing hurt to extort property or confession ... 327, 329 to 333.
Act dangerous to life or safety ... 336-337.
Wrongful restraint ... 341.
" confinement ... 342 to 346.
" " to extort property or confession ... 347-348.
Assault or use of criminal force ... 352, 355, 358.
Criminal intimidation or insult ... 504 to 509.
Causing annoyance in state of intoxication ... 510.
Unlawful compulsion of labor ... 374.
Buying or disposing of any person as a slave ... 370-371.
Kidnapping or abduction ... 363 to 365. 367 to 369.
Abducting a woman to compel marriage or for defilement ... 366.
Selling, letting, or unlawfully obtaining a woman for purposes of prostitution ... 372-373.
Enticing a married woman with criminal intent ... 498.
Fraudulent and unlawful marriages ... 493 to 496.
Adultery ... 497.
Rape ... 376.
Unnatural offences ... 377.
Defamation ... 500 to 502.

CLASS III.

Offences against Property.

With violence.

Dacoity	... 395, 397, 398.
Preparation or assembly for dacoity	... 399, 402.
Robbery with hurt or deadly weapon*	... 394, 397-398.
Robbery†	... 392-393.
Extortion	... 384 to 389.
House-breaking or house-trespass, in order to commit theft	... 451, 454, 457.
House-breaking or house-trespass, in order to commit an offence other than theft ...	449-450-451, 454, 457.
House-breaking or house-trespass, with preparation for, or attempt at, hurt ...	452, 455, 458, 460.
House-breaking or lurking house-trespass	452, 455, 458.

Without violence.

Theft ... { of cattle / ordinary }	... 379-380-381.
Dishonestly receiving stolen property	... 411 to 414.
Dishonest misappropriation of property	... 403-404.
Criminal breach of trust	... 406 to 409.
Cheating	... 417 to 420.

* { By poison or stupefying drugs. / By other means.

† { In a dwelling-house. / On the highway. / Elsewhere.

Malicious Offences.

Mischief, ordinary ...	{ 426-427, 430 to 433.
Mischief by poisoning or killing cattle	... 420-429.
Mischief by destroying land-marks	... 434.
Serious mischief by fire	... 435-436, 438.
Criminal trespass or house-trespass	... 447.
Breaking closed receptacle	... 461-462.

CLASS IV.

Not included in the above Classes.

Belonging to a gang of	Thugs	... 311.
	Dacoits	... 400.
	Thieves	... 411.

Vagrancy without ostensible means of livelihood	... C. P., 295.
Bad habit and repute	... C. P., 296-297.
Criminal breaches of contracts of service	... 490-492.

Breaches of special Laws for the protection of the Revenue, or on other subjects—the Acts being specified.

Breaches of laws relating—

To Excise on spirits and drugs.
" Opium.
" Salt and Saltpetre.
" Sea and Land Customs.
" Stamps.
" Paper Currency.
" Mint.
" Post Office.
" Electric Telegraph.
" Payment of Watchmen.
" Municipalities.
" Jails.

To Forests.
" Ferries.
" Canals.
" Railways.
" Tolls.
" Stage Coaches.
" The Press.
" Gaming and Lotteries.
" Wandering and dangerous lunatics.
" Cattle-trespass.
" Possession of arms.
" Foreigners.
" Emigration.

B.

Judicial Sta

Showing the Various Judicial Tribunals, Original and Appellate,

Class of Tribunal, distinguishing those which exercise powers in one Department from those exercising powers in two or three Departments, and those consisting of paid from unpaid Judges.	No. of Judicial Divisions.	Average area of each Division in square miles.	Average population of each Division.	No. of Tribunals.	Constitution of Tribunals, stating No. of Judges in each and Jury or Assessors, if any.	Judicial powers of each Tribunal, original and appellate.	Prescribed qualification of Judges previous to appointment.
1	2	3	4	5	6	7	8
Village Officers or Punchayets							
Local and Subordinate Magistrates exercising Criminal powers only ... { Paid ... Unpaid...							
Ditto ditto exercising Criminal and Civil powers ... { Paid ... Unpaid...							
Ditto ditto exercising Criminal and Revenue powers ... { Paid ... Unpaid...							
Ditto ditto exercising Criminal, Civil, and Revenue powers ... { Paid ... Unpaid...							
Small Cause Courts confined to proper functions... ...							
Ditto exercising also Ordinary, Civil, or Revenue powers							
Moonsiffs exercising only Civil powers...							
Ditto exercising also Revenue powers							
Boards of Magistrates ... ... { Paid ... Unpaid...							
Magistrates of full powers exercising only Criminal powers							
Ditto exercising also Revenue powers							
Ditto exercising also Revenue and Civil powers ...							
Magistrates exercising powers described by Act XV. of 1862 (*and so on, detailing all the different classes of Tribunals existing in the Province, and stating separately those exercising any different combination of powers*) ...							
NOTE.—The above are only examples, and where any class mentioned does not exist, it may be omitted. Sessions and Chief Courts and all other Tribunals will follow.							
☞ *At the end an Abstract should be given showing the total number of Original and Appellate Courts of each grade in each Department.*							

tements—I.

existing in the District of on the last day of the year.

Total Number of Judges.				Average Annual Salary of each paid Judge.		Total cost of tribunals.	Net receipt from stamps.	Executive or other functions exercised by the same officer.	Average number of days in the year devoted to judicial work.	Average number of advocates attached to each tribunal.	Number of Cases decided during the year.			
European.			Native.	European.	Native.						Criminal.	Civil.	Revenue.	Appeal.
Covenanted.	Commissioned Military Officers.	Uncovenanted.												
9	10	11	12	13	14	15	16	17	18	19	20	21	22	23

Judicial Statements—2—(Criminal).

Statement of offences reported, and of persons tried, convicted, and acquitted for each offence in the District of in the year 18 .

DESCRIPTION OF OFFENCES.	Number of offences reported during the year.	Number of persons under trial during the year.	Acquitted or discharged.	Convicted.	Died, escaped, transferred.	Remaining under trial.	REMARKS.
According to the classified list which accompanies. It will not, of course, be necessary to enter all the headings in the classified list in this column, but only the headings descriptive of offences actually committed, entered according to the order given in the list which follows the arrangement of the chapters in the Penal Code.							The number committed out of those remaining under trial should be noted in this column of remarks.

Judicial Statements—3—(Criminal).

Statement showing the general result of Criminal trials in the tribunals of various classes in the District of in the year 18 .

CLASS OF TRIBUNAL.	NUMBER OF PERSONS DEALT WITH.							PERSONS DISPOSED OF.								
	Remaining at end of last year.	BROUGHT TO TRIAL DURING PRESENT YEAR.				Received by transfer.	TOTAL.	Discharged without trial.	Acquitted.	Convicted.	Committed or referred.	Died, escaped, or transferred.	Remaining at end of year.	Average number of days during which each case lasted.	Number of witnesses who attended.	REMARKS.
		Under arrest by Police.	Upon warrant.	On summons.	Voluntarily.											
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Village Officers																
Unpaid Magistrates ...																
Local and Subordinate paid Magistrates																
Full-power Magistrates exercising jurisdiction throughout the district...																
Chief Magistrates of districts.																
TOTAL MAGISTRACY ...																
SESSIONS COURTS ...																
HIGH COURT ...																
GRAND TOTAL. ...																

Judicial Statements—4—(Criminal.)

Statement showing the punishments inflicted by various Criminal Tribunals in the District of *in the year 18* .

CLASS OF TRIBUNAL.	PERSONS SENTENCED TO												PERSONS ORDERED TO FINE OR GIVE			DETAILS OF PUNISHMENT.																							
		Transportation.			Imprisonment.				Fine.		Whipping.					Fine.								Imprisonment.												Whipping.		
					Rigorous.																			15 days.		6 months.		2 years.		7 years.		Above 7 years					
	Death.	For life.	For a term.	Penal servitude.	Without solitary confinement.	With solitary confinement.	Simple.	Forfeiture of Property.	With Imprisonment.	Without Imprisonment.	In addition to other punishment.	In lieu of other punishment.	Surety of the Peace.	Recognizance.	Sureties for good behaviour.	Rs. 10 and under.	" 50 "	" 100 "	" 500 "	" 1,000 "	Above Rs. 1,000.	Total amount of fine.	Amount realized.	Amount paid by way of compensation.	Rigorous.	Simple.	Rigorous.	Simple.	Rigorous.	Simple.	Rigorous.	Simple.	Rigorous.	Simple.	10 Stripes and under.	20 Stripes and under.	30 Stripes and under.

Judicial Statements—5—(Criminal).

STATEMENT showing the result of appeal and revision in criminal cases in the District of during the year 18 .

TRIBUNAL.	Number of appellants or persons applying for revision under Section 404, C. Cr. P.	NUMBER OF PERSONS.								REMARKS.
		Appeals or applications rejected.	Sentences confirmed.	Sentences modified.	Sentences reversed.	Proceedings quashed.	Further inquiry or evidence ordered.	Cases referred for revision to High Court.	Pending.	
1	2	3	4	5	6	7	8	9	10	11

Judicial Statements—6—(Civil.)

STATEMENT showing the number and description of civil suits instituted in the Civil Courts of the District of in the year 18 .

Class of Tribunals.	Suits for money, distinguishing suits up to Rs. 500, cognizable by Small Cause Courts from "other cases."																								Suits under the Rent Law.								Other Suits.												Remarks.
	On written objection.		On unwritten.		On account stated.		Money had and received.		Goods sold.		Breach of contract not mentioned above.		Rent not falling under the Rent Law.		Moveable property or value thereof.		Damages.		Arrears of rent with or without ejectment or cancellement of lease.	Enhancement or abatement of rent.	Relating to distraint.	Damages for extortion, or withholding receipts, or on account of illegal restraint or other cause.	For pottahs or kuboolcuts.	For ejectment or recovery of possession.	For recovery of money or accounts from Agents.	All other suits under the Rent Law not included above.	Suits for immoveable property.	Suits for specific performance of contract.	Suits to declare and establish rights to real property, including pre-emption, foreclosure, &c.	Suits to declare and establish personal rights.	Suits for an account.	Suits relating to religious endowments.	Suits to set aside judgments, contracts, or obligations, on the ground of fraud.	Suits for dissolution of marriage.	Suits for enforcement of matrimonial rights.	Suits for partition.	Suits relating to shipping.	Suits relating to religion and caste.	
	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.	Rs. 500 and under.	Above Rs. 500.																										

Judicial Statements—7—(Civil).

STATEMENT showing value of suits disposed of in the Civil and Revenue Courts of the District of in the year 18 .

VALUE OF SUITS.	NUMBER OF SUITS DISPOSED OF IN DIFFERENT COURTS.					Total value of Suits.	REMARKS.
	Village Courts.	Small Cause Courts.	Moonsiffs, Deputy Collectors, and Sub-Divisional Courts.	District Courts.	Superior Courts.		
IN CIVIL COURTS. Rs.							
Not exceeding 5							
,, ,, ... 20							
,, ,, ... 100							
,, ,, ... 500							
,, ,, ... 1,000							
,, ,, ... 5,000							
,, ,, ... 10,000							
,, ,, ... 1,00,000							
Exceeding 1,00,000							
TOTAL ...							
IN REVENUE COURTS. Rs.							
Not exceeding 5							
,, ,, ... 20							
,, ,, ... 100							
,, ,, ... 500							
,, ,, ... 1,000							
,, ,, ... 5,000							
,, ,, ... 10,000							
,, ,, ... 1,00,000							
Exceeding 1,00,000							
TOTAL IN REVENUE COURTS ...							
GRAND TOTAL ...							

Judicial Statements—8—(Civil).

STATEMENT showing the general result of the trial of civil suits in the Courts of Original Jurisdiction in the Province of in the year 18 .

CLASS OF COURTS.	Suits remaining from last year.	Instituted in	Received by transfer.	Total for disposal.	Transferred to other Courts.	Plaint rejected or returned.	Dismissed for default.	Withdrawn with leave.	Compromised.	Decreed on confession.	Decreed *ex parte*.	Dismissed *ex parte*.	CONTESTED. Judgment for plaintiff in whole or part.	CONTESTED. Judgment for defendant.	Total disposed of.	Pending.	Over 2 months.	Over 4 months.	AVERAGE DURATION OF SUITS. Contested.	AVERAGE DURATION OF SUITS. Uncontested.	Referred to arbitration.	REMARKS.
Village Courts																						
Small Cause Courts																						
Unpaid local Tribunals																						
Paid Sub-Divisional Tribunals ...																						
District Courts other than Chief Courts of Districts																						
Chief Courts of Districts																						
Superior Courts of General Jurisdiction																						
SUPERIOR COURTS OF SPECIAL JURISDICTION ... Admiralty ...																						
Testamentary																						
Matrimonial																						
Insolvent ...																						
TOTAL ...																						
REVENUE COURTS.																						
Unpaid local Tribunals ...																						
Paid Sub-Divisional Tribunals ...																						
Courts of Collectors																						
TOTAL ...																						
GRAND TOTAL ...																						

Judicial Statements—9—(Civil).

STATEMENT showing the business of the Civil and Revenue Appellate Courts of the Province of in the year 18 .

CLASS OF COURTS.	Remaining.	Instituted.	Received by transfer.	Total.	Transferred.	Dismissed for default, or under Secs. 5 and 6, Act XXIII. of 1861.	HEARD EX PARTE.			CONTESTED.				Total disposed of.	Pending.	Over four months.	Objections under Section 348, Act VIII., 1859.	Objections allowed.	REMARKS.
							Confirmed.	Modified.	Reversed.	Confirmed.	Modified.	Reversed.	Remanded.						
Civil Appellate Court other than Chief Court of District																			
Collector's Appellate Court ...																			
CHIEF APPELLATE COURT OF DISTRICT. Civil Appeals ...																			
CHIEF APPELLATE COURT OF DISTRICT. Revenue Appeals...																			
Superior Appellate Courts other than Chief Court of Province, each class of Courts being specified																			
CHIEF COURT OF PROVINCE. Regular Appeal from Judge or Bench in Original Jurisdiction ...																			
CHIEF COURT OF PROVINCE. From District Courts																			
CHIEF COURT OF PROVINCE. Special Appeals ...																			
TOTAL ...																			

In supersession of Circular Order, dated 2nd May 1870, directs that all records of cases sent to the High Court be transmitted by Banghy Post pre-paid, instead of Letter Post.

CIRCULAR ORDER No. 33.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Sessions Judges and all Magistrates of Districts, dated Calcutta, the 23rd November 1870.

(Civil and Criminal Sides.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges*.

In supersession of the instructions contained in Circular Order No. 8, dated 2nd May last,* the Court directs that all records of cases sent up to the High Court may be transmitted by banghy post instead of by letter post, *pre-payment* of the requisite postage being made in every instance in the manner prescribed by Rule 25 of the Post Office Rules notified at page 170, Part I. of the *Gazette of India* of 12th March 1870.

2. Should there be no sufficient provision in the local budgets to meet such a charge, a supplemental estimate of the cost which will probably thus be incurred should be prepared and submitted to the Comptroller-General of Accounts *at once* for transmission to the Government of India.

* 13 W. R., Civ. Cirs., p. 15.

Circulates letter to the Superintendent of Stationery regarding the supply of slip forms for Quarterly Returns prescribed by Circular No. 31, dated 4th November last

No. 3816.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Superintendent of Stationery, dated Calcutta, the 17th December 1870.

(Civil and Criminal Sides.)

Present:

The Hon'ble G. Loch, *Judge*.

Sir,—With a view to enable the Civil and Criminal Authorities subordinate to Civil and Sessions Judges to make Periodical Returns to the latter in such forms as shall be available for the preparation of the *Quarterly* Returns enjoined on such Judges by C. O. No. 31, dated 4th November last,* the Court have prepared *slip forms* (A, B, C, & D) as per margin, of which specimens are sent herewith, and direct me to request you will be so good as to provide at once a sufficient supply of the same for the use of Subordinate Judges and Moonsiffs, as well as of District Magistrates and Sub-divisional Officers.

Forms, Civil and Criminal.
A. Statement of *Civil* work in the Court of Subordinate Judge or Moonsiff, as the case may be.
B. Statement of appeals before the Courts of Subordinate Judges.
C. Statement of miscellaneous work.
(Two forms bear this letter, one for Subordinate Judges, the other for Moonsiffs.)
D. Statement of offences reported and persons tried.

* *Ante*, Civil Circulars, p. 16.

2. As regards the *Civil* forms (A, B, & C), I am to point out that Statement B, which relates to appeals only, will not be required for Moonsiffs whose Courts are purely Courts of original jurisdiction; of this form, therefore, a smaller supply will suffice. Specimens of the three forms above mentioned in both Bengali and Oordoo* are sent herewith. These Returns will be submitted by the various subordinate Courts to the Judge monthly. Each officer will, therefore, require 24 as a year's supply, *i. e.*, one for despatch and one for record in his office each month. To this number six more may be added to meet contingencies, accidents, &c. A year's supply therefore to each subordinate Civil Officer should not exceed 30 copies.

3. Form D, which is *Criminal*, will be required by Sub-divisional Officers, and a specimen in Bengali and Oordoo is accordingly forwarded.

4. As the above Return will be required to be made *quarterly*, and as two copies will be necessary for each officer, one for his office draft and the other for the despatch copy, eight copies would be necessary, to which might be added four copies to provide for accidents and other contingencies. It will, therefore, be sufficient if 12 copies of each form are provided by you as a year's supply for each officer requiring them.

5. For your information and guidance in applying the above principle, and with a view to check local indents, I am to append hereto a list showing the number of Subordinate Judges and Moonsiffs in each Judgeship, as well as the number of Magistracies and Sub-divisions subordinate to the High Courts.

* *Note.*—The only Oordoo Judgeships are Bhaugulpore, Gya, Patna, Sarun, Shahabad, and Tirhoot: the rest may be supplied with Bengali forms.

6. In requesting you in the first paragraph of this letter to lay in a sufficient stock of these Statements, the Court are particularly anxious to avoid a very large stock of Vernacular slips being at once printed. It is their intention to direct Judges and Magistrates, in making their indents, to specify the number of Slip Statements that they will require in English and in the Vernacular, and, after these forms have been in use a short time, you will probably not find much difficulty in estimating with tolerable exactness the number of both kinds which you will require to keep in store.

7. I am to remind you, in conclusion, that all indents from Subordinate Judges and Moonsiffs are to be submitted through their superior the District Judge, as provided in paragraph 3 of C. O. No. 16, dated 17th June 1870.*

I have, &c.,

(Signed) F. B. PEACOCK,

Registrar.

P.S.—A set of these forms, when printed or lithographed, should be sent for record in this Office.

CIRCULAR MEMO. No. 7.

Copy forwarded to all Zillah Judges and District Magistrates for information and guidance, with the request that, in making their indents upon the Superintendent of Stationery, they will pay particular attention to the instruction given to that officer in the 4th paragraph of the annexed letter, and to invariably inform him of the number of Slip Statements required by them in English and the Vernacular.

By order, &c.,

(Signed) F. B. PEACOCK,

Registrar.

* *Ante*, Civil Circulars, p. 1.

Statement showing the number of Subordinate Judges, Moonsiffs, and Sub-divisions.

DISTRICTS.	Number of Subordinate Judges.	Number of Moonsiffs (including additional Moonsiffs).	Number of Magistracies.	Number of Sub-Divisions.
Backergunge	1	6	1	4
Beerbhoom	1	7	1	...
Bhaugulpore	1	5	2	9
Burdwan, East	1	11	1	3
" West	1	7	1	1
Chittagong	2	14	1	2
Cuttack	1	4	3	5
Dacca	3	12	2	3
Dinagepore	1	9	2	...
Gya	1	4	1	3
Hooghly	2	9	2	2
Jessore	1	5	1	5
Midnapore	1	6	1	3
Moorshedabad	1	5	1	3
Mymensing	2	11	1	4
Nuddea	1	6	1	5
Patna	1	2	1	3
Purneah	1	6	1	3
Rajshahye	2	6	2	3
Rungpore	1	8	2	1
Sarun	1	4	1	2
Shahabad	1	3	1	3
Sylhet	1	6	1	3
Tipperah	1	12	2	1
Tirhoot	1	4	2	5
24-Pergunnahs	2	10	1	7
Assam	...	...	...	...
Kamroop	1	2	1	2
Gowalparah	1	2	1	1
Durrung	1	2	1	2
Nowgong	1	2	1	...
Seebsaugor	1	2	1	2
Luckimpore	1	2	1	3
Chota-Nagpore	...	...	...	...
Hazareebaugh	1	3	1	2
Manbhoom	1	4	1	1
Lohardugga	1	2	1	1
Singbhoom	1	...	1	...
Cachar	...	1	1	1
Cossyah Hills	...	...	1	1
Cooch Behar	...	...	...	...
Julpigoree	1	1	1	2
Darjeeling	1	...	1	1
	45	205	50	102

Calls for information regarding the increase required in the Subordinate Judicial Agency in consequence of the transfer of rent-suits to the Civil Courts.

CIVIL CIRCULAR ORDER No. 34.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Zillah Judges of all the Regulation Provinces, except Orissa, dated Calcutta, the 10th December 1870.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges*.

THE Government of India being desirous of information on the question of the increase which will be required in the strength of the Subordinate Judicial Agency in Bengal, in consequence of the transfer of rent-suits from the revenue to the Civil Courts, under the operation of Act VIII. (B.C.) of 1869, the Court directs that the Judges of the districts* to which Additional Moonsiffs have been appointed will report how far that assistance has been found sufficient to cope with the work thrown upon the Moonsiffs of their districts; and that the Judges of the other districts to which the new law has been extended will state how far they have succeeded in meeting the accession of work with their former staff of Moonsiffs.

* Backergunge.
Chittagong.
Dacca.
Gya.
Jessore.
Midnapore.
Mymensingh.
Tipperah.
24-Pergunnahs.

2. The Court also requests all the Judges of the districts in which Act VIII. (B. C.) of 1869 is in force to report the actual number (if any) of Additional Moonsiffs required in each of their districts, after full and careful consideration of the necessity for making any proposition involving increased cost to the State.

3. The reports must show fully the grounds of any recommendations made, and should be submitted in time to reach this office by the 1st January next.

Circulates list of holidays for 1871 for the Civil Courts in the Lower Provinces, the Behar Provinces excepted.

CIVIL CIRCULAR ORDER No. 35.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, Lower and Extra Regulation Provinces, dated the 12th December 1870.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges*.

THE High Court of Judicature hereby authorizes the closing of the Subordinate Civil Courts in the districts under its jurisdiction, with the exception of those comprised in the province of Behar and named on the margin, on the dates specified in the annexed list, being the Christian and Native Holidays permitted to be observed in the ensuing year 1871.

Bhaugulpore.
Gya.
Patna.
Sarun.
Shahabad.
Tirhoot.

2. The Courts are not to be closed except on the days specified; and this order is not to be taken as justifying the refusal to do any act or make any order for which emergent application may be made, or which may be lawfully made or done out of Court.

List of authorized holidays for the year 1871.

[*Omitted as unnecessary.*]

Circulates list of Holidays for 1871 for the Civil Courts in the Behar Districts.

CIRCULAR No. 36.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Judges of the Districts in the Behar Provinces, dated Calcutta, the 13th December 1870.

(Civil Side.)

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges*.

THE High Court of Judicature hereby authorizes the closing of the Subordinate Civil Courts in the Districts as per margin comprised in the Province of Behar on the dates specified in the annexed list, being Christian and Native holidays permitted to be observed in the ensuing year.

Bhaugulpore.
Gya.
Patna.
Sarun.
Shahabad.
Tirhoot.

2. The Courts are not to be closed except on the days specified, and this order is not to be taken as justifying the refusal to do any act or make any order for which emergent application may be made, and which may be lawfully made or done out of Court.

List of authorized holidays for the year 1871 (Behar Districts).

[*Omitted as unnecessary.*]

CRIMINAL CIRCULAR ORDERS OF THE HIGH COURT.

Prescribes new rules regarding the preparation, &c., of Sessions Statements Nos. 3 and 4, and a new Statement No. 3 to be used when the present stock of Statements Nos. 3 and 4 is exhausted.

CRIMINAL CIRCULAR ORDER No. 10.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, dated Calcutta, the 12th July 1870.

(Criminal Side.)

Present:

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, J. B. Phear, and Sir Charles Hobhouse, *Bart.*, *Judges*.

The 4th and 5th Clauses of the Circular order No. 5, dated 12th July 1867,* are hereby rescinded, and in lieu thereof, the following rules are prescribed.

So long as the existing stock of Statements No. 3 and No. 4 may last, Returns in those forms shall continue to be submitted by the Courts of Session. But instead of the abstract or description of each case required by the above-mentioned Clauses to be written on the reverse side, the Judges will submit only such remarks (if any) as they may consider necessary in each case.

Provided, however, that the Judges shall always state on the back of such form the grounds on which any person punishable with death has been sentenced to any punishment other than death (Section 380, Code of Criminal Procedure).

And the Court desire that Sessions Judges will state in the same place the reasons which have prompted a specially light or specially severe sentence in any particular case, and also the reasons of any difference of opinion between the Judge and the Assessors or Jury.

When the stock of these forms has been exhausted, the Judges will submit, instead of Statements Nos. 3 and 4, a new Statement No. 3 in the accompanying form, in which the case of every accused person awaiting trial at the commencement of the Sessions shall be entered.

The column headed Verdict, &c., shall contain a statement whether the accused was tried with a Jury or Assessors, and the verdict or opinion, specifying whether such verdict or opinion was unanimous, or, if not, the particulars of such difference.

When the accused person has been acquitted, the Judge shall specify in the column of remarks when he considers the Magistrate to have committed without sufficient grounds.

* 8 W. R., Criminal Circulars, p. 1.

SESSIONS STATEMENT No. III.—(To be submitted after each Sessions.)

CALENDAR of accused persons tried or brought before the Court of Session of the District of *at the* *Jail Delivery held in the Month of* *187* .

Name of accused.	Offences, nature of.	Date of				Verdict or opinion of Assessors.	Sentence passed.	Remarks.
		Offence.	Apprehension.	Commitment.	Sentence.			

Cancels Circular Order No. 15, dated 13th June 1870, and requests that the Criminal Statements for the 2nd Quarter of 1870 be submitted in the old Forms.

CRIMINAL CIRCULAR ORDER No. 11.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities in the Lower and Extra-Regulation Provinces, dated Calcutta, the 4th August 1870.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

THE Court's Circular Order No. 15, dated 13th June 1870,* is hereby cancelled, as the new Forms of Returns therein referred to have not yet been completed.

The Quarterly Statements of Criminal Business for the 2nd Quarter of 1870 are to be submitted in the old Forms.

* 13 W. R., Criminal Circulars, p. 18.

Points out how the return of "other applications" in Sessions Statement No. 1 is to be filled up.

CRIMINAL CIRCULAR ORDER No. 12.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, Lower Provinces, dated Calcutta, the 4th August 1870.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

As it appears that much diversity of practice exists in respect of filling up the return of "other applications" in Sessions Statement No. 1, the following general rule on that head is to be observed:—

Only substantive applications to the Court in which the Court is asked to make some order are to be included, but not mere "Urzees" by way of return to an order, summons, or process, as from persons summoned as Jurors or Assessors, nor communications from Ministerial Officers, nor (as reported to the Court in one instance) written applications from the Government Pleader when he appears to conduct the trial in Sessions cases. Such applications are quite unnecessary, as it needs only to be noted in the proceedings that " appeared on the part of Government as prosecutor."

Applications for authenticated copies of documents, not being applications under Section 440, Code of Criminal Procedure, are to be included.

Regarding the employment of Mooktears for suitors in cases before Magistrates.

CRIMINAL CIRCULAR ORDER No. 13.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities in the Lower Provinces, dated Calcutta, the 29th August 1870.

(Criminal Side.)

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and E. Jackson, *Judges*.

THE Court are of opinion that injustice and hardship may often ensue from the indiscriminate exercise by Magistrates of the power conferred upon them by Section 432 of Act VIII. of 1869, of refusing to permit Mooktears to act and plead for accused persons in the Criminal Courts.

2. The Court think fit, therefore, to point out to all Magistrates that the terms of the above law do not warrant any *general rule* for the exclusion of Mooktears in all cases, but only allow the exercise by Magistrates of a discretion in each case as it arises. And the Court expect that Magistrates will not, by indiscriminate exclusion of persons who are invested by law with a distinct professional status in criminal trials, deprive parties of legal aid which they could frequently obtain at a moderate cost.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 28th June 1870.

Present:

Sir James W. Colvile, The Judge of the High Court of Admiralty, Lord Justice Giffard, and Sir Lawrence Peel.

Mitakshara Law—Succession—Great-Great-Great-Grandson—Exclusion from heirship—Preference among heirs.

On appeal from the late Sudder Court at Agra.

Bhyah Ram Singh and another

versus

Bhyah Ugur Singh and another.

Under the Mitakshara law, a great-great-great-grandson of a common ancestor is not *excluded* from inheriting as a gentile to a great-great-great-grandson on the ground that he is too remote in descent from the common ancestor.

When a question of *precedence* among heirs arises, as precedence is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. No ground of entire *exclusion* exists if the opposing parties confer inferior benefits or benefits in equal degree only; but where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy is inapplicable to the solution of that question of precedence.

The suit out of which this appeal arose was brought in the Court of the Principal Sudder Ameen of Goruckpore, by the plaintiffs, as heirs, after the death of his widow, who survived him, of one Jaskurun Singh, to recover certain moveable and immoveable estate, the property of the deceased at his death.

The title as heirs was described generally in the plaint, but the course in which it was derived appeared by a pedigree exhibited by the plaintiffs, and filed with the plaint. It thus appeared that the plaintiffs claimed as kindred of the deceased, connected with him by descent from their common ancestor, Chuttur Bainee Singh.

By the pedigree it appeared that the plaintiffs and the deceased were in an equal degree removed from the common ancestor, being his great-great-great-grandsons. The appellants contended that the plaintiffs were too remote in descent from the common ancestor to be capable of succeeding to the deceased.

At the widow's death the heirs of the husband at that time alive were the legal heirs. The property claimed was at that time in the possession of the defendants under alleged alienations by the widow. Into the validity of their titles, respectively, no inquiry could be made by the Appellate Court in India from the mode in which the case was submitted to it; and the appellants may be treated simply as parties who had a right to put the plaintiffs to proof of their title. It was conceded on the argument that they were not descendants of the common ancestor.

The defendants denied the plaintiff's title. Admitting the pedigree to be correct as far as it went, and assuming, for the purpose of raising their objection to the title, all that the pedigree stated to be true, they contended by their answer that the plaintiffs were not within the line of heirs. They raised also two other objections in bar of any inquiry into their own title, *viz.*, that the suit was barred by limitation of time, and that the matter of the plaintiff's title was *res judicata*, and had been adjudged against parties in privity of title with the plaintiffs. As these two objections were not insisted upon on the argument of this appeal, it is unnecessary to state the facts as pleaded on which they rested.

The suit did not proceed in the Zillah Court beyond the framing of issues, at which

stage the Judge framed three issues in bar involving the three points above stated. Deciding all three against the plaintiffs, he dismissed their suit. On the title he took the opinion of the Pundit of the Court, whose bywustha was to the effect that the plaintiffs were beyond the line of heirs, and was in direct affirmance of the objection raised by the answer.

From this decision the plaintiffs appealed to the late Sudder Court of the North-Western Provinces, which reversed the decisions of the Court below on all the three issues in bar, and remanded the case to the Court below for trial. The correctness of this decision on the second and third issues in bar admits of no dispute, and it is unnecessary to notice them further.

As no decision was given in the suit below except on the issues in bar, as the Sudder Court remanded the suit for trial, and as the appeal to Her Majesty is limited necessarily to the decree reversing that of the Court below on the issues in bar, their Lordships will be careful to limit their observations as well as their decision in this case, strictly to the matter on which the decree under appeal proceeded.

The decision in the Sudder Court, as well as that in the Court below, may be viewed as in the nature of a demurrer, on which any consideration of possible title on other assumed states of facts would have been irregular. The decision of this case involves the consideration of a most important part of that vexed and difficult subject—the Hindoo Law of Succession. It must be limited to the validity of the title pleaded.

The title pleaded is that of some in the class termed Gentiles, asserting priority in that class. The derivation of title to the succession of the deceased opening on the death of his widow who survived him is made necessarily from a common ancestor who is named, and from whom the lines of the deceased and the claimants are respectively traced. The pedigree, if it be full and true, establishes community of family, kindred, and priority, unless the objection of the defendants be sustained; and nothing more is needed to be pleaded or proved in support of that title if valid. If it be not a good title of inheritance by the Hindoo Law, the plaintiffs' suit must fail. The issue in bar submits the objection to decision. The pedigree for the purpose of the appeal must be taken to be both full and true.

No objection founded on alleged facts not apparent on the face of the pedigree can be urged against a decree which did not proceed upon, and could not have proceeded upon, grounds not raised by the issue in bar. The question, then, is reduced to this, whether the plaintiffs, being great-great-great-grandsons of the common ancestor, were too remote in degree to be heritable as Gentiles.

The subject is important: it is beset by difficulties raised by varying opinions, decisions, and comments on a text clear enough, if interpreted by the principles of the Hindoo Law according to the Benares School, which is the most orthodox of the different schools. The governing authority of that school is the Mitakshara. The compiler of the Mitakshara is said to have been an ascetic or devotee, and from that source nothing at variance with the religion of the Hindoos is likely to have flowed. The Hindoo Law contains in itself the principles of its own exposition. The digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies. Approaching this somewhat delicate subject with an unfeigned desire to decide it in harmony with the

religious feeling of Hindoos, their Lordships observe that the case furnishes no evidence whatever that the decision under appeal disturbs that harmony. On the contrary, the Judges of appeal overrule a former decision given in their own Court, which, in their opinion, had disturbed it.

The Mitakshara, in the 5th and 6th Sections of the 2nd Chapter, recognizes two successive classes of heirs: first "gentiles;" next, bandhoos; after them it places certain special persons, and after these last, the State, the *ultimus hæres*.

Whatever descent prevails, and even where the State takes by escheat, the duty of some ceremonial performance to the deceased is still enjoined.

The "family" is the cherished institution of Hindoos. Individual separate ownership is less the subject of the general remarks of commentators on the Hindoo Law than the associated aggregate community, the family. In this respect an analogy is observed between family-ownership and that of the old village-community. Consequently, family-union or connection derived from a common head, the founder of the family, may reasonably be regarded, amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession, from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the 5th and 6th Sections of the 2nd Chapter of the Mitakshara is in the strictest conformity to these principles. The Gentiles, or gotraja, from the gotra, are described as descending from one common stock a male, and derived generally through males, as forming a family, though embracing, possibly, many families, and such original bond of union is regarded as necessary to the constitution of the gotra. These conditions are all that are stated as necessary to the constitution of the class of Gentiles.

As regulating preference of succession amongst them, the law of succession amongst Gentiles classifies them further, as sapindas and samanoducas. The first it treats as prior to the second, but excludes neither, within limits wide enough to include the present plaintiffs. As the plaintiffs then in this case show a common ancestor, a gotra, a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text, and as the decision appealed from proceeds upon the above grounds, and strictly conforms to the language of the Mitakshara, it follows that it must be affirmed, unless it can be shown that the plain language of the Mitakshara has received some qualification by usage or judicial construction.

The decision of the present case does not require that the Court should distinguish sapinda from sapinda, nor define where sapindas cease and samanoducas begin. This is not a case of priority between two persons claiming as heirs, or between two classes of heirs; it is one of asserted exclusion from inheritance raised by persons not competitors in the prescribed degrees of heirs.

The question of preference is distinct from that of entire exclusion. When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to a deceased, when the question mooted is a real one (at least in the contemplation of pious Hindoos), *viz.*, who best can confer on the deceased and his ancestors not fully benefited the

benefits which the grades of oblations offer in differing degrees. Where no sexual or personal incapacity exists, no ground of entire exclusion from inheritance exists if the opposing parties confer inferior benefits, or benefits in equal degree only. In such a case what reason could justify a sentence of exclusion from inheritance on a claim to put a limitation on language which declares the whole class heritable, and not simply some persons found in it? Where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy is inapplicable to the solution of that question of precedence.

Had a course of decisions or had the actual practice of Hindoos confirmed the view, which some framers of genealogical tables appear to have taken of this subject, it would have been the duty of the Courts of Justice to interpret the language of the Mitakshara by the aid of this modern light; but such is not the case, the weight of opinion and of decision is against the appeal.

The Sudder Court observed that the judgment below had followed a case which had been overruled in two succeeding cases in the same Court. It treated the overruled case as one which broke in upon the uniformity of the law. The Sudder Court further supported its opinion by the authority of two cases decided in the Privy Council. The case in 4 Moore, p. 292,* was governed by the law of the Mitakshara, but the point as to the calculation of the degrees for which it was cited as an authority was rather assumed than decided, for the decision proceeded on the ground that the Bengal School was the one to be followed in that case. In the case in 2 Moore, p. 132, the very passages of the Mitakshara, and that from Menu which has been relied on in this case and in the Court of Appeal in India, referring to the "seventh person" and the limits of the line of sapindas, received an authoritative exposition. That case, it is true, was one to which the doctrine of the Mithila School was applicable, but the interpretation of the text was unaffected by that distinction.

If this last case be attentively considered, and the learned and elaborate opinion of Mr. Harrington be carefully studied, it will clearly appear that the preponderance of the opinions of the various Pundits then consulted was greatly on the side of the literal construction of the Mitakshara. The judgment of the Privy Council concludes that the Bandhoos do not inherit "till those on the father's side to the seventh degree have been exhausted." As the judgment is founded in a great degree on that of Mr. Harrington, and expresses no dissent from his method of arriving at the seventh person, by taking six degrees in the descending or ascending line, the Sudder Court was justified in treating this point as settled by authority, and the plaintiffs as Gentiles within the degrees, and so entitled to inherit. The Pundits may be taken as fair exponents of the views of the Hindoo people on such subjects, and as the great majority of them supported the inclusive construction which ranks the descendants to the sixth degree amongst the class of sapindas, there is no reason for supposing that the plain construction of the language of the text of Menu, and of its authoritative comment, will clash with the religious feeling of Hindoos.

Their Lordships are of opinion that the decision appealed from, on the materials before the Court, on the issues in bar, was correct, and they will humbly advise Her Majesty that the appeal be dismissed with costs.

* Ranee Srimutty Dabea, *appellant*, 7 W. R., p. 44.

The 28th June 1870.

Present:

Lord Cairns, Sir James W. Colvile, the Judge of the High Court of Admiralty, Sir Joseph Napier, and Sir Lawrence Peel.

Usufruct—Suit—Account.

On appeal from the High Court at Agra.

Nawab Mahomed Ameenooddeen Khan,

versus

Mozuffer Hossein Khan.

Where a widow was put in possession of the property of her husband, in order to obtain by that possession payment of her dower (10,000 Rs.), and she, and after her death, her heir, continued in possession for 15 years, it was held that there was a very strong presumption that the dower was paid off: in a suit to recover possession of the property from the heir of the widow, the proper course would be to direct an account to be taken with a view to see if the dower had been paid; and in that event, to make the heir repay the difference; or if otherwise, to order plaintiff to pay the difference as the terms of obtaining possession of the estate.

In this case, so long ago as the year 1855, the widow, who has been termed in the proceedings the Begum, was, by a decree of the Court, put into possession of the property of her husband, in order to obtain by that possession payment of her dower, which was fixed by the decree at a sum of Rupees 10,000; and she, during her lifetime, and after her death, her heir, who is the present appellant, have continued in possession of the property ever since that time.

Whatever might have been the presumption as to payment by means of possession at the end of a year or two years after possession was taken, certainly at the end of 15 years there would be a very strong presumption either that payment of Rupees 10,000 had been effected by means of the possession, unless (as does not appear to have been the case) the value of the property was extremely inconsiderable, or, at all events, that justice would not have been done unless an account were taken for the purpose of seeing whether, by means of possession, payment had been effected.

Therefore, when the present plaint, out of which this appeal originates, was brought before the Court, the course to be taken, according to our ideas of what is proper to be done in such a case, would have been to have directed an account (which indeed was asked by the plaint), for the purpose of seeing what had been the amount of receipts by the Begum and her heir during the time they were in possession, and of finding whether she had, in point of fact, been overpaid her dower, and, in that event, making her heir repay the difference; or, if it was found that she had been under-paid to order the plaintiff in the suit to pay the difference as the terms of obtaining possession of the estate.

Now, that has not been done; but the plaintiff has been ordered to pay the exact sum representing that proportion of the whole of the dower of the Begum which corresponds to the share of the estate which he claims. If an appeal had been brought, not by the appellant, but by the respondent, complaining that scant justice had been done by that form of decree, their Lordships would have been under the necessity of considering whether there had not been a miscarriage of the Court, and whether less of justice had been done to the plaintiff in India than ought to have been done to him.

But no such appeal has been brought. The form of the decree abroad has dismissed the whole of the plaint, except that part of it in respect of which relief has been given, and therefore has, in effect, dismissed the plaint so far as it asked for an account of mesne-profits.

There has been no appeal against that; and their Lordships, with some regret, find that in disposing of this appeal, they are unable even to leave open the question of whether in India a decree could hereafter be made for an account of mesne-profits.

But now, turning to the grounds of complaint made by the appellant with regard to this decree, their Lordships find them to be these.

The appellant, in the first place, complains that this second suit was unnecessary; and that the respondent, resting upon the former decree, the decree of 1855, might, on tendering his share of the dower, without more, have obtained possession of his share of the estate. It is sufficient on that point to observe that when brought into Court, the appellant assumed no such attitude; on the contrary, he contested the whole right of the respondent; and although if he had, upon being brought into Court, said to the respondent that the only complaint he had was that the suit was unnecessary, and that, on receiving his share of the dower, he would be ready to give up possession, such an argument might have been urged now as that the suit was unnecessary, their Lordships think, that after the resistance offered by the appellant to the suit in India, it is impossible for him now to take an objection, which, after all, is only an objection on the score of costs.

The next objection is of the same kind. The appellant complains that before instituting this suit, the plaintiff in the suit should have settled with the Government, or the agent of the Government, the question whether there had been any confiscation of the property of this respondent. That, again, is simply a question of costs. It is simply that a plaint with a greater amount of costs has been thrown upon the appellant, than would have been thrown upon him if these preliminary proceedings had been taken. Their Lordships are not prepared to say that the form adopted was an improper form, or that it was by any means inconvenient in proceeding for the recovery of this property in the same suit, to call on the Government collector to clear away any cloud upon the title that might exist by reason of the argument, that the confiscation awarded against Hossein Khan might extend to the property of the present respondent.

The next objection made by the appellant is that the money—the Rupees 3,750—was not tendered before this suit was instituted. Their Lordships think that the decree has done full justice to the appellant on this score. The decree has ordered payment to be made as the terms of the respondent obtaining possession of the property. Then as to the claim for some expenditure upon a mosque, that was hardly urged at the Bar before their Lordships; and no right whatever is shown to add that sum by way of charge upon the estate before the estate is given up. Then as regards the two villages, which, it appears, were given to the present respondent by the Begum, it is said that those villages ought to have been taken into account in diminution of the share of the property awarded now to the respondent. Their Lordships are unable to see how that could properly be done. It is scarcely credible to suppose that when those two villages were made over by the Begum to the present respondent, the Begum intended to make them over simply as liberating them from her claim and security for dower, for that is the result that would arise from the view taken by the appellant. They were made over by the Begum to the respondent, apparently, by way of gift; and if so, they must have been made over, not out of the portion in dispute, but out of the other portion of the estate to which the Begum was entitled.

Under these circumstances, their Lordships are of opinion that the appeal fails on all the grounds urged by the appellant, and all they can do with it is humbly to recommend Her Majesty to dismiss it with costs.

The 12th July 1870.

Present:

The Master of the Rolls, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Purdah woman—Deed—Death-bed disposition.

*On Appeal from the High Court at Calcutta.**

Grish Chunder Lahoree

versus

Mussamut Bhuggobutty Debia and others.

Where a deed purports to have been executed by a purdah woman, the Court should see that it was fairly taken from her, and that she was a free agent, and duly informed of what she was about. When the disposition is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeded, to be satisfied that it was the free voluntary act of the party by whom it purports to have been executed and expresses his real intention.

THE appellant in this case is the heir-at-law of Sarodapershad, who was the adopted son and heir of Kali Kant Lahoree. The respondents are the sisters of Mirnamoye Debia, deceased, who was the widow of Kali Kant. The suit which has given rise to this appeal was a suit in the nature of an ejectment brought by the respondents, claiming under a deed of gift from Mirnamoye, to recover from the appellant three several parcels of land. Their case was that these lands, which, on three different occasions, had unquestionably been purchased in the name of Mirnamoye, were part of her stridhun or peculiar property; that she had, therefore, the power of disposing of them, and had effectually exercised that power by the deed of gift in question. The case of the appellant was that the lands, though purchased in the name of Mirnamoye, were purchased by Kali Kant with his own funds in the name of his wife, and formed part of his estate in which, under his will, she had only a life-interest; and further that the alleged deed of gift was either a forgery, or, having been procured from Mirnamoye by the fraud and contrivance of her brothers, was not an effectual disposition of the property. It lay, therefore, upon the respondents, who was seeking to disturb the possession of the appellant, to establish both that the property was the stridhun of Mirnamoye, and that she had effectually conveyed it by this deed of gift. If either of these issues be determined against them, it follows that, on the death of Mirnamoye, the title to the lands in question passed to Sarodapershad, who was the heir-at-law of both his adoptive father and his adoptive mother; and that the appellant as his heir is entitled to retain possession of them. Both issues were however determined, first by Zillah Court, and afterwards on appeal by the High Court, in favor of the respondents; and the present appeal is against those decisions.

Their Lordships are of opinion that, upon the evidence before them, they ought not to disturb the finding of the Courts below upon the first of these questions. They do not adopt all the reasons assigned by either Court for coming to this conclusion. They desire to state in particular that they are not satisfied that the 20th and 21st Sections of Act I. of 1845 raise a presumption of law fatal to the case of benamee purchase set up by the appellant; and they observe that this objection, if well founded, would at most apply only to one of the three parcels of land in dispute (Somashpara); and not, as is stated by the learned Judges of the High Court, "to all the denominations of lands claimed by the defendants." They find, however, that Mirnamoye has certainly some stridhun. They find that Kali Kant in his lifetime solemnly and deliberately admitted that these purchases were made out of her funds, and for her benefit as well as in her name. The evidence, no doubt, fails to show satisfactorily that her peculiar funds amounted to a sum which would cover all the purchases which she is said to have made. But it cannot be said conclusively to prove the contrary.

Again, though the extracts from Kali Kant's books afford some evidence in support of the allegation that these purchases were made out of his funds, and were, therefore, presumably taken benamee for him, they are not absolutely conclusive. Their Lordships

* From the judgment of L. S. Jackson and Levinge, JJ., dated 8th December 1863, passed in Regular Appeal No. 227 of 1862—not reported.

are unable to say how the separate funds of the husband and wife may have been intermixed by them. We know by his own statement that he did, on one occasion, take and employ 8,000 rupees belonging to her. It seems, therefore, to their Lordships that this evidence cannot fairly be taken to outweigh the positive admissions of Kali Kant himself. It is argued, however, that credit is not to be given to those admissions, because they may be assumed to have been made falsely, with the object of defeating the claim of the present appellant to share in the self-acquired property of Kali Kant, including these parcels of land. But looking to the remarkably fair and open character of the pleadings in which the statements in question were made, and considering that the defence of Kali Kant (a defence which proved successful) was that the plaintiff in that suit (the present appellant) was not entitled to share in any part of his self-acquired property, whether held benamee or otherwise; and that those pleadings admitted that some of the purchases then in question had been taken benamee; their Lordships feel that they would not be warranted by the evidence before them in imputing to Kali Kant that he had been guilty in a judicial proceeding of deliberate falsehood. It is, therefore, unnecessary to consider how far a Court of Justice is at liberty to disregard admissions so made in favor or for the benefit of a person claiming as the heir of him by whom they were made.

Assuming, then, that the Courts below have correctly found that the property in question was the stridhun of Mirnamoye, their Lordships have to consider whether the respondents have established that the deed of gift was, under the circumstances of its execution, a valid disposing of it in their favor.

It cannot be said that this issue has been fully or satisfactorily tried in the Courts below. It does not appear on the record whether there was any formal settlement of the issues; or, if there was any, in what terms this particular issue was framed. The statement of the Zillah Judge that the conveyance by Mirnamoye to her sisters is not denied by the defendant, implies either that he mistook the effect of the defendant's written statement, which unquestionably disputed the validity of the deed, or that he never addressed his mind to try an issue on which nevertheless both sides had put in a considerable amount of evidence. The Appellate Court observed on this part of the case that the Judge below had apparently by inadvertence taken for granted that the conveyance was not denied, and had passed no opinion except inferentially on its validity. But instead of sending the case back for the trial of the issue on which the Court of first instance had thus failed to pass any satisfactory judgment, the learned Judges of the High Court proceeded to dispose of it on the evidence which had been taken in the Court below. It follows, therefore, that the only Court which has really tried the question was equally with their Lordships under the disadvantage of having to determine it on the written depositions, and without an opportunity of seeing the witnesses.

What are the undisputed facts of the transaction? About the end of May 1856. Mirnamoye, labouring under the disease of which she died, left her house in Rajshahye, and went for the sake of medical advice to Shoyabad near Moorshedabad, where she took up her residence in the house of the Pundit Gobind Kant. She was accompanied by her sisters (the defendants), her dewan, Krishonath Sannyal, and other servants. Early in the following July, her brothers, Ram Krishno and Doorgadoss Chowdhry, came to her from Rajshahye. The hibba, or deed of gift, bears date the 16th, and was produced for registration on the 18th, and actually registered on the 19th of July under a mooktearnamah purporting to have been executed by her contemporaneously with it. Early in August 1856, other mooktearnamahs and a petition purporting to have been also executed by Mirnamoye were produced; the first in the Collectorates of Rajshahye and Bogra; the last in the Court of the Judge of Zillah Rajshahye. Their object was to give publicity to the hibba, and to cause the properties comprised in it to be transferred in the books of the Collector into the names of the respondents. The Zillah Authorities required that these documents should be verified. On their requisition the Principal Sudder Ameen of Moorshedabad appears to have sent a paishkar to take Mirnamoye's deposition at the house of the Pundit, and on his report to have declared them to have been verified. The order to that effect was passed on the 19th of August, and on the 25th of August 1856 Mirnamoye died. Nothing further was done between these dates to give effect to the hibba, or deed of gift. After her death the validity of the deed, as well as the power of Mirnamoye to dispose of the property, was disputed by the guardian of Sarodapershad, and a contest for the mutation of names was carried on in the Revenue Courts, which was finally determined by the Board of Revenue in

favor of Sarodapershad whose possession was confirmed, the respondents being left to assert their title by a regular suit in the Civil Court.

Their Lordships now proceed to consider more particularly the evidence by which the respondents have attempted to prove the due execution of the hibba by Mirnamoye. Their principal witnesses are the Pundit Govind Kanto, whom the learned Judges of the High Court seem to have considered a respectable witness, the dewan, and Ram Kristno Chowdhry, one of the brothers of Mirnamoye. The Pundit seems now to be employed as Pundit in one of the Civil Courts; but at the date of the transaction he did not hold that office, but stood in some kind of spiritual relation to the two brothers (the Chowdhries), they being his "Jujman." His story is that early in July 1856, Mirnamoye expressed to him an intention to give all the property over which she had a disposing power to her brothers; and desired him to write to them, and request them to come to Shoyabad. He did so write, but the letters are not produced. He goes on to state that Ram Kristno came to the place several days before Doorgadoss, who accounted for the delay in his coming by saying that it had been occasioned by his having caused a draft of the instrument for which he had been brought to be prepared at Rampoora.

From the cross-examination of the Pundit it appears that finally Mirnamoye was made to execute two hibbas, *viz.*, the one in question in this suit, and one by which she gave other part of her stridhun to her brothers in the names of their wives; that the actual form of this disposition, varying as it did from the intention said to have been expressed by her to the Pundit, was prompted by the brothers, one of whom brought the drafts from which the instruments executed were prepared with him. He also states a conversation which supports the allegation of the defendant, that the gift in question, though nominally made to the sisters, was for the brothers. To the actual execution of the instrument this witness does not speak. He accounts for his absence by saying that he was suffering from fever, and unable to bear the press of the crowd which assembled on that occasion; that he retired to the house of one Prem Baboo, situated at a short distance from his own, and was informed from time to time of what was going on by his disciples; that he made one short visit to his own house, where he saw the dewan writing with stamped paper before him, but could not stay there.

Their Lordships are compelled to say that this absence of the Pundit begets a suspicion in their minds, which the story told by him of its cause does not dispel. It is by no means improbable that a person in a respectable position in life, knowing that a deed was about to be unfairly obtained, would take care not to be personally present, and would contrive to give only such corroborative evidence of the transaction as he might think he could safely give. In the present instance, the only legal proof which the Pundit gives of the actual execution of the document, is the subsequent and verbal admission of Mirnamoye Dabee in a conversation with him. The learned Judges of the High Court laid some stress on this admission. But their Lordships need not remark upon the danger of trusting to that kind of evidence, unless the witness is wholly above suspicion.

Doorgadoss Chowdhry deposes that he has no interest in the deed of gift, and treats it as made for the benefit of the respondents. He does not confirm the account given by the Pundit of the change of intention on the part of Mirnamoye; he does not speak of having brought any draft with him, or give any account of the preparation of the deed, or show how it came to be made in the names of the two sisters, or who gave the instructions for it.

The dewan who wrote the hibbanamah says that the gift was intended to be in favor of the brothers; that he cannot tell why it was executed in the names of the sisters; and he does not state from what draft or under whose instructions he wrote the deed in the form in which it was executed. He says that the respondent Ram Soondery put Mirnamoye's seal to the document at her request. The brother and the subscribing witnesses say that Mirnamoye sealed it herself.

Of the testimony of the subscribing witnesses it is unnecessary to speak at length. They are either cultivators living at a dis-

tance from the place of execution, or menial servants. It is not satisfactorily explained why some of them were there at all. And the testimony of the dewan makes it, to say the least, extremely doubtful whether they were in fact there; and whether, according to a reprehensible practice not uncommon in India, their names were not afterwards written on the deed. Only one of them professes to have written his own name. They were not examined when the deed was registered, and the subscribing witnesses who were then examined were not produced at the trial of this cause. Some of them speak of Mirnamoye as present in the verandah amidst a crowd of men, giving her own instructions and describing the property verbally, and personally asking the witnesses to become subscribing witnesses.

It is further to be observed that, although the Pundit says he heard of the execution from the Kobiraj and other respectable persons; and although Doorgadoss names several persons far more respectable in station than the subscribing witnesses as present at the execution, none of those persons either subscribed the instrument or have given their testimony in support of it. Again, if it had been clearly proved by the officer sent to verify the execution of the mooktearnamahs by Mirnamoye that she had acknowledged those instruments to be hers, that would have been an important corroboration of the respondent's case. But that officer was not called as a witness; his actual report is not forthcoming; and the testimony of the dewan leads to the conclusion that he performed his duty in the most perfunctory manner, and was satisfied on the report of a maid-servant, not called or examined, that Mirnamoye had admitted the execution of the mooktearnamahs.

Is then the evidence adduced by the respondents, and considered without reference to any conflicting testimony on the part of the appellants, sufficient to establish the due execution of this deed of gift? Their Lordships, differing respectfully from the Judges of the High Court, have come to the conclusion that it is not.

The disposition is one by a purdah woman, made not very long before her death, and whilst she was labouring under a mortal disorder. Their Lordships consider that it is not open to the objection of inofficiousness. Her preference of her own blood relations to a son adopted by her husband, and otherwise provided for, was not unnatural. But this Committee and the Courts in India have always been careful to see that deeds taken from purdah women have been fairly taken; that the party executing them has been a free agent, and duly informed of what she was about. Again, when the disposition, as in this case, is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeded, to be satisfied that it was the free, voluntary act of the party by whom it purports to have been executed, and expresses his real intentions. In the present case the respondents' evidence is conflicting as to the party intended to be benefited, and leaves it uncertain, to say the least, what were the instructions for the deed and from whom those instructions emanated. Evidence so untrustworthy, so uncertain, and so conflicting, is not such as enables their Lordships to declare affirmatively that the hibba was in any sense the act and deed of Mirnamoye, or even that she herself put her hand and seal to it.

Their Lordships, therefore, have come to the conclusion that the respondents having failed to prove a material link in the title upon which alone they can recover, the decrees under appeal ought to be reversed, the suit dismissed with costs in the Courts below, and that the respondents should pay the costs of the appeal. And they will humbly advise Her Majesty accordingly.

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HELD that Section 4 did not apply to this case, and that that Section refers only to cases of gain by acquisition by means of gradual accession, to the gain which an individual proprietor might make from what was part of the public territory, not from a private person's property.

Romanath Thakoor *versus* Chunder Narain Chowdhry (Marshall, p. 136) approved, and 3 Weekly Reporter, Civil, p. 51, disapproved.

THE plaintiff in this case, Felix Lopez, was the proprietor of a very considerable estate, a mouzah, on the banks of the Ganges. By the year 1840, by reason of the continued encroachment of that river, it was wholly submerged, and it was, to adopt an expression used in this class of cases in India, "diluviated;" that is, the surface-soil, the culturable soil, was wholly washed away. After the lapse of some years, and after one temporary recession and re-encroachment which has occurred in the interval, the water has ultimately retired, and the land, having been for some time in a state described as admitting of only temporary cultivation by hand-sowing, has become hard and firm soil, capable of being cultivated in the usual manner. The plaintiff says: "This was my property. The Ga[illegible] which "swallowed it, has again yielded [illegible] "I claim my property, which, hav[illegible] "buried and lost to sight, has ag[illegible] "appeared."

The rule of the English Law applicable to this case is thus expressed in a work of great authority (Hale, "De Jure Maris," p. 15): "If a subject hath land adjoining the sea, "and the violence of the sea swallow it up, "but so yet that there be reasonable marks "to continue the notice of it, or though the "marks be defaced, yet, if by situation and "extent of quantity and boundary on the "firm land the same can be known, or it be "by art or industry regained, the subject "doth not lose his property. If the marks "remain or continue, or the extent can "reasonably be certain, the case is clear." And in another place, p. 17, he writes thus: "But if it be freely left again by the reflux "and recess of the sea, the owner may have "his land as before, for he cannot lose his "property of the soil, although it for a time "becomes part of the sea and within the "admiral's jurisdiction while it so con-"tinues."

This principle is a principle not merely of English Law, not a principle peculiar to any system of Municipal Law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner.

There is, however, another principle recognized in the English Law (derived from the civil law), which is this—that where there is an acquisition of land from the sea or a river by *gradual, slow, and imperceptible means*, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land (Lord Yarborough's case, 2 Bligh, N. S., 147). And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea (The Hull and Selby Railway case, 5 Meeson and Welsby 327). To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined.

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THE plaintiff in this case, Felix Lopez, was the proprietor of a very considerable estate, a mouzah, on the banks of the Ganges. By the year 1840, by reason of the continued encroachment of that river, it was wholly submerged, and it was, to adopt an expression used in this class of cases in India, "diluviated;" that is, the surface-soil, the culturable soil, was wholly washed away. After the lapse of some years, and after one temporary recession and re-encroachment which has occurred in the interval, the water has ultimately retired, and the land, having been for some time in a state described as admitting of only temporary cultivation by hand-sowing, has become hard and firm soil, capable of being cultivated in the usual manner. The plaintiff says: "This was my property. The Ganges, which "swallowed it, has again yielded it up, and "I claim my property, which, having been "buried and lost to sight, has again re-"appeared."

The rule of the English Law applicable to this case is thus expressed in a work of great authority (Hale, "De Jure Maris," p. 15): "If a subject hath land adjoining the sea, "and the violence of the sea swallow it up, "but so yet that there be reasonable marks "to continue the notice of it, or though the "marks be defaced, yet, if by situation and "extent of quantity and boundary on the "firm land the same can be known, or it be "by art or industry regained, the subject "doth not lose his property. If the marks "remain or continue, or the extent can "reasonably be certain, the case is clear." And in another place, p. 17, he writes thus: "But if it be freely left again by the reflux "and recess of the sea, the owner may have "his land as before, for he cannot lose his "property of the soil, although it for a time "becomes part of the sea and within the "admiral's jurisdiction while it so con-"tinues."

This principle is a principle not merely of English Law, not a principle peculiar to any system of Municipal Law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner.

There is, however, another principle recognized in the English Law (derived from the civil law), which is this—that where there is an acquisition of land from the sea or a river by *gradual, slow, and imperceptible means*, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land (Lord Yarborough's case, 2 Bligh, N. S., 147). And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea (The Hull and Selby Railway case, 5 Meeson and Welsby 327). To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined.

* From the judgment of E. Jackson and Glover, JJ., in Regular Appeal No. 126 of 1865, dated 28th November 1865—not reported.

tance from the place of execution, or menial servants. It is not satisfactorily explained why some of them were there at all. And the testimony of the dewan makes it, to say the least, extremely doubtful whether they were in fact there; and whether, according to a reprehensible practice not uncommon in India, their names were not afterwards written on the deed. Only one of them professes to have written his own name. They were not examined when the deed was registered, and the subscribing witnesses who were then examined were not produced at the trial of this cause. Some of them speak of Mirnamoye as present in the verandah amidst a crowd of men, giving her own instructions and describing the property verbally, and personally asking the witnesses to become subscribing witnesses.

It is further to be observed that, although the Pundit says he heard of the execution from the Kobiraj and other respectable persons; and although Doorgadoss names several persons far more respectable in station than the subscribing witnesses as present at the execution, none of those persons either subscribed the instrument or have given their testimony in support of it. Again, if it had been clearly proved by the officer sent to verify the execution of the mooktearnamahs by Mirnamoye that she had acknowledged those instruments to be hers, that would have been an important corroboration of the respondent's case. But that officer was not called as a witness; his actual report is not forthcoming; and the testimony of the dewan leads to the conclusion that he performed his duty in the most perfunctory manner, and was satisfied on the report of a maid-servant, not called or examined, that Mirnamoye had admitted the execution of the mooktearnamahs.

Is then the evidence adduced by the respondents, and considered without reference to any conflicting testimony on the part of the appellants, sufficient to establish the due execution of this deed of gift? Their Lordships, differing respectfully from the Judges of the High Court, have come to the conclusion that it is not.

The disposition is one by a purdah woman, made not very long before her death, and whilst she was labouring under a mortal disorder. Their Lordships consider that it is not open to the objection of inofficiousness. Her preference of her own blood relations to a son adopted by her husband, and otherwise provided for, was not unnatural. But this Committee and the Courts in India have always been careful to see that deeds taken from purdah women have been fairly taken; that the party executing them has been a free agent, and duly informed of what she was about. Again, when the disposition, as in this case, is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeded, to be satisfied that it was the free, voluntary act of the party by whom it purports to have been executed, and expresses his real intentions. In the present case the respondents' evidence is conflicting as to the party intended to be benefited, and leaves it uncertain, to say the least, what were the instructions for the deed and from whom those instructions emanated. Evidence so untrustworthy, so uncertain, and so conflicting, is not such as enables their Lordships to declare affirmatively that the hibba was in any sense the act and deed of Mirnamoye, or even that she herself put her hand and seal to it.

Their Lordships, therefore, have come to the conclusion that the respondents having failed to prove a material link in the title upon which alone they can recover, the decrees under appeal ought to be reversed, the suit dismissed with costs in the Courts below, and that the respondents should pay the costs of the appeal. And they will humbly advise Her Majesty accordingly.

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The 11th July 1870.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, and Sir Lawrence Peel.

Alluvion lands—Accretion—Regulation XI. of 1825.

*On Appeal from the High Court at Calcutta.**

Lopez

versus

Muddun Mohun Thakoor and others.

Plaintiff sued for the recovery of alluvion lands which originally formed a portion of his estate, which had been washed away by the Ganges, but which subsequently re-formed. The defendants relied on Section 4, Regulation XI. of 1825, and contended that the plaintiff's land having been wholly submerged so as to make the defendants' land the river-boundary, the subsequent recession of the river caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land has been re-formed on the ascertainable and ascertained site of the plaintiff's mouzah.

HELD that Section 4 did not apply to this case, and that that Section refers only to cases of gain by acquisition by means of gradual accession, to the gain which an individual proprietor might make from what was part of the public territory, not from a private person's property.

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The principle of law, so far as relates to accretion, has, to some extent, been made part of the positive written law of India, and it is on the operation of such positive written law that the defendant's case is based. This law is to be found in the Regulation No. XI. of 1825, a Regulation for carrying out the rules to be observed on the determining of claims to lands gained by alluvion or by the dereliction of a river or the sea. There is a recital in that Regulation as to disputes which had arisen with regard to such claims, and the necessity of having some definite rule laid down with regard to several matters, only one of which is material or relevant to the present case; and that is the case provided for by the 4th Section of the Regulation. By that Section it is provided that, "when land may be gained by "gradual accession, whether from the recess "of a river or of the sea, it shall be con-"sidered an increment to the tenure of the "person to whose land or estate it is thus "annexed, whether the land be held imme-"diately from the Government or from any "intermediate landowner." And the defendants' contention is, that the plaintiff's land having been wholly submerged, so as to make their (the defendants') land the river-boundary, the subsequent recession of the river has caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land has been reformed on the ascertainable and ascertained site of the plaintiff's mouzah.

It is to be observed, however, that that Clause refers simply to cases of gain—of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The plaintiff here says: "I had the pro-"perty. It was my property before it was "covered by the Ganges. It remained my "property after it was submerged by the "Ganges. There was nothing in that state "of things that took it from me, and gave it "to the Government. When it emerged, "there was nothing that took it from me, and "gave it to any other person." And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another.

In truth, when the whole words are looked at, not merely of that Clause but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense; that is to say, the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was, in a state of nature, neither valuable nor usable.

And on the very words of the Section itself, if the ownership of the submerged site remained as it was (and there seems nothing to take it away), it is difficult to see why a deposit of alluvion directly upon it is not at least as much an accretion and annexation vertically to the site, as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property.

If we had then to consider the question for the first time, we should have come to the conclusion that the 4th Section did not govern the case, and that the question would have to be determined by the general principles of equity, to which all cases not in terms provided for are referred by the 11th Section. Those principles would not give the plaintiff's property to the defendants. But the question is not raised for the first time. The very point came for consideration in India before a Court comprising Sir Barnes Peacock, Mr. Justice Bayley, and Mr. Justice Kemp;* and after full consideration, it was

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*The 11th September 1862.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Case No. 42 of 1862.

Regular Appeal from the decision of the Principal Sudder Ameen of Rajshahye.

Ramanath Thakoor and others, *Appellants*,

versus

Chundernarain Chowdhry, *Respondent*.

Peacock, C. J.—We are of opinion that the word "gained" in Section 4, Regulation XI. of 1825, does not extend to cases of land washed away and afterwards re-formed upon the old site which can be clearly recognized. In such a case, we think the land formed by accretion on the old recognized site remains the property of the owner of the original site. It never could have been intended that, where the surface of an

decided that lands washed away and afterwards re-formed on an old site, which could be clearly recognized, are not lands gained within the meaning of Section 4, Regulation XI. of 1825, *viz.*, they do not become the property of the adjoining owner, but remain the property of the original owner.

And the same point arose in a case in this Court of Mussamut Imam Bandi and Wajid Ali Khan, appellants, and Hurgovind Ghose, respondent, reported in 4 Moore's Indian Appeals.* It is there said: "The whole of the "district adjoining the land in dispute, as well "as that land itself, is flat, and very liable to "be covered or washed away by the waters "of the Ganges, which river frequently "changes its channel. The land in dispute "was inundated about the year 1787; it "remained covered with water till about "1801, and then became partly dry, until "in the year 1814 it was again inundated. "After this period it once again re-appeared "above the surface of the water; and by the "year 1820 it became very valuable land." That is a state of things very singularly like what has occurred in this case.

In that case it was held as follows: "The question then is, to whom did this "land belong before the inundation? Who-"ever was the owner then, remained the "owner while it was covered with water and "after it became dry."

This authority appears to their Lordships conclusive in the present case.

In a subsequent case, however (*Kattemonee Dossee* versus *Kanee Monmohinee Dabee*, 'Weekly Reporter,' 26th May 1865*), it was held by a Court comprising Justices Trevor, Loch, Bayley, and Morgan, that all gradual accessions from the recess of a river or the sea are an increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases; and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the river. Their Lordships, however, are unable to assent to any such distinction between surface and site. The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained.

Their Lordships, however, desire it to be understood that they do not hold that property absorbed by a sea or a river is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to emerge again, like any other derelict land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation.

But in this case not only did the parties themselves take the proper, prudent, and honest means of preventing the necessity of any dispute arising by interchanging the Tanabundee which has been put in evidence, but the plaintiff, as between him and the State, did also take the most effectual means in his power (having the description and measurement of the submerged mouzah recorded, and continuing to pay rent for it) to prevent the possibility of any question of dereliction or abandonment being raised against him. Their Lordships are, therefore,

estate is washed away, and the lower portion of it is covered with water, and formed into a portion of the bed of a river, the ownership of that portion of the estate which has become inaccessible in consequence of its being covered with water should be lost, and that, when the surface is re-formed, it should become the property of an entirely different owner, because he may happen to be the owner of the estate adjoining. If such were the case, if A had an estate between a river and the estate of B, and A's estate were washed away, leaving B's estate adjoining the river, B would become the owner of A's estate if it should be gradually re-formed on the old site. Such a case would not fall within Clause 2, Section 4, but it would fall within the same principle. The cases in Clause 2 are given only as examples, and not as the only cases in which land acquired by accretion can be clearly recognized as having been formed on the site of an old estate. The principle is that, where the accretion can be clearly recognized as having been re-formed on that which formerly belonged to a known proprietor, it shall remain the property of the original owner. This is founded on general principles of equity and justice, which are the principles recognized by the 5th Clause. We think Clause 1, Section 4, applies only to cases of land gained, that is to say, formed upon a site which cannot be recognized as that of any former proprietor. The case must be remanded to be tried with reference to the above remarks.

The compensation referred to, as given by Act IX. of 1847, is merely a diminution of the amount payable to Government as revenue, but this would be no compensation to a man the whole of whose estate has been washed away, if, when re-formed, it is to belong to a different proprietor. He will have to pay no revenue; but he will have no estate. We may remark that in this case the plaintiffs do not rely solely upon the fact of re-formation, but they claim at least some portion of the land re-formed by accretion as being annexed to their estate. This point will also have to be determined. Ordered, that this case be remanded and tried *de novo* upon the merits with reference to the above remarks.—Marshall, page 136.

*7 W. R., P. C., p. 67.

* 3 W. R., *Civil*, p. 51.

of opinion that the property now being capable of identification by means of that Tanabundee and otherwise, the property having been the property of the plaintiff when it was submerged, never having been abandoned or derelict, having now emerged from the Ganges, is still his property; and they will therefore recommend to Her Majesty to reverse the decision of the Court from which the appeal has come, to affirm the decision of the Principal Sudder Ameen, and that the costs of the litigation both below and here should be given to the appellant, the plaintiff.

The 12th July 1870.

Present:

The Master of the Rolls, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Benamee transactions—Succession.

On Appeal from the late Sudder Court at Agra.

Nawab Azimut Ali Khan

versus

Hurdwaree Mull and others.

The law as to benamee conveyances taken by a father in the name of a son, whether in Hindoo or Mahomedan families, should be considered in all Courts in India as conclusively settled by the decision of the Privy Council in *Gossain* vs. *Gossain*, 6 Moore, 53.

That case, however, was not applied to the present case in which it was found that a father, who had purchased property with his own funds, had had the conveyance drawn up in his son's name with a view to affect the interests of his daughters, and to vary the rule of succession between sons and daughters in his family.

THE Nawab Rooknoodowlah, the original appellant, has died pending this appeal, and is now represented by his son, the Nawab Azimut Ali Khan. The original appellant will, to prevent confusion between them, be called the Nawab in the observations of their Lordships on this case. This appeal is brought from a decision of the late Sudder Dewanny Adawlut at Agra, affirming a decree of the Judge of the Zillah Saharunpore, who had affirmed, on appeal to him, a decree of the Principal Sudder Ameen of that place, dismissing the suit of the Nawab against the present respondents.

The respondents, by trade bankers, were creditors of a deceased son of the Nawab, named Ruhmut Ali Khan. The debt was evidenced by an instrument in writing in the usual form there of a bond; but this instrument does not appear to have been a mortgage-bond hypothecating any property of the debtor. The respondents obtained a decree in the Civil Court of Saharunpore for the amount of their demand against Ruhmut, who died before execution was had on that decree. The respondents, after the death of Ruhmut, proceeded, agreeably to the law and practice of the Court, to attach the property of their debtor, in order to obtain payment of their debt. They were proceeding to bring to sale the property which is the subject of the present appeal, when the Nawab intervened in the execution proceeding as an objector, claiming the whole property as his own absolutely, and stating the deceased Ruhmut to have been merely a fictitious or benamee-holder of the property for his father, the Nawab. The Judge of that Court, for reasons which it is unnecessary here to state or consider, refused to allow the Nawab to proceed on that objection, and referred him to a regular suit. The Nawab accordingly preferred his claim by a civil suit against the respondents, *viz.*, the original suit before referred to, in the Court of the Principal Sudder Ameen of Saharunpore. The properties sought to be recovered are named respectively Bhensee and Babree.

The whole contest in this suit was whether Ruhmut held these properties benamee for the Nawab. No case was made by the Nawab that the son had a postponed interest or estate in the property. Such a case, even if substantiated, would not have enabled the Nawab, as an opponent of the sale, to defeat by intervention the claim of the creditors wholly. The ordinary mode of conveyance under such a judicial sale, *viz.*, of the right, title, and interest of the debtor, would have enabled the creditors to realize their debt or some portion of it by a sale of the interest, whatever it might prove to be. The Nawab instituted no suit to protect any alleged life-interest in himself against a title derived under the judicial sale. The Court, therefore, had in the Nawab's suit simply to decide whether he had proved his son Ruhmut to have been, from the time of the conveyance to Ruhmut until the death of the latter, a benamee-holder of these properties for the Nawab.

The title to Bhensee was one derived originally by mortgage. The owner Wuzeer Ali mortgaged this with fifteen other mouzahs to one Bhuwanee Pershad for a certain

sum, which, by a second advance and charge, amounted to 26,400 rupees. Bhuwanee Pershad, as the Nawab alleged, sub-mortgaged the whole sixteen mouzahs to him for the same sum; and he, according to his statement, had the conveyance taken benamee in the name of two of his infant sons, of whom Ruhmut was one. The other of these two sons died young; on his death, the Nawab, who was his heir, substituted another son. This son died young, unmarried, and without issue; his father was his sole heir. The interest, therefore, of Ruhmut, if real, was to a moiety of this share of Bhensee originally conveyed to the two sons. The title to Babree was by conveyance, as upon an ordinary purchase, for a money-consideration, and the conveyance was in the name of Ruhmut. Some contest has been made about the real facts of this purchase, and the respondents deny that it was, what it purports to have been, a purchase at all; but in the view which their Lordships take of this case, it will be unnecessary to advert further to this head of contention, or to distinguish further between the title of the respective properties, since the explanation of the Nawab as to the reasons for the conveyance to his sons applies alike to both properties.

The case made by the Nawab at the hearing of this appeal before their Lordships was, that the funds which purchased both properties were exclusively the funds of the Nawab; that a legal presumption thence arose that the proprietary right was the Nawab's, and that the respondents, who have no better title than that of Ruhmut, have not rebutted this presumption. The Counsel for the Nawab relied on the case of Gossain *versus* Gossain* in 6 Moore, which they contended had been disregarded in the decision of this case in the Courts below.

Had this appeared to their Lordships to have been so, they must necessarily have recommended to Her Majesty to reverse the decisions under appeal, since the law as to benamee conveyances taken by a father in the name of a son, whether in Hindoo or Mahomedan families, should be considered in all Courts in India as conclusively settled by that decision.

It becomes necessary, therefore, to see what were the real grounds of the decision in the Court of the Principal Sudder Ameen. It appears to their Lordships that that Judge found as a fact that the Nawab purchased the property with his own funds; a conclusion which, on the evidence before him, and in the absence of all evidence of property at that time in the sons, their Lordships think a reasonable and proper conclusion. Had this fact received no other addition than that the conveyance was taken in the names of the Nawab's sons, the case would have fallen within that of Gossain *versus* Gossain, and the argument for the appellant must have prevailed with their Lordships; but the Principal Sudder Ameen remarks, and relies on a very important addition to these facts, in the Nawab's own explanation of the cause of the conveyance to his sons. The Court thence inferred that a motive existed for it in the state of his family, the existence of daughters, and his desire, as expressed,

* 4 W. R., P. C., p. 46.

to vary the rule of succession between sons and daughters in his family. The Sudder Dewanny Adawlut also, in their judgment, rely on these additional facts.

If the conveyance to the sons was designed to produce an effect thereafter, by changing the amount of shares of the whole property on a succession between sons and daughters, it could not be designed as a mere naked benamee conveyance, because, as Mr. Bell correctly observed, a mere benamee conveyance would in no way affect such succession. But if, as the Nawab himself represented the transaction, it was designed to affect the daughter's claims or interests, it could only so operate as a real transaction; that is, by a conveyance of interest to the sons. It is immaterial in this case to consider whether the legal effect of the arrangement would be to confer a resulting life-estate on the Nawab or not, since the only contest made in the suit was whether it was an absolute benamee transaction. The case admitted, certainly, of being viewed thus, that the conveyance was merely colorable, to be treated as real, should it become necessary to defeat a daughter's claim, but fictitious as between father and sons. It is to be observed, however, that this view of the case was not presented to the Judge; and if it had been so presented, the Judge would have been justified in declining to act on such an allegation of fraud against creditors of the son made after the son's decease in favor of the father, alleging his own fraud. Their Lordships, therefore, think that the Principal Sudder Ameen was justified in regarding the whole evidence before him as not sufficient to establish the case of benamee ownership, which the Nawab advanced. As the decision under review does not appear to conflict with any rule of law, as the question decided is one of fact, as the decision is sustained by sufficient evidence, and establishes the claim of creditors against property of which their debtor was allowed for many years to have, at least, the ostensible ownership, it is one which their Lordships would not disturb, unless it were clearly shown to be wrong. It is the duty of a Court of Justice in such a case to put the objector to the rights of creditors founded on apparent ownership to strict *proof* of his objection; he must recover, if at all, on the case that he asserts. It would be easy, if such vigilance and jealousy were not exhibited, for a family to place the family-property out of reach of creditors. If the father became indebted, the titular right would be then stated to have conveyed the real interest; but if the son were indebted, then the claim would take the form to which this suit is adapted. Views of these dangers to the rights of creditors seem to have been present to the Courts below; and in the present case their Lordships are unable to see that jealousy of a probable fraud has induced an incorrect estimate of the evidence. Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed with costs.

The 12th July 1870.

Present:

The Master of the Rolls, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Redemption—Mortgage—Accounts.

On Appeal from the late Sudder Court at Agra.

Nawab Ajimut Ali Khan

versus

Jowahir Singh and others.

The plaintiffs in this suit were purchasers of the equity of redemption in a portion of certain mortgaged premises which were sold in lots, and they brought this suit against the mortgagees who were also purchasers of the equity of redemption of several of the lots. They made the purchasers of the other lots parties to the suit, and sought to redeem their own portion of the estate and to recover possession of their own portion and the portion purchased by the purchasers other than the mortgagees, on payment into Court of a sum sufficient to cover the proportion of the mortgage-debt attributable to the said parcels. The mode of applying the whole of the mortgage-debt between the different mouzahs of the mortgaged estate in such a case pointed out.

The principle of Construction No. 359—that when a creditor sues for his principal and interest (the latter being equal or more than equal at the time of the commencement of the suit to the principal) he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtor's resistance of the demand—is not applicable to a case in which a mortgagee in possession is not a party suing for the money, but the party resisting by every means in his power a claim to redemption and the final settlement of the account.

The original appellant in this case was in April 1846 the mortgagee of an estate comprising sixteen different mouzahs, and known as talook Bhainsee. The estate had been originally mortgaged (it is said by way of usufructuary mortgage) by its then owner, Vuzeer Ali, for 26,400 rupees to one Bhowany Pershad, who may be taken to have transferred, in 1822 or 1823, his interest as mortgagee to the appellant. Further sums, amounting to 15,700 rupees in all, were afterwards advanced by the appellant on the security of the estate, upon terms which will be afterwards considered. In 1839 the representatives of the mortgagor brought a redemption-suit, which was finally dismissed by the Sudder Court of the North-West Provinces on the 1st August 1843, by a decree which is one of the exhibits in this cause. On the 8th April 1846, the estate was sold, subject to the mortgage, under process of execution in satisfaction of decrees against the original mortgagor or his representatives. It was sold in different parcels. One mouzah (Hosseinpore) was purchased by Jowahir Singh and the four other persons who, with him, are the plaintiffs in this cause; mouzah Jettpore was purchased by Buhal Singh and Bustee Ram; mouzah Rookunpore by Hosein Ali Khan and two other persons; and one-fourth of mouzah Chundharee by Mussamut Imamee Begum. The residue of the estate was purchased by the appellant; and the result of the sale was consequently that, whilst he retained the rights of mortgagee over the whole property, he became the owner of the equity of redemption in twelve and three-quarters of the sixteen mouzahs of which it was composed.

In 1862 the plaintiffs, as the owners of the equity of redemption in mouzah Hosseinpore, brought a suit against the appellant for the redemption of their mouzah on payment of 4,737 rupees 7 annas, which they alleged to be the rateable share of the mortgage-debt payable by them. The suit was tried first by the Principal Sudder Ameen, and afterwards, on appeal, by the Zillah Judge. The latter held that the plaintiffs were entitled to redeem their mouzah on payment of an additional sum of 1,212 rupees 13 annas. But his decision was reversed, and this suit finally dismissed by the Sudder Court on special appeal on the 29th April 1864, principally, if not wholly, on the ground that the purchasers of the other three parcels of land should have been made parties, and that the plaintiffs should at least have offered to redeem those parcels by paying their proportionate part of the mortgage-debt attributable to them. The decree affirmed the principle established by a previous case in the Court that the plaintiffs were at liberty to redeem their mouzah without bringing into Court that portion of the mortgage-debt which was attributed to the mouzah wherein the equity of redemption had been purchased by the mortgagee.

On the 22nd of December 1864, the plaintiffs instituted their present suit. It was framed in the manner indicated by the last stated decree. The purchasers of the parcels other than those purchased by the appellant or the plaintiffs were made parties on the record; and the plaintiffs, having paid into Court a sum which they alleged to be sufficient to cover the proportion of the mortgage-debt attributable to those parcels, as well as to their own village,

claimed absolutely to redeem the latter, and to recover possession of that and the three other parcels with mesne-profits, from the date of the institution of the suit. This suit, like the former one, was tried in first instance by the Principal Sudder Ameen, who decreed in favor of the plaintiffs; and his decision was affirmed on regular appeal by the Zillah Judge, and afterwards on special appeal by the Sudder Dewanny Adawlut at Agra. The present appeal, which has been heard *ex parte*, is against these decrees.

The appellant does not, as their Lordships understand, contest the proposition that the plaintiffs, as purchasers of the equity of redemption in a portion of the mortgaged premises, are entitled to redeem that portion on payment of *some* proportion of the mortgage-debt. His objections to the decrees may be divided into three classes: first, objections to the mode in which the rateable share of the debt payable in respect of Hosseinpore has been calculated; secondly, objections to the mode in which the gross amount of the mortgage-debt to be apportioned has been ascertained; and, thirdly, to the mode in which the decrees deal with the villages whereof the equity of redemption belongs, or is alleged to belong, to the other defendants on the record.

Under the first head of objection it was strongly argued that the principle upon which the debt was apportioned amongst the different villages was erroneous; that the apportionment should have been made according to the actual and ascertained values of the several mouzahs, and not according to the amount of revenue assessed on, and payable in respect of, such mouzahs to Government.

Their Lordships do not deny that there is some force in this objection.

The proportion of the debt chargeable on each village ought to vary according to the actual value of the village; and the amount of Government revenue assessed on a village may not always be a correct criterion of its actual value.

On the other hand, there might be a difficulty in applying the principle contended for by the appellant to cases in which the amount payable by a mortgagor seeking to redeem is not ascertained as in this country by inquiry and account; but must be calculated and tendered or brought into Court by him before the commencement of the suit. Their Lordships, however, do not feel called upon to affirm the correctness of the principle adopted in the Court below, or to give any opinion which may have the effect of sanctioning its adoption in other cases, because they are clearly of opinion that the objection is not one which this appellant is now entitled to take. They cannot find any trace of its having been taken in the Courts below. The written statement of the appellant does not raise the question. On the contrary, he seems, in coming to the conclusion that 27,387 rupees 6 annas 6 pie was the amount which the plaintiffs ought to have brought into Court, to have adopted the same principle of apportionment, as will be seen by referring to his own petition and the account annexed thereto at pages 5 and 6 of the record; though the latter account claims something more than the 27,387 rupees 6 annas 6 pie as the sum payable in respect of all the four villages.

It is questionable whether the appellant has lost anything by reason of the principle of apportionment of which he now complains; but it is certain that by yielding to the objection now for the first time taken and re-opening the whole account, their Lordships would do great injustice to the respondents, and make a very dangerous precedent.

It is true that the appellant's written statement did object to the particular application of the principle, on the ground that the revenue assessed on Hosseinpore was taken at somewhat less than its real amount; and contended that consequently the amount brought into Court by the plaintiffs was less by a few rupees than even on their calculation it ought to have been. But this objection does not seem to have been pressed in the Courts below, certainly not in the two Appellate Courts. And their Lordships are of opinion that the decrees, if otherwise correct, ought not to be disturbed on that ground.

The next question is whether the gross amount of the debt to be apportioned has been correctly ascertained in the Courts below. Mr. Leith, in the course of his argument, remarked strongly on the scantiness of the evidence on which those Courts have proceeded. It is, however, to be observed that for this and any consequences that may have followed from it the appellant is chiefly responsible.

The plaintiffs are mere purchasers of the equity of redemption in a portion of the estate at an execution-sale, and are not likely to have a single document relating to it except the bill of sale of their particular village. On the other hand, almost every document of title relating to the property or to the mortgage-debt incurred upon it is presumably in the possession or power of the appellant, who has been in actual possession of the estate since 1823. In truth, both the parties and the Courts have been content to proceed upon certain findings in the decree of the 1st August 1843, which dismissed the redemption-suit of the representatives of the original mortgagor. On these findings it has been taken as proved that the principal money secured by the mortgage amounts to 42,100 rupees, and that that sum consists of 26,400 rupees, advanced in two sums on two different occasions to Vuzeer Ali, upon usufructuary mortgages of the property, of a sum of 5,000 rupees advanced to his representatives, and bearing no interest on condition of their agreeing not to sue for redemption for twenty years, and of a number of different sums advanced to several of those representatives on their respective bonds at interest, and aggregating 10,700 rupees. These were all held by the decree of the 1st August 1843 to be charged on the estate; and the suit in which that decree was made was dismissed on the ground that the plaintiffs had not tendered or deposited a sum sufficient to cover those charges.

The following is the manner in which the Courts below have dealt with the questions of interest on these items. They have treated the interest on the 26,400 rupees as satisfied by the rents and profits of the property of which the mortgagee has been in possession, no account of those rents and profits having been required from, or rendered by, the mortgagee. They have held that no interest ran upon the 5,000 rupees; and that, under Section 5 of Regulation XXXIV. of 1803, no larger sum could be recovered in respect of interest on the 10,700 rupees than the amount of the principal. The result of taking the account would be to make the whole mortgage-debt apportionable amongst the different villages 52,800 rupees.

The original contention, however, of the appellant seems to have been this. He treated the decree of the 1st August 1843 as having conclusively determined, as between the mortgagors and the mortgagee, that the mortgage-debt from that date was to be taken to be 42,100 rupees, carrying interest at the rate of 12 per cent. per annum. He calculated the amount of such interest for twenty-one years and some months at 108,093 rupees 12 annas, and insisted that the amount due on the mortgage at the date of the commencement of this suit must be taken to be 150,193 rupees 12 annas, of which the proportion attributable to Hosseinpore and the other premises sought to be redeemed was 27,387 rupees 6 annas 6 pie. This mode of calculation, which does not give credit for one rupee in respect of the rents and profits realized from the property during more than 21 years, is obviously erroneous.

Moreover, the whole argument is based upon a misconception of the nature and effect of the decree of the 1st August 1843. That decree, in fact, did nothing but dismiss the then pending suit for redemption, on the ground that the full and entire amount of the mortgage-money had not been deposited (the sums tendered being only 26,400 rupees and 400 rupees). According to the course and practice of the Court in India, the only point to be determined in such a suit is whether the mortgage-debt has been fully satisfied after taking into account the sum tendered or deposited; nor is the finding of any particular amount as still due conclusive against the mortgagee in a subsequent suit. But in truth this decree, after dismissing the suit, merely said that the plaintiffs would not be entitled to redeem until they should liquidate the whole of the money due to the appellant, both on account of the past and the present, according to the conditions set out in the various deeds. If, therefore, according to the terms of the original contract, no interest was to run upon the 5,000 rupees, this decree would not convert that loan into a loan bearing interest. Nor would it alter the rights or liabilities of the parties in respect of the other sums which made up the 42,100 rupees.

The question now under consideration, *viz.*, the amount of the whole mortgage-debt to be apportioned between the different mouzahs, may be treated without reference to apportionment, and as if it arose between a sole mortgagor and the mortgagee. It is also to be considered with reference both to the sufficiency of the tender or deposit, and to the actual sum payable on redemption.

It was clearly not necessary for the mortgagor to deposit anything by way of interest on the 26,400 rupees, if, as seems to be assumed, that sum was secured by usufructuary mortgages. He had a right to assume, until the contrary was shown by taking an account, that that interest was covered by the rents and profits. Again, he was under no obligation to deposit anything in respect of the 5,000 rupees if no interest was chargeable on that loan. The question of sufficiency is, therefore, reduced to this—Was he or was he not justified to recover by way of interest on the 10,700 rupees more than the principal, and in limiting the deposit in respect of interest to that sum?

The contracts on which this liability arose were entered into long before the passing of Act XXVIII. of 1855, and *primâ facie* fall within the rule enacted by the 4th Section of Regulation XXXIV. of 1803. The contention on the part of the appellant is that they are taken out of the scope of that rule by the application of Construction No. 359 to the facts of this case, and in particular to the two former suits for redemption which were dismissed by the decrees of the 1st of August 1843 and the 29th of April 1864. Their Lordships are, however, of opinion that the Courts below have correctly held that the Construction in question does not apply to this case. The effect of it is that, when the creditor sues for his principal and interest (the latter being equal or more than equal at the time of the commencement of the suit to the amount of principal), he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtor's resistance of the demand. Neither the rule nor the reason of the rule seems to their Lordships to apply to a case in which a mortgagee in possession is not a party suing for the money, but the party resisting by every means in his power a claim to redemption, and the final settlement of the account.

Their Lordships are, therefore, of opinion that the sum to be apportioned between the different villages has, for the purposes of deposit, been correctly taken to be 52,800 rupees.

With respect to the final adjustment of the account, their Lordships have to observe that, if the suit had been conducted in the ordinary way, the mortgagee must have accounted for the rents and profits received by him whilst in possession. The result of such an account would, not improbably, have been considerably in favor of the mortgagee, who does not, however, complain that it has not been taken. But, however that may be, the mortgagee, whose duty it was to render such an account, who has the best means of knowing what would be the result of such an account, if taken, and who does not suggest that he has been prejudiced by the omission to take it, cannot be heard to complain of these decrees in so far as they treat the interest on the 26,100 rupees as satisfied by the rents and profits. And what has been already stated shows that, in their Lordships' opinion, he is not entitled to claim any interest in respect of the 5,000 rupees, or interest on the 10,700 rupees in excess of the principal.

The remaining question is what, upon the facts found by the Courts below, ought to have been their decree. The appellant now complains that the plaintiffs have been allowed to redeem as against him the villages other than their own village of Hosseinpore, *i. e.*, to put themselves in his shoes as mortgagee in respect of these villages; and further, that the decrees were wrong in refusing to treat him as the owner under a subsequent purchase of three-fourths of Rookunpore.

The first objection does not come with a good grace from the appellant, who defeated the plaintiffs' former suit, on the ground that they had not offered to redeem the villages in question, and who in this very suit has included in his calculation of the amount, which, as he alleges, ought to have been brought into Court, the shares of the mortgage-debt which he said were chargeable on those villages. The Courts below, however, seem to their Lordships to have mistaken the effect of the former decision of the Sudder Court. It merely ruled that the plaintiffs were bound to offer to redeem the villages in question; it did not rule that they were entitled to do so, or to acquire the interest of the mortgagee in them against his will. It is unnecessary to determine in this suit whether in the peculiar circumstances of this case the former proposition is correct. Their Lordships are of opinion that the latter cannot be supported. They think that the appellant, if desirous of retaining possession of these villages as mortgagee, is entitled to do so against the plaintiffs, whose right in that case is limited to the redemption and recovery of their village of Hosseinpore upon payment of so much of the sum deposited in Court as represents the por-

tion of the mortgage-debt chargeable on that village. On this view of the case, it is unnecessary to consider whether the appellant had or had not given sufficient evidence of his alleged purchase of three-fourths of the equity of redemption in Rookunpore.

Their Lordships are nevertheless of opinion that the appellant was properly condemned in the costs of the suit, and ought not, any variation in the decree notwithstanding, to be relieved from them. His defence in the former suit, which is inconsistent with his present contention, defeated that suit, rendered the present suit necessary, and invited the claim on the part of the plaintiffs which he now resists. In this suit he ought at the earliest stage to have submitted to the redemption of Hosseinpore alone, on payment of that portion of the sum deposited which represented the debt due in respect of that village. Instead of doing so, he raised issues touching the sufficiency of the deposit, which have been determined against him. It is the course of practice in India that the costs of this kind of suit follows the result of the finding on such an issue, and are not, as in an English redemption-suit, added to the mortgage-debt. And their Lordships are of opinion that this rule has, in the present case, been most properly applied to a mortgagee who has so long, and by so many expedients, inequitably and vexatiously resisted the right of redemption. Their Lordships will, therefore, if the appellant desires it, humbly recommend to Her Majesty that the decree of the Principal Sudder Ameen be varied by declaring that the appellant is entitled to receive 5,947 rupees 1 anna, part of the 9,654 rupees deposit, and that the balance of that sum be returned to the plaintiffs; and that the plaintiffs are entitled to redeem and recover possession of the village of Hosseinpore with mesne-profits, from the date of the commencement of this suit until the date of the delivery of possession; and that the appellant should pay his own and plaintiffs' costs in the Court below. The plaintiffs have not appeared on this appeal, and their Lordships give no costs of the appeal.

The 14th July 1870.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Execution—Bona-fide proceeding—Limitation.

*On Appeal from the High Court at Calcutta.**

Maharajah Dheraj Mahtab Chund Bahadoor

versus

Bulram Singh and others.

Where the original judgment-debtor died, and there was a dispute as to whether any estate of the judgment-debtor had passed into the hands of his heirs, and that dispute was *bonâ fide* prosecuted and contested, it was held that the proceeding in question was sufficient to keep the decree in force within the meaning of Section 20, Act XIV. of 1859.

The Full Bench Decision in Ram Sahaye Singh *versus* Degun Singh, 6 W. R., Miscellaneous, 98, approved.

THE question in this appeal is the proper construction of the 20th Section of Act XIV. of 1859, which enacts that "No process of "execution shall issue from any Court not es-"tablished by Royal Charter to enforce any "judgment, decree, or order of such Court, "unless some proceeding shall have been "taken to enforce any such judgment, "decree, or order, or to keep the same in "force within three years next preceding "the application for such execution." Was there, at any time within three years preceding the application for execution made in the Court below, any proceeding which had been taken to keep in force the judgment, decree, or order originally made in favor of the present appellant?

What took place was this—The original debtor died. The appellant desired to have the benefit of his judgment against the heir or heirs-at-law. In this state of things he applied to the Judge for process of execution

* From the judgment of Loch and Macpherson, JJ., in Miscellaneous Appeal No. 415 of 1866, dated 20th August 1866—6 W. R., Miscellaneous, 63.

against the respondents as heirs, and on the 26th of December 1861 this application was made to assume the form of a cause. It was marked and described as 106 of 1861, and was sent by the Judge to the Principal Sudder Ameen, who directed the usual notices to issue. It is the history of that cause which we have to trace for the purpose of seeing whether it was kept alive, or whether it became at any and what stage inoperative.

On the 24th of January 1862, the officer of the Court made his report that another officer, a peon, had gone to the place stated, and searched for the judgment-debtors, but was unable to find them, and had affixed the notice in a particular way, and served it upon the village-watchman. Then, in February 1862, the next month, the respondent filed a petition of objections before the Principal Sudder Ameen, not disputing the service of the notice, but objecting to execution-proceeding on the grounds that it was barred by limitation, and that no estate of the judgment-debtor had come into their possession. There was, therefore, a *litis contestatio* between the parties to this suit, the defendant to the suit appearing, and contesting the right of the plaintiff to have the benefit of the execution against the defendant. In March 1862, without any delay, the appellant put in a petition by way of answer to the petition which the respondent had put in, contesting the allegations in point of law that the respondent had made. In that state of things, both parties having placed their view of their respective cases upon record, as it were, on the 4th of March 1862, the Sudder Ameen ordered that, on the last petition, if there were no objection, the notice of sale should be drawn up in due order; and it appears that, following upon this, on the 29th of November 1862, a species of hearing was brought on before the Principal Sudder Ameen, for the purpose of discussing all or some of the allegations which had been made in these petitions; and it was then, upon that day, the 29th of November 1862, that the Sudder Ameen pronounced his opinion: "Whereas the heir of the judgment-debtor is a respectable woman, the "final process cannot be issued against her. "Let the number of the suit be struck off "from this record at present."

Now, I pass by the question whether that was meant to be a final judgment, or only a temporary delay interposed in the proceeding of the suit; and I will suppose, for the purpose of argument, that it was meant to be a final judgment. It was at this point, and at this point for the first time, that the suit which up to that time had been pending was disposed of by any order of the Court, and up to that time there appears certainly to have been no delay on the part of either side. It was prosecuted, and prosecuted *bonâ fide*, and defended, and defended *bonâ fide;* and it appears to their Lordships that, so long as that process was going on, so long as there were these allegations and counter-allegations as to the right to revive and prosecute the decree, there was a pending proceeding, and it would have been out of the power of the appellant to have done anything but wait for the result and the order of the Court upon that pending proceeding.

Their Lordships, therefore, were the case not affected by any authority or by any prevalent course of practice in India, would have no hesitation whatever in holding that there was here a proceeding to keep in force a judgment, decree, or order originally made; that that proceeding was pending every day of the time, and every hour of every day, until it was disposed of on the 29th of November 1862, by the order to which I have referred.

But it has been suggested in the judgment of the Court, in the present case, that the matter is affected by former decisions of the Courts in India, which had led to a conclusion different from the one which we have expressed. Their Lordships have referred to the case* which was cited upon this head, and they desire to say that they see no reason whatever to find fault with the decision in that case. That case appears to have laid down this rule, that all acts done either by the Court, or by an officer of the Court, or *bonâ fide* by the applicant for enforcing the decree, or keeping it in force, would satisfy the term "some proceeding" in the 20th Section; but then the Court goes on to qualify that by saying that there might be things done by the Court, or there might be things done by the party, which might appear at first sight to be steps taken in execution and prosecution of his right, but which really might be done in such a way as, so far from showing diligence or vigilance on his part, might be so tainted with

* Ram Sahaye Singh *versus* Degun Singh, 6 W. R., Misc., p. 98.

want of good faith, that they would lead to a totally opposite conclusion; and in the particular case before the Court, they found that there had been an application made to execute the decree, that that had been pending for a considerable time before the Court, and had ultimately been dismissed by the Court itself by an act of the Court for want of prosecution; and applying other general observations to that case, they appear to have arrived at the conclusion that the circumstance that there had been a want of diligence which obliged the Court to dismiss the cause for want of prosecution, made the act of the Court there not to be an act which could satisfy the expression "some proceeding" within the 20th Article.

Their Lordships see no reason whatever to disapprove of that decision. It would, as it has been pointed out, be a very strange result if the mere chronicling or recording by the Court of the fact, that there had been delay and laches on the part of the litigant, such as obliged them to strike the suit off the file, if that act of the Court done, under such circumstances, were to redound to the benefit of the litigant, and to enable him to say that he had been using due diligence within the period of three years. Not in any way disapproving, therefore, of the decision to which we have been referred, their Lordships are of opinion that, in the present case, the proceeding which has been taken now was taken in the period of three years, because it was taken within three years after the order of the Principal Sudder Ameen of the 29th of November 1862 was made. We, therefore, will humbly recommend to Her Majesty that the order should be reversed, and that the appellant should have his costs of the appeal.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Execution—Mesne-profits.

*On Appeal from the High Court at Calcutta.**

Rajah Leelanund Singh

versus

Maharajah Lakchmissar Singh.

Where in a suit by *L* for recovery of certain lands with mesne-profits, a decree was given by the Privy Council declaring *L* absolutely entitled to two mouzahs, and also to certain other lands with regard to which the High Court was ordered to institute certain enquiries, it was held that he might have waited the result of these enquiries before applying for execution in respect of the two mouzahs:

HELD, further, that, although the decretal order of the Privy Council did not specifically mention anything about the mesne-profits of the said two mouzahs, the right to mesne-profits was consequential on the declaration for possession contained in the decree and upon possession: and the High Court was accordingly directed to proceed; to ascertain the mesne-profits of the said two mouzahs.

THE appellant in this case originally sued to recover from the respondent certain villages and lands, alleging that, on a true adjustment of the boundaries, they belonged to the Nizamut Mehals, and not to Havailee. He claimed also mesne-profits. The suit was dismissed by the Court of first instance, and that dismissal was confirmed by the Sudder Dewanny Adawlut.

Their Lordships, on whose recommendation the order† in question was made, thought that this dismissal was wrong; and in an ordinary case they would have made the final decree which the Appellate Court in India ought to have made. Not having materials for doing this, they suggested the order in question, which declared the appellant absolutely entitled to the villages of Goremahee and Goruckpore, and to all the rest of the land in dispute which was not comprised in the settlement of Havailee. By declaration it limited Havailee to 123,207 beegahs, including 129 beegahs and 19 biswas, part of Beadon settlement, and so much of the land in dispute as belonged to or was attributable to the Bunker and Boondee

* From the order of L.S. Jackson, J., in Regular Appeal No. 299 of 1855, dated 15th March 1866—not reported.

† 3 W. R., P. C., pp. 19, 30; also Sutherland's P.C. Judgments, pp. 578, 591.

Mehals. It then directed the High Court of Calcutta to make the inquiry necessary to understand what this last-mentioned land was, and to proceed in the suit as upon the result of such inquiry might seem just—dealing with the whole question of costs, including the taxed costs of the appeal.

Now, in this state of things, their Lordships are of opinion that the appellant might well have waited the result of those inquiries and accounts before applying to the High Court in Calcutta, for the execution of the earlier part of the decree with reference to those villages to which he was declared entitled; and their Lordships also are of opinion that the High Court at Calcutta might well have declined, if they had been so minded, to execute the earlier part of the decree until they had completed the whole of the inquiries and accounts. However, the appellants did apply to the Court for the execution of the part of the decree which related to the two villages of Goremahee and Goruckpore, to which his title had been declared, and the single Judge of the High Court on whom appears to have devolved the duty of answering the application was willing to execute and proceeded to execute the decree, so far as regards possession of these two villages. He stated his opinion to be that, with regard to mesne-profits, inasmuch as the order of Her Majesty in Council had not specifically mentioned anything about mesne-profits, it would not be proper for the Court in India, in executing a decree, to make any order with regard to the mesne profits.

That order standing would, of course, be an impediment hereafter, even after the inquiries directed by the other part of the decree were completed, in the way of any application by the appellant on the subject of mesne-profits from those two villages; and inasmuch as their Lordships are of opinion that, had the first part of the decree stood alone, it would have been one of the consequential directions proper to be given to ascertain the amount of mesne-profits at the time that possession of the villages was given, they think that, inasmuch as one part of the decree, namely, that with regard to possession, has been executed by the High Court, everything connected with that possession should be executed at the same time.

Their Lordships are of opinion that the right to mesne-profits is consequential on the declaration in the decree, and upon possession. They, therefore, think that the High Court should proceed to ascertain, either itself or by an issue properly framed to be answered by the local Court, what the amount due to the appellant for mesne-profits upon these two villages is. They will, therefore, humbly recommend to Her Majesty that an order should be made to that effect; but, inasmuch as the difficulty has arisen partly by the application of the appellant to execute the decree piecemeal, and partly by the erroneous apprehension which the Judge appears to have entertained of the effect of the decree of their Lordships, their Lordships think it a case in which there ought to be no costs of the appeal.

The 21st July 1870.

Present:

Lord Cairns, Sir James Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Account—Practice—Evidence.

*On Appeal from the High Court at Calcutta.**

Mulka Mukhdra, Begum of the Ex-King of Oude.

versus

Tekaeth Roy.

In a suit for a sum of money on an unadjusted account, plaintiff filed a memorandum (*A*) with her plaint, from which the amount claimed in the plaint could not be made out. In her examination by the Court, the plaintiff put in another memorandum (*C*) to explain memorandum *A*. Defendant admitted that memorandum *C* was signed by him. It had reference to a period immediately preceding that for which the suit was brought. HELD that memorandum *C* was rather evidence to support the originally stated cause of action, than an amendment of the claim or the substitution of one claim or cause of action for another. The case was one which should have been decided, not merely on the discrepancy between the two statements made by plaintiff, but on the whole of the evidence.

The mere omission of an accountable party, framing his own account, to carry forward into a new account a balance against himself existing in a former one, can constitute no evidence in his own favor. To prove the existence of the balance, such omission might be considered in conjunction with other evidence in the cause.

UPON the hearing of this appeal on the 8th July, their Lordships intimated that they would report to Her Majesty in favor

* From the judgment of Trevor and Campbell, JJ., in Regular Appeal, No. 560 of 1865, dated 30th June 1864—not reported.

of the appeal. They now proceed to state the reasons of their judgment.

This is an *ex-parte* appeal brought by the Begum of the ex-King of Oude from a decision of the High Court at Calcutta, which reversed in part a decree of the Principal Sudder Ameen of the 24-Pergunnahs in favor of the appellant, by disallowing a large item of her demand, amounting to nearly one lakh of rupees. The defendant was her cashier.

The plaintiff stated in her plaint that the defendant had been for a long time employed under her as a servant in the capacity of her cashier, in consequence of which about 1,00,000 rupees were due to her, "as per Schedule given below."

The Schedule referred to is headed "Detail of the Account." It mentions a sum of 145,202 rupees 3 annas 2 pice as an amount in deposit with the defendant, as per account, dated the 26th Rujjub 1271. Hijree, given by the defendant. The plaint states the amount claimed on a conjectural estimate as one lakh of rupees, and asks for the adjustment of the account. The Judge, on an objection made that the documents were not stamped, rightly declared the claim to be for a sum on an unadjusted account.

The plaintiff filed with her plaint two furds or memoranda, one of which is described as A. In the commencement of her first examination in Court, the plaintiff stated that the other memorandum had been filed by mistake; it was accordingly withdrawn by her, and is treated in the judgment under appeal as so withdrawn, and as immaterial. The introduction and withdrawal of this latter paper are, however, so far important, as showing that some mistake had occurred, and that the vakeels had, in fact, not fully understood the case at that early stage. The document A mentions the same sum, 1,45,202 rupees 3 annas 6 pie, which is stated in the detached statement annexed to the plaint; but no possible explanation of the contents of A, without the introduction of other items of charge or discharge, can reconcile it with the plaintiff's statement that she is entitled to recover a lakh of rupees.

The defendant in the third head of his statement, at p. 3 of the Record, remarks on and excepts to the confusion and uncertainty of this paper A. In no part of the proceedings did the plaintiff abandon or qualify her statement that she was entitled to recover a lakh of rupees. This state, then, of the proceedings at this stage of the cause certainly shows the necessity of some explanation of the proceedings on the part of the plaintiff, which indeed the exception of the defendant was calculated to elicit. The explanation was given by the plaintiff herself on her examination in support of her case. It is to be found in a statement of the Court itself set forth in the body of her examination at p. 5 of the Record, line 30.

At this time the furd or memorandum C was first introduced by the plaintiff, who proved it to be in the handwriting of the defendant, as he subsequently admitted it to be, and to refer to the years 1267, 1268, and 1269, the years immediately preceding that to the balance of which the paper A related. The Judge received the document, and permitted it to be filed. Viewed in its proper light, it was rather evidence to support the originally stated cause of action, than an amendment of a claim or a substitution of one claim or cause of action for another. If it were inconsistent with any other evidence in the cause, or with the statements in the plaint, the due consideration of those difficulties or objections, as well as its claims to belief, would have to be considered by the Court when it proceeded to deal with the proofs of the issues of fact.

The claim, as originally prepared, was for what might prove to be due on adjustment of an account continuous in its nature, as connected with continuous receipts and disbursements in the plaintiff's service. The plaintiff, whilst her examination was being proceeded with, having produced in support of her claim the document C, which showed the defendant accountable to her, and charged with certain sums by his own admission derivable from this document, it is difficult to conceive how the Court could have rejected it in that or any other stage of the cause, or have refused to give due weight to it as evidence on the trial of the issues of fact. Had it been open to any just exception as an amendment of the plaint, this should have been proposed to the Judge who allowed it to be filed; and if in any way inadmissible as evidence, this should have been urged on the hearing of the issues, if not at an earlier stage. Its general value was taken into account by the Court below in considering the whole of the evidence.

Their Lordships cannot find in the proceedings before them any ground for such special exception or objection. The defendant admitted the document to be in his handwriting. The issues were framed so as to include the ascertainment of the balances for the years which this document covered. No objection was made to this framing of the issues. The defendant went into evidence to discharge himself from the items of charge which the balance, evidenced by this document C, constituted.

His case on this point was, that the balance which C showed had been subsequently liquidated, and had not entered into A. It lay upon him to substantiate his discharge. On the whole account he claimed to be a creditor of the plaintiff to the amount of about 8,000 rupees. It was common ground that the balance of C did not enter into A.

The plaintiff and the defendant were both examined, cross-examined, and re-examined. Her evidence, if trustworthy, established her case. The case turned on a conflict of evidence. Several witnesses for the defendant were examined, some under Commission, others before the Court itself. Each litigant had full opportunity of presenting her (or his) whole case to the Judge, and of answering and commenting upon the case opposed to it. The matter was substantially one of account, the decision one upon evidence. The defendant was necessarily well acquainted with the sources and extent of the plaintiff's income; he must be presumed to have been well acquainted with her ordinary expenditure, and any special deviations from it would not be likely to have escaped his notice or to have been unknown to him. Her case, as originally framed, was either mistaken in point of statement or details, or false as the defendant represented it. No Court could properly decide such a case without a full examination of the whole evidence on both sides. The plaintiff's suit, if false, must have been false to her knowledge.

The Principal Sudder Ameen made a careful and exact abstract of the whole case and of the statements on each side; he then carefully examined the whole evidence; he commented on the conduct of the parties and the probabilities which the case afforded of the truth of the claim.

The defendant had objected that the plaintiff's demand belonged to a foreign forum—that of Oude; the Judge described the claim as a continuous claim, existing after the extinction of the Kingdom of Oude, and the subject of the jurisdiction of his own Court, for the reasons which he assigns in support of that jurisdiction. The very objection treats the demand as extending over a considerable time, and makes no distinction between the years covered by C and the subsequent time. On the merits of the case, he remarks on the defendant's conduct as evasive and inconsistent, he considers the credit due to the witnesses, and adjudges the case against the defendant for the full balance claimed.

Amongst the grounds of this decision are the following: That the document C was in the defendant's handwriting, and constituted certain items of charge against him: that the document A also constituted items of charge and discharge, and that there was no reasonable evidence that either document was imperfect, or superseded by any subsequent account; that the defendant stated himself to be a creditor of the plaintiff on the whole account, and that his written letter E was inconsistent with that statement: that he declared certain vouchers to be in his possession, and said that he would produce them, but failed to do so, and did not account for this omission; that he had gone into evidence to prove that the balance shown by the document C was covered by subsequent payments on account of the plaintiff by defendant, but that the evidence was unsatisfactory to the Court on several grounds which are fully and particularly detailed in the judgment. The largest of these items in discharge of the balance shown by C, *viz.*, 50,000 rupees given to the Begum Amanee, the defendant admits, must have been directed by a written order of the plaintiff, whilst one of the witnesses professes to know that an oral order was given. The Begum Amanee herself is not examined as to this, and nothing is urged to explain this omission; the order is not produced, and it is not shown that the payment of so large a sum was not provable by better evidence than that produced, of the value of which the Ameen must have been a competent Judge. The Begum's receipt also was not produced. The Court added that the item as to the gold utensils was advanced for the first time at a late stage of his examination, and was supported by very meagre evidence. The witnesses whom the defendant adduced the Judge described as mean persons, and on examining the evidence, most of these witnesses,

it will be seen, give no dates, and the absence of dates to the transactions to which they depose fails to point sufficiently the items of discharge to the times and items of charge. The mere statement of an accounting party that his vouchers are destroyed was not readily to be credited. The conclusions, therefore, of fact, of the Principal Sudder Ameen, seem to their Lordships to be fully sustained by the evidence.

The judgment of the High Court has failed to alter this opinion.

The question for decision in the High Court was one of fact. The Judges state that the question principally urged before them was the inconsistency of the plaintiff's then present case with that first set up by her. In support of this objection on appeal, the discrepancy between the documents A and C seems to have been pressed on the attention of the High Court. If the case could be viewed as one limited to what these documents alone disclose on a comparison between them; if the memorandum C were, as the High Court describe it, a loose memorandum; if the acts of the plaintiff in producing C were fit to be viewed as a substitution of a new case, as an afterthought, and not as a production of evidence always in her favor in support of her case as she meant to prefer it: then the conclusion of the High Court, respecting that part of the finding which disallowed the balance established by document C, would be one the correctness of which could not be impeached. In coming to its conclusion, the High Court seems to have based its decision on a distrust engendered by the inconsistency between the first and the amended statements of the plaintiff—that is to say, on a part only of the whole evidence.

The High Court thought it highly improbable that a lady of her rank, a person competent herself to the transaction of business, and having competent persons in her service, should in an honest case make so erroneous a statement of her case as that which it presented according to her evidence. But the Court failed to remember that this lady was a purdah-nusheen; that she and her immediate servants were new to Bengal and its Courts; that between a purdah-nusheen lady and her vakeels there is intermediate agency; and that mistakes may thence arise, and that one mistake had certainly occurred. It might further be urged that the hypothesis that her case was a false one, and her use of C an afterthought, involved much more serious blundering in support of a false case, usually not preferred without previous concert and deliberation; for as the document itself was genuine, and showed a balance in her favor, and was throughout her mainstay, that, rather than A, was likely to have been put forth.

The defendant answered to C as to a correct document charging him in the usual course of dealing, but insisting that it was discharged. The High Court did not review the finding of the Court below on this part of the evidence of discharge, or declare any opinion of its own that the items of discharge were established. The mere omission of an accountable party framing his own account, to carry forward into a new account a balance against himself existing in a former one, could constitute no evidence in his own favor. To prove the extinction of the balance, such omission might be considered in conjunction with other evidence in the cause. Their Lordships cannot support the reversal of the finding of the Court below on the presumption which the High Court acted on in this case, and treated as fatal to the plaintiff's recovery, *viz.*, that founded on the inconsistency between the original and the subsequent statement of the case. Unless the defend-

ant's case of discharge be true, the imputations on that of the plaintiff fail. The Court of first instance thought that case of discharge untrue; and the Court which reversed its judgment has left its remarks unanswered, and its conclusions unrefuted. It has reversed, on suspicion founded on only a part of the case, without a review of the whole evidence, a judgment carefully prepared on a searching examination of that evidence, and apparently supported by it. Their Lordships, therefore, think that the original judgment should be restored; that the judgment of the High Court should be reversed, with costs, including those of her appeal; and they will humbly advise Her Majesty accordingly.

The 26th July 1870.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Resumption—Chakeran or service-lands—Section 41, Regulation VIII. of 1793.

*On Appeal from the High Court at Calcutta.**

A. J. Forbes

versus

Meer Mahomed Tuquee and others.

The lands, the subject of this suit, being certain mehals comprised in a zemindaree, were granted by the Government, before the Permanent Settlement, to the ancestors of the persons through whom the defendants claim, as a hereditary jageer tenure, in consideration of services which they rendered to the Government in repressing the incursions of wild elephants upon the cultivated lands of the zemindaree. The plaintiff, in 1851, purchased the zemindaree from an auction-purchaser at a sale for arrears of Government revenue, and he sued to resume the lands in the jageer, which had been held rent-free by the defendants, and those from whom they claim, for nearly a century.

HELD that, notwithstanding that the lands were the subject of assessment when the zemindaree was permanently settled by the Government with the zemindar in 1802, the plaintiff had no right to assess these lands. The settlement between the Government and the zemindar could not affect the rights of the jageerdars, whose rights were derived, not from the zemindar, but from the supreme authority in the State. The lands held on this tenure, even if chakeran, differ from the ordinary chakeran lands contemplated by Section 41, Regulation VIII. of 1793. The jageerdars are bound, if occasion required it, to protect the pergunnah from the incursions of wild elephants, and may forfeit the tenure if they wilfully fail in the performance of that duty, but are not liable to have their lands resumed, because there is no longer any occasion for the performance of the particular service.

THE appellant is the owner of the zemindary right in Pergunnah Sultanpore and Talooqua Remae in Zillah Purneah. These mehals were purchased by him in April 1851 from one Pertaub Singh, who, on the 24th of July 1850, had purchased the estate, of which they then formed part, at a sale of arrears of Government revenue; and the estate so purchased by Pertaub Singh had once been part of a far more extensive zemindary, which, in 1802, was first permanently settled with one Ranee Indrawatee.

In July 1862, the appellant commenced the suit which has given rise to this appeal, in which he claimed against the respondents, first, the right to resume 9,000 beegahs of land held by them upon the tenure which will be afterwards considered; and, secondly, the right to recover from them 2,000 beegahs of land, described as Towfeer or excess, being lands which, he alleged, they had wrongfully acquired under color of their tenure by gradual encroachment or otherwise.

The Court of first instance allowed the first of these claims, but rejected the second. On appeal and cross-appeal, the High Court of Calcutta rejected both claims, reversing the decree of the Court below on the first and affirming it on the second, and dismissed the suit. This appeal again raises both questions.

The claim of Towfeer may be shortly disposed of. It was very faintly pressed at the bar. Mr. Leith, it is true, relied upon a passage in the Ameen's report at page 73 of the record; but the Principal Sudder Ameen was of opinion that, on the Ameen's report, taken as a whole, no excess of land was shown to be in the respondent's possession; but that, on the contrary, they appeared to hold less than 9,000 beegahs in all. The High Court has confirmed that decision, and no grounds have been laid before their Lordships which would justify them in disturbing the concurrent finding of the two Indian Courts on what is, in fact, a mere question of boundary and measurement.

* From the judgment of Bayley and Phear, JJ., in Regular Appeal No. 313 of 1864, dated 31st March 1865—not reported.

In dealing with the question of resumption, their Lordships desire to state, in the first place, the conclusion to which they have come touching the origin and duration of the tenure on which the lands sought to be resumed are held.

The following is its history: In 1775 the lands in question were granted by the sunnud at p. 100 of the record to Meer Syud Ally, a Persian, who had done, and was doing, good service in repressing or preventing the incursion of wild elephants coming from the Morungs or Terai upon the cultivated lands of Pergunnah Sultanpore. This first sunnud contained no words of inheritance. In 1786, the Meer being then dead, the Government granted the second sunnud in favor of Meer Abdool Hossein Khan and Meer Ally Rezza, who represented themselves to be the elder brother and nephew of Meer Syud Ally, and, as such, his heirs. This sunnud does contain words of inheritance, and made the grantees and their descendants fixed jageerdars. It is not shown what, if any, interruption of possession took place between the death of Meer Syud Ally and the date of this second sunnud. In February 1804, Mirza Mahomed Saduk Goolstana and others brought a suit against Meer Ally Rezza and the widow of Meer Abdool Hossein, alleging that they were the two heirs of Meer Syud Ally, and that the grantees under the second sunnud had falsely pretended to be his brother and nephew. The first decree in this suit declared the plaintiffs to be the true heirs of Meer Syud Ally, and directed the defendants to relinquish the possession and enjoyment of the jageer to them, treating, apparently, the former as trustees for the true heirs. On appeal the Provincial Court affirmed this decree, and dismissed the appeal. But considering, apparently, that it could not, without the santcion of Government, transfer the benefit of the second sunnud from the persons named in it to the true heirs of Meer Syud Ally it, directed that the possession of the former should remain undisturbed "until an order should be issued from head-quarters"—meaning the Governor-General in Council.

In consequence of these decisions, the third sunnud was granted on the 10th of January 1807. It recited the two former sunnuds, and that by the decrees in the last-mentioned suit the heirship of the plaintiffs had been proved, and the said jageer continued to the plaintiffs. And it went on to state that, under these circumstances, the Government had, on the application of Meer Mahomed Saduk, confirmed the said jageer lands to the plaintiffs, from whom the present respondents derive their title.

Under the three sunnuds, the lands comprised in the jageer have been held rent-free for nearly a century.

One of the questions raised in the suit is, however, that, under the circumstances above stated, the title of the respondents must be held to have been first created by the third sunnud in 1807; and that, inasmuch as the zemindary, of which Sultanpore was then part, was permanently settled in 1802, the appellant, who claims through an auction-purchaser, is entitled under Act I. of 1845 to set aside the tenure as one created within his zemindary since the perpetual settlement.

Their Lordships are of opinion that this contention cannot be supported. It is perfectly clear that the effect of the second sunnud was to create, sixteen years before the settlement of the estate in 1802, an hereditary jageer-tenure; and that the settlement was made upon the assumption of the subsistence of that hereditary jageer. The grant was perfectly good against the zemindar, who could not have come into Court to set aside the second sunnud, on the ground that the grantees had obtained it from Government by fraud or misrepresentation. Nor, in fact, has any Court or any authority ever revoked or set aside that second sunnud. The decrees in the suit between the real and pretended heirs of Meer Syud Ally made (subject to the sanction of Government) the latter trustees for the former, and directed them to relinquish the enjoyment of the lands accordingly. And the Government, by the third sunnud, sanctioned that arrangement, and confirmed the title of the true heirs. On this view of the transaction, the action of Government, and the inaction of the zemindar in 1807, become intelligible. For it is not to be presumed that the Government would have assumed the power of granting a new tenure in a settled zemindary, or that the zemindar would have submitted to such an invasion of his rights. Their Lordships, therefore, concurring on this point with the High Court of Calcutta, are of opinion that the jageer of the respondents must be held to be a tenure created before, and subsisting at the time of, the decennial settlement; and consequently that it is within the exception of the 26th Section of Act I. of 1845, whether the appellant has or has not in respect of his estate the powers of an auction-purchaser under that Act (as to which their Lordships express no opinion), and whether the lands comprised in it were or were not part of the zemindary settled in 1802.

Has, then, the appellant established his right to resume the lands comprised in this ancient jageer? His case is that they are within the limits of the zemindary settled in 1802; that as between the Government and the zemindar they were then treated as mâl or revenue-paying lands, and a revenue assessed upon them, although they were then, and have ever since been, held rent-free as between the zemindars and the jageerdars; that under these circumstances they must be deemed to be chakeran or service-lands; and that the services on which they are held being no longer required or performed, the right of the zemindar to resume them has accrued.

Some attempt has been made on the part of the respondents to show that the lands comprised in the jageer are not even within the geographical limits of the settled zemindary, or, at least, have not been proved to be so. But, looking at the pleadings and the evidence, their Lordships are of opinion that upon this point the appellant has established his case. He has given strong *primâ-facie* proof of the fact, and there is no evidence at all to the contrary.

If this be so, the next question is, how were the lands dealt with on the occasion of the settlement? They were then unquestionably held rent-free under a subsisting sunnud, and the presumption is that they would be treated as lakheraj. In that case no revenue would be assessed upon them Nor would the zemindar acquire any right to question the validity of the title on which lakheraj land of that extent was held? That question could only be raised by Government; and having been decided adversely to Government in 1845, the title of the respondents would now be indefeasible.

On the other hand, it seems to follow that, if on the occasion of the settlement revenue was assessed on these particular lands as between the Government and the zemindar, they must, since they produced no money-rent payable to the zemindar, have been treated as in the nature of chakeran lands within the meaning of the 41st Section of Regulation VIII. of 1793, upon the notion that the services to be performed by the tenant were equivalent to rent payable to the zemindar. It is therefore a very material issue whether, in point of fact, these lands were, on the occasion of the settlement, treated as part of the mâl assets of the zemindary.

Their Lordships are not prepared to say that the appellant has established the affirmative of this issue beyond reasonable doubt.

He relies mainly on the evidence afforded by the Quinquennial Register, and the proceedings in the resumption-suit brought by Government against the respondents, or those through whom they claim, which was finally determined in 1848.

Their Lordships do not concur with the High Court in thinking that the first of these documents has not been properly authenticated. The learned Judges of that Court seem to have confined their attention to the extract at page 92 of the Record, and to have taken no notice of the fuller document at page 122, which not only bears the Collector's seal, but is shown by the indorsements upon it to have been the identical paper produced by the jageerdars in the resumption-suit. The appellant's case is that the lands in dispute are included in the villages Talooka Ramgunge and Mouzah Gurka, part of Talooka Remae, on which a revenue of 850 rupees appears to have been assessed.

Their Lordships cannot assent to the proposition of the learned Counsel for the respondent, that Talooka Remae is something different from Pergunnah Sultanpore, and that the appellant is bound to show that the lands in question are mâl lands within Sultanpore Proper. They think it is proved that Talooka Remae was part of Pergunnah Sultanpore in the larger sense of that denomination. Nevertheless, if the appellant's case depended solely on the Quinquennial Register, their Lordships would doubt whether it had been sufficiently proved that the lands in question were subject to the assessment. For even if it be assumed that the different villages or divisions of land mentioned in the Chuckbund and Ameen's Report are comprehended within the denominations of Talooka Ramgunge and Gurka, it seems consistent with that register that those mouzahs may have included the 9,000 rent free beegahs in excess of the 5,819 beegahs mentioned in it, as the lands in respect of which the revenue of 815 rupees was assessed. But it is argued that the identity of the jageer lands with the mâl lands in Talooka Ramgunge, &c., has been admitted by the respondents, or those through whom they claim in the resumption-suit. The question then arises, what is the weight to be given to that admission?

Their Lordships cannot agree with the learned Judges of the High Court in treating it as a mere admission or argument at the bar by a mooktear whose authority to make it is not proved. It seems to them to be the foundation and substance of at least one of

the defences deliberately pleaded by the jageerdars in the resumption-suit to the claim of Government. It was not the sole defence, nor can the ultimate decision of the case be said to proceed upon a finding by the Collector that the lands were mâl and not lakheraj. For he seems to have held that the proof of the sunnud was of itself a bar to the claim of Government in that proceeding. Nevertheless, the admission appears to their Lordships to be one of a grave character; and though it is not to be treated as an estoppel, it at least casts upon the respondents the burthen of explaining it, and of showing that what was then deliberately asserted was not the fact. The onus then of showing that the jageer lands are something distinct from the mâl lands of Talooka Ramgunge and Gurka is shifted upon them. And this fact they have not attempted to establish by direct evidence. They have been content to rest on the alleged insufficiency of the proof on the other side. Their Lordships, therefore, are constrained to say that, though the evidence before them is not conclusive, the preponderance of it is in favor of the allegation that the jageer lands were made the subject of assessment in the settlement between the zemindar and the Government in 1802.

But is it a necessary consequence of this finding that the appellant is entitled to resume these jageer lands? His right to do so must depend on the nature of the tenure; and it is worthy of observation that, so little value did the zemindar in possession between the years 1835 and 1845 attach to this supposed right of resumption, that he did not intervene, as undoubtedly he might have intervened, to resist the then claims of Government.

The settlement between Government and the zemindar cannot affect the rights of the jageerdars. The lands held on this tenure, even if then treated as in the nature of chakeran lands, differ widely from the ordinary chakeran lands contemplated by Section 41 of Regulation VIII. of 1793. They seem hardly to fall within the description of "lands held by a public officer or a private servant in lieu of wages." Neither Meer Syud Ally nor his descendants were by the sunnuds appointed to an office known as "elephant hunter for the pergunnah," or by any like description. Still less ground is there for saying that they were the private servants of the zemindar. Their right, whatever it be, was derived, not from any zemindar, but from the supreme authority in the State.

Their Lordships have carefully considered the various authorities cited at the Bar, but they can find none which expressly govern the case.

Of those which have been decided by this Committee, it is sufficient to say that in the Madras case, in 7 Moore I. A., p. 128,* the question really discussed and decided was, whether the tenure in question was enam or amaram, it being established and almost admitted that, if it were the latter, it was resumable at pleasure; and the case in the 10 Moore I. A., p. 16,† decided that lands held in lieu of remuneration by a village-chowkeedar, though unquestionably chakeran within the meaning of Regulation VIII. of 1793, Section 41, were not resumable at the pleasure of the zemindar, if the public, or the Government representing the public, had an interest in the appointment of the chowkeedar.

The Indian authorities are not quite consistent with each other; but taken altogether, they do not appear to their Lordships to establish the right for which the appellant contends in this case.

In the case of the 11th May 1857,‡ the chakeran lands had been assigned for the maintenance of a chowkeedar, and the existing chowkeedar had no connection with them, being otherwise remunerated. Other provision had, therefore, been made for the service to be rendered in return for them.

In the case of the 30th November 1857,§ the tenant whose services had been dispensed with or had otherwise ceased, was clearly the mere private servant of the Maharajah (the zemindar). He was the person bound to perform all the leather work required in the family.

The case of the 11th December 1857‖ was one of ghatwallee tenure; and one of the learned Judges who decided it (Mr. Justice Trevor), in the subsequent case decided by him and Mr. Justice Campbell, 3 Weekly Reporter, p. 87, and again in the case decided by the Full Bench, 6 Weekly Reporter, p. 203, concurred in the ruling that all that was laid down in the first-mentioned case, beyond the decision that the zemindar was entitled to resume when the ghatwal had actually failed to render the service which he was bound to

* 4 W. R., P. C., p. 121.
† 1 W. R., P. C., p. 26.
‡ S. D. A. Decisions, 1857, p. 786.
§ S. D. A. Decisions, 1857, p. 1772.
‖ S. D. A. Decisions, 1857, p. 1812.

render, was mere *obiter dictum*. Both these cases in the Weekly Reporter support the contention of the respondents rather than that of the appellant. Both also relate to ghatwallee tenures. The case decided in 1868, 1 Bengal Law Reports, p. 120,* is to the effect that, the Government having concurred in the suppression of the office, the son of a ghatwal, who had held his office, not by hereditary right, but on the appointment of the zemindar (though practically the son had continually been appointed in succession to the father), could not successfully sue to recover lands which the zemindar had resumed.

Their Lordships do not think it necessary, for the determination of this case, to examine minutely these decisions touching the ghatwallee tenures. And they abstain the more willingly from doing so, since it was stated at the Bar that some of them are likely to be brought regularly before this Board by appeal. But they cannot but express their concurrence in many of the general principles laid down by the Chief Justice in the case in the 6th Volume of the Weekly Reporter.

Another case cited is that at p. 84 of the Sudder Dewanny Adawlut Decisions for 1858. The property, as in this case, was a jageer. The decision did no more than remand the case for re-trial, with the following intimation of opinion: "The issue raised by the plaintiff is not solely whether the grant to the ancestor of the defendant is hereditary, but also whether it has any condition of service annexed to it or not; and if it has, whether that service be still performed. Should a condition of service be annexed to the grant, the hereditary nature of the grant will not be the test of its present validity, but the performance of the required service; and if this service be not performed then, notwithstanding its hereditary nature, the tenure will be liable to resumption."

To this ruling, if it be understood to mean only that where continued performance of certain services is, upon the true construction of the grant, the condition on which the lands are to be held, their Lordships conceive no exception can be taken. But if it means that, whenever service enters into the motive or consideration for a grant, the grant will become void, if for any reason the service ceases to be performed, their Lordships think that the proposition is far too wide.

* 10 W. R., p. 179.

The conclusion which they would draw from the decided cases, as well as from the reason of the thing, is that in every case the right to resume must depend in a great measure upon the nature of the particular tenure, or the terms of the particular grant.

They agree with the observation of Mr. Justice Jackson, 6 Weekly Reporter, p. 209, that there is a clear distinction between the grant of an estate burdened with a certain service, and the grant of an office the performance of whose duties are remunerated by the use of certain lands.

They have already stated that, in their opinion, the grant in question does not fall within the latter category.

Assuming it to be a grant of the former kind, their Lordships do not dispute that it might have been so expressed as to make the continued performance of the service a condition to the continuance of the tenure. But, in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that the service ceasing, the tenure should determine.

It appears to their Lordships that neither the first nor the second sunnud is a grant of the kind last mentioned. Each proceeds in part upon the past services of Meer Syud Ally; nor is the consideration, so far as it is unexecuted wholly the keeping up of a body of men to repel the incursions of the elephants, for the grantees are also to cultivate the waste land. The latter stipulation was probably designed to protect the already cultivated districts of Sultanpore, by interposing a further belt of cultivation between them and the forest. Hence the grant may be said to have been made *pro servitiis impensis et impendendis*—partly as a reward for past, partly as an inducement for future services. Again, neither sunnud contains any words which expressly import that the tenure shall cease if and when any of the services cease to be performed. Such a provision is something very different from one which merely casts upon the grantee the performance of certain duties so long as they are necessary. The former makes the grant determinable when there is not further occasion for the services. But, in the latter case, if the operation of any natural cause (as, *e. g.*, the progress of cultivation which has caused the wild elephants to cease out of the land) removes the necessity for the services, the

grantee will hold the lands practically freed from the condition originally imposed upon him. Their Lordships are, therefore, of opinion that, upon the true construction of these sunnuds, the grantees, though bound to protect the Pergunnah from incursions of wild elephants so long as those incursions lasted, and though still bound to do so should, by any chance, those incursions be renewed, and though they may be liable to forfeit the tenure if they wilfully fail in the performance of this duty, are not liable to have their lands resumed because there is no longer any occasion for the performance of this particular service, "there being now no fear of the depredations of elephants in those places."

Had this been a grant reserving to the zemindar a small money-rent, as well as the services, if indeed the latter are reserved to the zemindar, their Lordships would have had no doubt upon the case. But it seems to them that the unexplained anomaly of making mâl lands rent-free in the hands of the jageerdars does not affect the construction of the sunnud or the rights of the parties.

It emphatically lay upon the appellant—who is seeking to dispossess or to rack-rent the respondents, who by themselves or their ancestors have brought these lands into cultivation, and enjoyed them for so long a period; who must have been permitted by former zemindars to continue undisturbed in such enjoyment long after the incursion of wild elephants had become mere matter of tradition—to make out a clear title to resumption. In their Lordships' opinion, he has failed to do so; and therefore, though they dissent from the particular grounds on which the High Court has dismissed the suit, they think its dismissal was right, and ought to be affirmed. They will, therefore, humbly advise Her Majesty to dismiss this appeal with costs.

The 29th July 1870.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Hindoo Law—Hindoo family—Compromise.

On Appeal from the High Court at Madras.

Sri Gajapathi Radhika Patta Maha Devi Garu

versus

Sri Gajapathi Nilamani Patta Maha Devi Garu;

and

Sri Gajapathi Radhika Patta Maha Devi Garu

versus

Sri Gajapathi Hari Krishna Devi Garu.

The principle laid down by the Privy Council in Abraham *versus* Abraham, that a family ceasing to be Hindoos in religion may still enjoy their property under the Hindoo Law, is applicable, *inter se*, to the members of a Hindoo family entering into possession of an estate under a compromise by which the members divided the estate among themselves on certain terms.

THIS is an appeal from a decree of the High Court of Judicature at Madras.

The property which is the subject of litigation is called Tekaly talook. This property was acquired by purchase by one Pathmanaba, described hereafter as the common ancestor. A lady, described as his principal wife, by whom he had no issue, survived him. He left also two sons by different mothers. Between the elder of these sons, named Gopinada, and his father a quarrel of long standing existed, which continued to the time of the death of the latter. Gopinada was at that time 36 years old; he did not live with his father, and was absent at the time of his death.

The common ancestor left also a younger son, named Krishna, who, at the death of his father, was a child about 7 years of age. This boy appears to have been treated by his father as legitimate. The legitimacy of both sons was doubted by the Collector of the district, who, at the death of their father, placed the above-described widow in possession of the talook by way of a temporary arrangement for the management and protection of the family-estate, and with a view to the interests of the Government in the collection of the revenue.

The doubts about the legitimacy of these sons, which the Collector entertained, may have had their origin in the nature of the marriages contracted by the common ancestor with their respective mothers, which were in the Gandharva form, and in the alleged difference of caste between the common ancestor and his wives, the mothers of these sons. This irregularity was supposed by some persons to render the progeny of such marriages illegitimate.

Whatever was the origin, and whatever the weight of these doubts concerning the legitimacy of the sons, or of either of them, it is at least certain that they were grave enough to lead to the family-arrangement about to be stated.

Supposing the sons, or either of them, to have been legitimate, the widow would have been entitled to maintenance only. Had both the sons been illegitimate, their claim, unless some special custom governed the case (which is not in proof), would have been to maintenance only. In this last-named case, the widow would have had the ordinary estate of a Hindoo widow.

As each son asserted his own legitimacy, and denied that of the other, the dispute, unless adjusted and settled amicably, would probably have led to litigation; and as the estate was already an embarrassed one, the Collector, not without reason, represented such litigation as likely to involve the ruin of the family.

The management of the estate under the widow was not prosperous. The Collector proposed to her to place the estate under the management of the elder son, of whom he appears to have entertained a favorable opinion. The widow is described as at enmity with the elder, and favorable to the younger son. The Collector's advice, which was undoubtedly directed to the preservation of the family-property, was adopted; and if reluctantly adopted, it was nevertheless acted on by the members of the family. The Collector had advised a compromise, and in consequence of this advice and suggestion, the lady addressed a petition to the Collector, dated the 26th November 1838, which is set out in the third page of the case of the appellant A, the sole appellant before their Lordships.

In her petition she states that she has that day made a settlement, reconciled both her sons, and caused an interchange of agreement between them to the effect that they are equally entitled to the talook which belonged to her husband. Her petition then proceeds to state further terms of this arrangement, to the effect that the management should be held by Gopinada until Krishna attained his majority; that, on the younger attaining his majority, the elder should give up a moiety to the younger as his own and retain a moiety for himself. It prays that the sale of the zemindary may be stayed, and possession be given to Gopinada of the talook. The petition also contains a statement of the allowances to be made to herself and the sons, and of some minor matters not material to the decision of this appeal.

This agreement constituted the basis of the compromise suggested; it amounted to a family-arrangement entered into for the preservation of the estate; and though the younger son was minor at the time, he ratified it at full age, and became bound from its date by all its terms.

The construction and effect of this agreement will be afterwards considered.

The agreement was acted upon until the younger son reached his majority. That was the period originally fixed for the actual division of the estate and its separate possession in moieties. At that time, the actual division of the estate was judged by the sons to be inexpedient, and it was further postponed. Another document was at this time executed between the two sons, bearing date the 24th July 1844. This document states that disputes existed between them respecting the ancestral property in cash, the division of the talook, and the accounts of receipts and disbursements of the talook. It states that they had addressed several urzees (petitions) to the Collector, that he had explained to them the circumstances, and then it proceeds to state "the terms for our future guidance."

This document does not state any new compact or agreement to have been formed to vary the essential terms of the original compromise, but seems rather to have been designed as supplemental to it, and made with a view to carry out its provisions conformably to the Collector's explanations with such variations of detail as the convenience of the parties required. After stating certain inconveniences which would result from an immediate division of the talook, it provides "that the division should be postponed at present;" but the reason assigned is to avoid the probability of loss from a present division.

Consequent on that postponement it contains some provisions as to equality of rank and dignity between the sons whilst the elder retained the ostensible headship; but it provides that the affairs of the talook or zemindary should be managed by both unanimously.

A document of this character between natives should not be construed narrowly, by a strict interpretation of the literal meaning of the words. Its object and general spirit are the best keys to the interpretation of language probably not very carefully studied.

The second clause of this document, if it were construed literally, would appear to give the talook, in the event of the death of the younger son, to such of the lawful widows as shall have male issue; but as such a disposition would at once contravene the ordinary rules of devolution of Hindoo property, and not be in accordance with the usages of Hindoos, and as there is no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers is obviously inadmissible.

The document provides also that Krishna, after the death of his elder brother, shall be recognized as the zemindar of the whole talook.

This provision might take effect without any substantial alteration of the terms of the first agreement. It is consistent in its terms with a custom prevalent in some properties in this part of the country. The headship in such cases is constituted in one member of a family, whilst the beneficial enjoyment of the proceeds may be shared with the other members. It by no means follows, even from the literal terms of that Section, that either brother deliberately agreed to exclude his own male issue, if he had any, as sharers, during the survivorship of the other brother. This clause contains a further provision, about which considerable doubt has been entertained both as to the true translation of the words and its legal effect. This clause states an alternate contingent provision consequent on the failure of legitimate male issue by the widows of both sons; it provides that the talook shall be divided in equal shares, if there be sons born out of wedlock. This agreement further provides that 100 rupees a month shall be paid out of the zemindary to the family, which shall have no title to the talook; but it contains no declaration of the cause of cesser of interest, so as to show in what event they thought such exclusion might arise. It is to be observed further that there is no express gift to illegitimate issue, and that the time of the division of the talook on that contingency is not defined.

The younger predeceased the elder son. The elder retained the headship and property of the family. There was no one entitled to dispute it with him, as Krishna left no male issue, unless the family had been a divided one, in which case the widow of the latter would have been entitled to her husband's share. She does not appear to have preferred any claim to it during the elder son's lifetime; but no inference unfavorable to her subsequent claim should be drawn from that circumstance alone, as Hindoo females are often ignorant of and unable to assert their rights.

On the death of the elder son, a dispute arose as to the possession. His widow was placed or preserved in possession of the estate. This step decided nothing as to her proprietary right. As the widow of the surviving brother, apparently the sole proprietor, she was rightly placed in possession.

Her title to retain and enjoy the sole possession and usufruct was disputed by the widow of Krishna, who claimed a moiety as the widow of a deceased brother in a divided family. She preferred her suit, numbered 72 of 1861, against the present appellant, the widow of the elder son.

Another suit was brought about the same time by Hera Krishna against the same defendant, which suit is numbered 62 of 1861. The title was stated to be as son of the last owner, the elder son. He claimed the whole property, stating his title, either as a legitimate or as an illegitimate son, to be preferable to the alleged title of either widow.

In No. 72, the plaintiff stated the property to be divided, and that allegation was one necessary to her recovery.

In No. 62, the plaintiff declared the property to be joint, and to have become solely owned by his father by survivorship.

The Judge dismissed both suits.

Both plaintiffs appealed to the High Court. The present appellant, the original defendant in both suits, was respondent in both appeals.

The appeals were allowed by the High Court, which reversed both decrees below, and made a decree declaring each widow and

the son Hera Krishna, whom it found to be illegitimate, to be entitled in equal shares, together with any other illegitimate sons of either brother. It directed the suits to proceed as an administration-suit, and directed inquiries as to the illegitimate issue. The result of this inquiry has been that two other illegitimate sons having been reported to exist, the estate has been decreed to be divided into five shares, to be enjoyed equally by the two widows and three illegitimate sons respectively.

From this decree the widow of the elder son, the original respondent in each suit, has alone appealed.

Much of the evidence which engaged the attention of both Courts below may be dismissed from the consideration of their Lordships.

The evidence as to the nature of the marriages, and the rules or laws of caste, together with the consideration of the effect on legitimacy of irregular marriages between persons of unequal caste, is, in the view which their Lordships take of this case, unnecessary to be stated or observed upon.

The litigation was confined to persons, all of whom claimed under the sons respectively. The estate was taken possession of, and enjoyed by, these sons under the compromise or family-arrangement before stated. That compromise proceeded on the basis of legitimacy.

Whether both sons were legitimate, or only one legitimate, and to whichever of the two that status might really attach, was a question no longer material to the consideration of the rights devolving to persons taking under that compromise and family-settlement, by which the assumed was to be taken as the real state of the family.

The case of Abraham *vs* Abraham* shows that a family ceasing to be Hindoos in religion may still enjoy their property under the Hindoo Law; and the same principle is applicable, *inter se*, to the members of a Hindoo family entering into possession of an estate under such a compromise as that which took place in this family.

The widow, though in one passage she terms the zemindary her zemindary, as in a certain sense it was, did not intend to convey, and did not, in fact, convey, the property to the sons; she executed no deed nor instrument of gift whatever. Neither son admitted his illegitimacy, nor consented to take a gift on that admission. The widow accepted maintenance and surrendered possession. Possession was taken by her sons upon her abandonment of the estate; and this possession was taken also under their own agreement, which, as well as her petition which referred to it, proceeded on an acknowledgment common to all three of an antecedent right in both the sons whom she describes as "her sons." She had no estate entitling her to be an absolute donor, in any view of her position. Whatever effect this transaction might have as against heirs of the common ancestor, after the death of the widow, it bound her and the sons and all claiming under them.

These instruments do not purport to give any new quality of descent to the talook, even if such quality were capable of being derived from the agreement of two or more owners. There is no evidence to show that the nature of the estate and its descendible character were meant to be affected by this transaction.

The case depends entirely on the construction of the petition and the agreements before referred to. The talook itself is not the sole subject of the arrangement. A reference is made to one item—ancestral cash, as forming an element of dispute, and to other articles of property. The decision appealed against has given neither widow a preference over the other. In the opinion of their Lordships, the High Court erred in making the illegitimate sons sharers with the widows, and their Lordships have now to consider the more difficult part of this case—whether the widow of the elder and surviving son has a title by survivorship to the whole talook.

If this case could rightly be viewed, as it was viewed in the Court of first instance, as one governed by the ordinary presumption in Hindoo Law, that family-property is joint, and by the ordinary law of the place where this talook was situate, as to the devolution by survivorship under such failure of male issue as occurred in this case, the decision of it would be attended with no difficulty, and the decree of the Court below dismissing the widow's suit would have to be restored; but, upon this subject, though not for the reasons assigned by the Judges of the High Court, their Lordships think such conclusion inadmissible.

The property was held under a family-arrangement which silenced disputes, but

* 1 W. R., Privy Council, p. 1.

contained no admission that such disputes were without foundation.

Neither son admitted that they were, *inter se*, antecedently heirs to each other in the then state of the family, nor admitted a right of succession of either to the other beyond that which this arrangement itself specifies.

It is not stipulated in terms that the property shall be enjoyed as that of a joint undivided Hindoo family; nor is any succession by widows on the true construction of the instruments provided for. The documents in question contain terms some of which are consistent, and others inconsistent, with the rights to the possession, use, and enjoyment of undivided estate.

The first agreement contains, in the first condition, words that import division and consequent management. This division is not in terms referred to a time subsequent to the commencement of the management spoken of. The next sentence clearly points, on the majority of the younger son, to an actual division and a possession in moieties. It provides for each son (the younger being a mere child) an equal present income by way of maintenance, and further, that each should pay out of his own income his own expenses of maintaining his own servants and relations; and by the last article it provides for an equal division from that time of such surplus as might exist after defraying all the outgoings spoken of, which are to fall on the common money. These provisions are not such as would be applicable to a joint Hindoo family property. On the other hand, it seems to have been supposed by both sons that a survivorship by one would or might exclude the family of the other, and there are several other provisions which, though not absolutely inconsistent with mere managership, more resemble that of the constituted manager of a joint Hindoo family.

The second agreement recites that disputes had arisen concerning the ancestral property in cash, the division of the talook, and the accounts of the receipts and disbursements of the talook; it proceeds to state that "the Collector having sent for both of us to the nuzar, and communicated the circumstances to us, we understand the same; and the terms for our future guidance are hereunder specified." This language is certainly more consistent with disputes arising out of the existing arrangement than with a substitution for it by the sons alone, of their own authority, of some new terms of compromise. The disputes seem also to imply some precedent division of property constituting rights in a surplus after receipts and disbursements are accounted for. So far they are consistent with the provisions of the first agreement as to the division of any surplus. Again, the 5th Article, which relates to future debts; the 6th, which provides for the division of future surplus profits of the talook; and the 7th, which refers to a settlement in respect to the ancestral money and the money already acquired from the talook, and implies a division of these funds, are all inconsistent with the hypothesis that the brothers were, or considered themselves to be, members of an undivided Hindoo family.

Nothing is stated to show that the talook must be regulated by one law of succession and the rest of the property by another. It seems, therefore, to their Lordships more proper to consider the provisions as to the talook as regulated by its peculiar nature, and influenced by the necessities of its proper management, and the maintenance of the dignity attached to it, rather than as furnishing alone the rule for the solution of the difficult question to be determined between the two widows.

The construction of these documents is beset with considerable doubt and difficulty; but their Lordships are, on the whole, of opinion that, although they postpone indefinitely the actual division of the talook by metes and bounds, and provide for its joint management, and, in certain events which have not happened, for its devolution otherwise than by the law which regulates the succession to separate property, they nevertheless contemplate its enjoyment in other respects by the two brothers as by members of a divided family, and the actual division of other family-property. Their Lordships accordingly think that the finding of the High Court that the brothers were not members of a joint and undivided Hindoo family must be taken to be correct. It follows that, at least wherever the agreements have not specifically provided for the contrary—even assuming that they could so provide—the succession to this property must be governed by the law which governs the succession to separate estate. How, then, is the law which makes each widow succeed to her husband's share affected by the terms of the particular instruments?

Equality between the two widows is consonant to the expressed desire to maintain, as far as possible, equality between their respective husbands. The exclusion of widows by male legitimate issue is an exclusion which would prevail equally in a divided or undivided family. The agreement provides, by language not apt nor correct, for the devolution on sons of lawful widows: in case one has male issue, and the others none, a preference is declared; but where each is childless, the agreements prefer neither. In such a case, then, the law alone can regulate the succession. The instruments do not support by any clear expression of intention the claim of the widow of the elder son to exclude the other. There is no ground for confining the estates of the sons to life-estates The mortgage is inconsistent with that view. The provisions as to the possession of the talook alone may refer merely to titular dignity and ceremonial usage. The equal division between widows and illegitimate sons is not likely to have been conceived by the framers or advisers of this compromise.

Their Lordships will, therefore, recommend to Her Majesty that the decree (or decrees, if separate decrees have been made in the two suits) of the High Court of the 22nd of April 1865 be reversed, and that, in lieu thereof, a decree be made in suit No. 61 of 1861, affirming the decree of the Zillah Judge of the 13th March 1862, and dismissing the appeal therefrom to the High Court with costs; and that in suit No. 72 of 1861 a decree be made declaring that, according to the true construction of the agreements of the 26th November 1838 and the 29th July 1844, the widow of Gopinada, the appellant, and the respondent, the widow of Krishna, upon the deaths of Gopinada and Krishna without male issue, became entitled from and after the death of Gopinada, as Hindoo widows, each to one moiety of the estate; and decreeing possession of the moiety claimed to the respondent, Nilamani Patti, but without costs. The High Court, in executing Her Majesty's Order, must take all necessary steps to undo whatever may have been done under the decree reversed inconsistent with the rights thus declared. Adverting to the difficulties occasioned by the instruments executed by the brothers, their Lordships think there should be no costs, as between the widows, either in the Courts below or here on appeal.

back his missing property. The statement that though he had told the witness that he would not have been able to save his reputation unless he affixed his signature is indeed thrown in at the end of the deposition. But no fact which renders that statement probable is proved. Against this testimony the evidence of the witnesses from the bazaar is worthless. But even their testimony does not amount to proof of the allegations in the plaint. Their Lordships are, therefore, of opinion that the plaintiff in the suit altogether failed to establish the case alleged, and that the evidence in the cause was insufficient to warrant the decrees under appeal.

Their Lordships need hardly remark that, in coming to this conclusion, they have not been insensible to the difficulty which they always feel in disturbing the concurrent judgments of two Indian Courts upon an issue of fact. They observe, however, that they have not here to deal with a consistent case deposed to by the witnesses for the plaintiff, and contradicted by the witnesses for the defendant—a case of which the determination depends on the credit to be given to the witnesses on one side or the other. In this case their Lordships' conclusion is very much founded on the inconsistencies and imperfections of the plaintiff's proofs. Moreover, the finding of the Courts below is inconsistent with the result of the investigation of the Magistrate held immediately after the transaction, and with the finding of the Principal Sudder Ameen already adverted to in favor of the validity of the deed. The judgment of the Zillah Judge contains several inferences which do not appear to their Lordships to have been warranted by the facts before him, and it treats the order of the Magistrate dismissing the complaint of the Cazee as reversed, whereas it was confirmed on appeal. The judgment of the High Court is a mere statement that the Judges of that Court saw no reason to differ from the finding of the Zillah Judge.

Their Lordships, however, regret to say that they are by no means prepared to affirm upon the evidence before them, that the conduct of Inglis and his agents throughout these transactions was fair, honest, and straightforward. The defendant allowed her defence to be conducted so as to leave her case open to grave suspicions. She has failed to explain what the negotiation really was which induced the Cazee, who a few days before was in a state of hostility, to make the sale. Brijomohun, Dhuneeram, and Biddyanund Mookhtear were all subject to the gravest imputations, yet not one of them was called as a witness to deny the charges against him. They are not shown to have been dead when the cause was tried; it is pretty clear Brijomohun at the least was then alive.

They had to meet not merely the charge of violence, but the imputation of having contrived, by means of the abstraction of the Cazee's goods, to trick him into coming to Chattuck where he would be under their influence, and of having made the detention of his goods the means of pressure upon him. From the latter imputation they have certainly not relieved themselves. Nor has Biddyanund shown by what authority he represented himself to be the mookhtear of the Cazee when he procured the registration of the deed. The non-delivery of the title-deeds, upon which stress was laid in the Zillah Court, seems to their Lordships to be a circumstance of no moment, since it is consistent with either view of the transaction: for those documents are not likely to have been with the Cazee at Chattuck, and his repudiation of the deed followed immediately on its execution. Nor are their Lordships disposed to think that the consideration for the purchase was at the date of the transaction inadequate. The lands, whatever be now their value, were then recently settled;

and the peishgee leases afford some criterion of their then annual value.

Let it, however, be assumed that Inglis' amlah entered into the alleged plot to bring the Cazee to Chattuck; that they caused his goods to be abstracted and made the execution of the deed of sale the condition of their restoration; and that, on his side, he agreed to sell, and executed the conveyance in order to get back his goods, but with a mental reservation that he would take the earliest opportunity of impeaching the transaction. The testimony of his most trustworthy witness scarcely carries the case beyond this. What, on such a case, would be his rights? The contract was complete, and he could only be relieved from it in a suit properly framed for that purpose upon proof of facts entitling him to that relief, and upon the terms of accounting for the 4,000 rupees with interest. Whatever be the law applied to such a transaction, whether it be the law of England which, in this case, was the law of the defendants, or the Mahomedan Law, which was the law of the plaintiff, or the general rule of equity and good conscience, which was the law of the Forum, these consequences would equally follow. The plaintiff could not insist that he was subjected to such duress as destroyed his free agency and entitled him to treat his deed as a mere nullity. He could not both avoid the contract and retain the money. For the law of England it is sufficient to cite Skeate *v.* Beale, 11 Ad. and Ellis, p. 983, or Sheppard's "Touchstone" p. 61. The Mahomedan Law on the point may be found in the 3rd volume of the Hedaya, pp. 454 to 458. The Cazee, however, did not take this course. He thought to gain an advantage over his opponents, by making the transaction the groundwork of false charges which would bring them within the scope of the criminal law. Whether he might have succeeded in establishing a case for such equitable relief, as is above suggested, their Lordships are not in a position to s since no such case has been alleged or pro before them. On this appeal they can a say that he has failed to prove the case ma and that his suit ought to have been d missed. To such a case the rule laid do in Hickson *v.* Lombard, L. R., 1 House Lords, p. 324,* clearly applies.

Their Lordships, therefore, will hum advise Her Majesty that this appeal sho be allowed; that the decrees under appeal reversed; and that in lieu thereof a dec be made dismissing the suit with costs both the Courts below. Their Lordsh would, however, further recommend that t dismissal be without prejudice to any questi as to the lands alleged not to have be comprised in the purchase-deed, or to t title of any person other than the Cazee those claiming as his representatives. Th deem this reservation to be necessary, in much as the evidence as to any lands be held by Mrs. Inglis in excess of those c veyed by the deed is altogether unsatisf tory; and a claim appears to have been vanced by certain members of the Caz family under a title alleged to be prior that conveyed by the deed, which [illegible] tried—and could not have been tried [illegible] them and the defendant.

* In delivering opinion in this case Lord Cr[illegible] said: "I subscribe most readily to the doctrine where pleadings are so framed as to rest the claim relief solely on the ground of fraud, it is not ope the plaintiff, if he fails in establishing the fraud, to out from the allegations of the Bill facts which mi if not put forward as proofs of fraud, have yet ranted the plaintiff in asking for relief. A defend in answering a case founded on fraud, is not bou do more than answer the case in the mode in w it is put forward. If, indeed, relief is asked alte tively, either on the ground of fraud, or failing ground then on some other equity, a plaintiff may on the first but succeed on the latter alternative. then, the attention of the defendant has been distin directed to it, and he has been called on to answe case according to both alternatives. There is no of this sort in the pleadings of this case."

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